No. 00-292

In the Supreme Court of the United States

C&L ENTERPRISES, INC., PETITIONER

v.

CITIZEN POTAWATOMI NATION

ON WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF OKLAHOMA,
SECOND DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether or under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to enforcement of an arbitration award entered pursuant to such contract "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court.

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INTEREST OF THE UNITED STATES

The question presented by this case is whether or under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to have judgment entered upon the final award by the arbitrator "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court. The United States has a substantial interest in that question due to its special relationship with the Indian Tribes and the congressional policy of encouraging tribal self-determination and economic development. In addition, the United States has an interest in the sound application of principles of foreign sovereign immunity, upon which petitioner relies (Br. 25-27) by analogy in this case. The United States also has an interest in ensuring that arbitration agreements

entered into by the federal government are not erroneously construed as waivers of sovereign immunity from suit. Cf. 28 C.F.R. 50.20(d)(6) (Department of Justice's "consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated.").

STATEMENT

1. a. The Citizen Potawatomi Nation (Tribe) is a federally recognized Indian Tribe that occupies a federally established reservation and other land in central Oklahoma.[1] By virtue of treaties entered into by the United States with the Potawatomi Indians, the federal government has long recognized the Tribe as a "domestic dependent nation," and thus occupies a relationship of trust and protection with the Tribe. See generally *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Today the Tribe is formally organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503, and enjoys all "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 65 Fed. Reg. 13,298, 13,299 (2000).

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[1] The Tribe comprises descendants of Algonquin Indians who centuries ago migrated from the Atlantic seaboard to the eastern Lake Michigan area, where they reportedly were first observed by Europeans in 1640 on islands surrounding Green Bay, Wisconsin. The Potawatomis subsequently entered into treaties with the United States pursuant to which they received federally reserved lands in Mississippi and in Kansas. An 1861 treaty gave the Potawatomi Indians citizenship and land in Oklahoma. The Tribe was known as the Citizen Band Potawatomi Indians of Oklahoma, but in 1996 it changed its name to the Citizen Potawatomi Nation. The Tribe currently has approximately 23,500 members. See Citizen Potawatomi Nation Summary; Potawatomi History <http://www.potawatomi.org.>.

The Tribe is governed by a tribal council comprising members of the Tribe who are 18 years of age or older. See Citizen Potawatomi Nation Const. Art. 5.[2] Tribal members elect a five-person business committee that "is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the [Tribe]." *Id.* Art. 7, § 2. The Tribe's constitution establishes a tribal court system with "courts of general jurisdiction." *Id.* Art. 11, § 2. The Tribe has adopted a corporate charter empowering the Tribe, in its corporate form, "[t]o enter into any obligations or contracts necessary or convenient to the transaction of its ordinary affairs," for "corporate purposes," and for "tribal economic enterprises." Citizen Potawatomi Nation Corporate Charter Art. III(e). The corporate charter authorizes the business committee "[t]o sue and allow the Incorporated Tribe or its agents to be sued by granting an express and unequivocal waiver of sovereign immunity." *Id.* Art. III(b).

b. On August 25, 1993, the Tribe entered into a contract with a private company, petitioner, for the installation of a foam roof on a building that was owned by the Tribe and located on off-reservation, non-trust land owned by the Tribe. See Pet. App. 32-60 (reproducing agreement). The contract was based on a standard form agreement copyrighted by the American Institute of Architects and approved by the Associated General Contractors of America. *Id.* at 32, 33. Among other things, the contract contained the following arbitration provision:

> All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accor-

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[2] The "jurisdiction and governmental powers" of the Tribe extend to persons and property within Indian country, as well as to persons or property beyond the boundaries of Indian country, in accordance with laws of the Tribe, any State, or the United States. Citizen Potawatomi Nation Const. Art. 4, § 2.

> dance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise * * *. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. * * * The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

Id. at 46-47 (Art. 10.8 of contract). A separate provision stated that "[t]he Contract shall be governed by the law of the place where the Project is located." *Id.* at 56 (Art. 19.1).

Before work had begun on the project, the Tribe discovered that it was necessary to change the type of material specified in the contract from foam to rubber guard. The Tribe solicited new bids and ultimately retained another company to install the roof. Petitioner claimed that the Tribe's actions resulted in a breach of the August 25, 1993 contract and, pursuant to the arbitration provision quoted above, submitted an arbitration demand. Pet. App. 13. The Tribe notified the arbitrator in writing that it was asserting sovereign immunity, and that—although the Tribe had substantive defenses to petitioner's arbitration claim—the Tribe therefore would not participate in any arbitration proceedings.[3] On June 30, 1995, the arbitrator entered an award

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[3] The Tribe also argued that the contract was void and unenforceable, because it was not approved by the Secretary of the Interior in accordance with 25 U.S.C. 81. See Br. in Opp. 2 n.3, 3 n.6, 4 n.9. Originally enacted in 1872, Section 81 provides for the Secretary to review and approve certain contracts entered into by Indian Tribes, and provides that contracts "made in violation of this section shall be null and void." 25 U.S.C. 81. As we discuss below, the Oklahoma courts did not address the applicability of

in favor of petitioner in the amount of $25,400 plus attorney's fees and costs. *Id.* at 61-62.

2. a. On August 7, 1995, petitioner filed suit to enforce the arbitration award in the state district court for Oklahoma County, Oklahoma. The Tribe appeared specially and moved to dismiss the petition on the ground that it was immune from suit, arguing that the "boiler-plate language" of the "standard arbitration clause" contained in the contract did not amount to the "unequivocal" waiver of tribal sovereign immunity required by this Court's precedents. Br. in Supp. of Mot. to Dismiss 4. The district court denied the Tribe's motion and its subsequent motion to reconsider that decision. Pet. App. 24-27. On October 27, 1995, the district court entered a judgment confirming the arbitration award, finding that that award "was duly entered, is binding upon the parties and, for good cause shown, should be confirmed." *Id.* at 21-22. In a separate order, the court awarded petitioner attorney's fees and costs. *Id.* at 18.

b. The Oklahoma Court of Civil Appeals affirmed, holding that the fact that the contract was "executed outside of Indian country" disposed of the Tribe's sovereign immunity claim. Pet. App. 14 (quoting *Hoover* v. *Kiowa Tribe*, 909 P.2d 59, 60 (Okla. 1995), cert. denied, 517 U.S. 1188 (1996)). The Tribe unsuccessfully petitioned for review of the court of appeals' decision in the Supreme Court of Oklahoma, then filed a petition for a writ of certiorari in this Court. On June 1, 1998, this Court granted the Tribe's petition, vacated the state court judgment, and remanded for further consideration in light of *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). In *Kiowa Tribe*, discussed at p. 10, *infra*, this Court reaffirmed that Tribes enjoy sovereign immunity from suit except "where Congress has authorized the suit or the Tribe has waived its immunity," and further

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Section 81 to the contract in this case, and that issue is not before this Court. See pp. 28-30, *infra*.

held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 754, 760.

c. On remand, the Oklahoma Court of Civil Appeals held that the Tribe is entitled to sovereign immunity from suit. Pet. App. 2-7. The court of appeals first recognized that under *Kiowa Tribe* the trial court had erred in exercising jurisdiction simply because the contract involved property "outside of Indian Country." *Id.* at 5. Next, the court held that the Tribe had not waived its sovereign immunity from suit by entering into the contract. In so holding, the court observed that "[t]he agreement of [the] Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on [the] Tribe's part to expose itself to suit on the contract" and, thus, might support a waiver "based on implication." *Id.* at 7. But the court concluded that "the contract does not expressly waive [the] Tribe's sovereign immunity." *Ibid.* The court further noted that a "reasonable implication of the language of the contract might be that [the] Tribe's own courts are the 'court[s] having jurisdiction thereof' mentioned in the contract." *Id.* at 7 n.1.

d. The Oklahoma Supreme Court declined to review that decision. Pet. App. 1.

SUMMARY OF ARGUMENT

In *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), this Court reaffirmed that, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Under "settled" law, "a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted). Congress's actions in the wake of *Kiowa Tribe* only bolster

the conclusion that Congress adheres to those principles, and this Court accordingly should do likewise. Applying those principles here, the Court should hold that a simple agreement to arbitrate does not waive a Tribe's sovereign immunity from suit and, further, that an agreement to enforcement of arbitration awards "in any court having jurisdiction thereof" does not waive a Tribe's immunity from suit in *state* court, at least when ambiguity exists as to whether the Tribe consented to enforcement actions only in its own courts.

As courts have recognized in the context of foreign sovereign immunity, a simple agreement to arbitrate does not constitute an unequivocal waiver of sovereign immunity from suit. When Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), it carved out an exception to the Act's general rule of immunity of foreign states from suit in the United States for instances "in which [a] foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. 1605(a)(1). In interpreting that provision, federal courts generally have held that an agreement to arbitrate, without more, does not constitute even an *implied* waiver from suit, let alone an express waiver. Congress amended the FSIA in 1988 to provide that a foreign state is not immune from suit when it agrees to arbitrate in a particular manner. 28 U.S.C. 1605(a)(6) (1994 & Supp. IV 1998). By contrast, Congress has not adopted any arbitration exception to the rule of tribal sovereign immunity, and this Court should defer to Congress to decide whether such an exception is appropriate.

The fact that a contract entered into by an Indian Tribe provides for enforcement of arbitration awards "in any court having jurisdiction thereof" does not necessarily mean that any particular court in which an enforcement action is brought actually *has* jurisdiction over such a suit against the Tribe. This Court has recognized that "immunity encompasses not merely *whether* [a sovereign] may be sued, but

where it may be sued." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984). Accordingly, in determining whether a State has waived its Eleventh Amendment immunity from suit in federal court, this Court has been vigilant in ensuring that the State has in fact consented to suit in federal court, rather than only in its own courts. *E.g.*, *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299 (1990). And, in that regard, the Court has recognized that a State does not waive its immunity from suit in federal court "merely * * * by authorizing suits against it 'in any court of competent jurisdiction.'" *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999). Similarly, when a Tribe's own courts have jurisdiction to entertain suits against the Tribe for the enforcement of arbitration awards, an agreement by the Tribe to enforcement of an arbitration award "in any court having jurisdiction thereof" should not necessarily be deemed to be an unequivocal waiver of the Tribe's immunity from suit in state court.

The record in this case does not establish whether the Tribe's courts would have jurisdiction to enforce arbitration awards entered pursuant to the parties' contract, and that issue has not, to this point, been briefed by the parties. Accordingly, this Court may wish to vacate the judgment of the Oklahoma Court of Civil Appeals and remand to that court for consideration of that question before deciding whether the arbitration provision in this case unequivocally waives the Tribe's immunity from suit in state court. If such jurisdiction exists in tribal court, it not only would create added ambiguity as to the meaning of the phrase "any court having jurisdiction thereof," on which petitioner heavily relies, but also would answer petitioner's argument that to recognize immunity of the Tribe from suit in state court would render the contract provision superfluous.

Finally, there is no occasion for this Court to decide whether the contract in this case is void or unenforceable on the ground that it was not reviewed or approved by the Secretary of the Interior pursuant to 25 U.S.C. 81. That issue was not decided by either court below. Moreover, while confusion has existed in the past over the reach of Section 81 to certain contracts, Congress has recently amended Section 81 to clarify its scope.

ARGUMENT

PETITIONER HAS NOT ESTABLISHED THE REQUISITE UNEQUIVOCAL WAIVER BY THE TRIBE OF ITS SOVEREIGN IMMUNITY FROM SUIT IN STATE COURT

A. Immunity From Suit Is A Fundamental Attribute Of Indian Tribal Sovereignty, And Any Waiver Of Such Immunity Must Be Unequivocally Expressed

The basic principles governing tribal sovereign immunity run deep throughout this Court's Indian law jurisprudence. First, from the time European settlers first set foot on North America's shores, the Indian Tribes occupying the continent have been regarded as "states" or "nations." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 851 (1985) (The Indian Tribes are a direct continuation of "self-governing political communities that were formed long before Europeans first settled in North America."); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). While the original sovereignty of the Tribes was diminished with their loss of complete territorial dominion over the land, Tribes retain a sovereign status as "domestic dependent nations" under the dominion and protection of the United States. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian*

Tribe, 498 U.S. 505, 509 (1991); *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978).

Second, as an attribute of their inherent sovereignty, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). See *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986); see also *Alden* v. *Maine*, 527 U.S. 706, 716 (1999) (quoting *The Federalist* No. 81, at 548-549 (A. Hamilton) (J. Cooke ed., 1961) ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*.")). This Court recently reaffirmed that "settled law" in *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 756 (1998), where the Court laid to rest any doubt over the continuing validity of the doctrine of tribal immunity from suit in light of the modern economic activities undertaken by many Tribes, and reiterated that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe* further established that Indian Tribes do not forfeit their immunity from suit when they engage in commercial activities or contract for goods or services outside of Indian country. See *id.* at 754-756, 758-759.

Third, "[i]t is settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). See *Potawatomi*, 498 U.S. at 509 ("Suits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe."); see also *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 512-513 (1940). That understanding is consistent with the approach this Court follows in determining whether other sovereigns have relinquished their

sovereign immunity from suit. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 682 (1999) (state agency); *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 300 (1990) (state instrumentality); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-443 (1989) (foreign state); *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (United States) (quoted in *Santa Clara Pueblo*, 436 U.S. at 58).

This case calls for application of those familiar principles to the narrow question whether—and, if so, under what circumstances—an Indian Tribe's agreement to arbitrate disputes under a contract with a private party, and to enforcement of arbitration awards entered pursuant to such a contract in "any court having jurisdiction thereof," constitutes an unequivocal waiver of the Tribe's sovereign immunity from suit in state court.[4]

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[4] In cases such as this one involving a purported waiver by contract of the Tribe's sovereign immunity from suit, there may be a threshold question as to whether the Tribe has authorized the alleged waiver of immunity by tribal officials. See, *e.g.*, *Hydrothermal Energy Corp.* v. *Fort Bidwell Indian Cmty. Council*, 216 Cal.Rptr. 59, 63 (Ct. App. 1985). For example, like the United States and presumably most state governments, many tribal governments may waive their sovereign immunity only by legislative act. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 468 (1945); *Seminole Police Dep't* v. *Casadella*, 478 So.2d 470, 471 (Fla. Ct. App. 1985). That requirement ensures careful consideration—by the sovereign—of the terms and conditions of the waiver, as well as whether any waiver is appropriate at all. In addition, even if specific legislative authorization is not required, there may be a dispute over whether the persons who entered into a contract in fact had the authority to act on behalf of the Tribe, including to waive the Tribe's immunity from suit. Compare *United States Fidelity & Guar. Co.*, 309 U.S. at 513 & n.14. In the trial court, the Tribe in this case argued that a factual dispute exists as to whether the contract was authorized or approved by the Tribe in accordance with tribal regulations. Br. in Supp. of Mot. to Dismiss 5-6 & n.19. But it was unnecessary for the state courts to reach that question,

B. There Is No Occasion For This Court To Reconsider The Doctrine Of Tribal Sovereign Immunity That Was Reaffirmed In *Kiowa Tribe*

Petitioner first argues (Br. 13) for the application of a watered-down version of the tribal immunity doctrine, asserting that this Court's decisions establish a "marked movement away" from recognizing Indian sovereign immunity "toward broader exertion of jurisdiction over Indian tribes," "especially * * * in actions concerning commercial activities off of the reservation." The Court's recent decision in *Kiowa Tribe*—in which the same theory was advanced by the respondent, at much greater length—is a complete answer to that argument. There, the Court reaffirmed that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." 523 U.S. at 760. Petitioner offers no justification for the Court to revisit *Kiowa Tribe* practically before its ink has dried. And, in fact, Congress's actions since *Kiowa Tribe* only bolster the case for continued judicial adherence to the "settled" doctrine of tribal sovereign immunity that was reaffirmed in *Kiowa Tribe*. *Id.* at 756.

In *Kiowa Tribe*, this Court observed that the ultimate decision whether to alter the scope of tribal sovereign immunity is for Congress, the Branch that "is in a position to weigh and accommodate the competing policy concerns and reliance interests" affected by that doctrine. See 523 U.S. at 759-760. Since *Kiowa Tribe* was decided, Congress has not restricted the scope of the tribal immunity doctrine, and recent legislation expressly confirms that Congress still recognizes that doctrine. The Indian Tribal Economic Development and Contracts Encouragement Act of 2000 (2000 Act),

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because the Oklahoma Court of Civil Appeals held that the Tribe was entitled to sovereign immunity on other grounds.

Pub. L. No. 106-179, § 2(d)(2)(A)-(C), 114 Stat. 46, discussed further at p. 29, *infra*, amended 25 U.S.C. 81 to require the Secretary of the Interior to disapprove a contract encumbering tribal land whenever such a contract does not include a provision that "provides for remedies in the case of a breach of the agreement or contract," "references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe," or "includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action)."

The legislative history of the 2000 Act shows that Congress was fully aware of the *Kiowa Tribe* decision when it imposed that added requirement. See S. Rep. No. 150, 106th Cong., 1st Sess. 11 (1999) (discussing Justice Stevens' dissent in *Kiowa Tribe*). Furthermore, the legislative history demonstrates that Congress—after having "held extensive hearings on tribal sovereign immunity," *id.* at 11 & n.28—has determined that it is beneficial for contracting parties to deal "directly" with the issue of tribal sovereign immunity from suit. *Id.* at 12; see also *id.* at 11 (The approach adopted by the Act "builds upon an apparent agreement that Indian tribes and their contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed."). The doctrine of tribal sovereign immunity articulated by this Court advances that same policy by requiring that any waiver of tribal immunity "must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted).[5]

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[5] While the amici States object to the result in *Kiowa Tribe*, they acknowledge that, in the wake of that decision, this case must be decided

C. An Indian Tribe's Agreement To Arbitrate A Dispute Does Not, Without More, Constitute A Waiver Of Its Sovereign Immunity From Suit In Court

In *Kiowa Tribe*, this Court observed that the manner in which Congress has addressed "the problems of sovereign immunity for foreign countries" may be "instructive" in resolving tribal sovereign immunity questions. 523 U.S. at 759. Relying on the Restatement (Third) of the Foreign Relations Law of the United States (1986), petitioner argues (Br. 25-27) that the practice with respect to foreign states supports the conclusion that a Tribe's agreement to arbitrate a dispute waives its sovereign immunity from suit. The Restatement (§ 456(2)(b)(ii)) does state that "an agreement to arbitrate is a waiver of immunity from jurisdiction" in an "action to enforce an arbitral award." But the Restatement was not fashioned by Congress and, in fact, when it comes to *Congress's* actions, the law of foreign sovereign immunity strongly supports the conclusion that a simple agreement to arbitrate does not constitute a valid waiver of sovereign immunity from suit.

1. a. Congress comprehensively addressed the subject of foreign sovereign immunity from suit in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* As this Court has observed, Congress intended the FSIA to "be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic*, 488 U.S. at 434. Under the FSIA, a foreign state retains its immunity from suit in the United States unless the suit fits within one of the exceptions established by the Act. See 28 U.S.C. 1604 (general rule of immunity), 1605 (exceptions). In particular,

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based on application of the same basic principles set forth in the text (see pp. 9-11, *supra*), including the established principle governing a Tribe's waiver of its immunity. See Br. for Amici Texas *et al.* 3-5; *id.* at 4 ("An Indian tribe may waive its tribal immunity, but the waiver 'must be unequivocally expressed.'") (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

when Congress enacted the FSIA, it expressly abrogated foreign sovereign immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. 1605(a)(1). The House Report accompanying the Act stated that "[w]ith respect to *implicit* waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) (emphasis added).

Notwithstanding that legislative history, the vast majority of courts applying the FSIA have concluded that an agreement to arbitrate in another country is insufficient to establish even an *implied* waiver for purposes of Section 1605(a)(1), because "[s]uch an interpretation of §1605(a)(1)'s 'implicit waiver' exception would vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations." *Seetransport Wiking Trader* v. *Navimpex Centrala*, 989 F.2d 572, 577 (2d Cir. 1993). See *Creighton Ltd.* v. *Government of the State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999) ("We follow the Second Circuit in rejecting such a broad reading of the 'implicit waiver' exception" to arbitration agreements.); *S & Davis Int'l, Inc.* v. *Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000) (following *Creighton*); *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993); *Zernicek* v. *Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex. 1985), aff'd, 826 F.2d 415 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); see also *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985); *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1102 n.13 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983). Similarly, in *Argentine Republic*, 488 U.S. at 442-443, this Court rejected the argument that "a foreign state can waive its immunity under § 1605(a)(1) by signing an international agree-

ment that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."

b. In 1988, Congress amended the FSIA to add the following express exception to Section 1605(a):

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

28 U.S.C. 1605(a)(6) (1994 & Supp. IV 1998), added by Pub. L. No. 100-669, § 2, 102 Stat. 3969.

2. For several reasons, the foregoing statutory history is instructive with respect to the tribal sovereign immunity question presented in this case. First, there is virtually no support under the FSIA for the proposition that a simple agreement to arbitrate constitutes an *express* waiver of sovereign immunity. Second, while the legislative history of the FSIA indicates that Congress believed that an agreement to arbitrate in another country might amount to an

"*implicit* waiver[]" of immunity from suit in United States courts, H.R. Rep. No. 1487, *supra*, at 18 (emphasis added), the federal courts, as discussed above, have generally rejected that notion. It follows, *a fortiori*, that a simple agreement to arbitrate does not constitute a waiver of tribal sovereign immunity, because, as this Court has held, a "waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted).

Third, the fact that Congress has carved out an explicit arbitration exception to foreign sovereign immunity but has not done so with respect to tribal sovereign immunity strongly counsels against judicial creation of an arbitration exception in this case. Section 1605(a)(1) and (6) of the FSIA establish both that Congress does not equate an agreement to arbitrate with an express waiver of sovereign immunity, and that Congress knows how to abrogate sovereign immunity when it wants to in the case of arbitration agreements. As this Court recognized in *Kiowa Tribe*, 523 U.S. at 758-759, Congress has restricted tribal sovereign immunity in several particular contexts, *e.g.*, 25 U.S.C. 450f(c)(3), 2710(d)(7)(A)(ii), and it has declared its intention not to alter such immunity in others, *e.g.*, 25 U.S.C. 450n. See also *Potawatomi*, 498 U.S. at 510 ("Congress has consistently reiterated its approval of the [tribal] immunity doctrine."). Congress has not, however, adopted any arbitration exception to the rule of tribal sovereign immunity.

This Court should do as it did in *Kiowa Tribe* and "defer to Congress" (523 U.S. at 760) to decide whether it is appropriate to restrict tribal sovereign immunity in this area and, unless Congress so acts, apply the settled rule that waivers of tribal immunity from suit "must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). The fact that Indian Tribes may thus enjoy a broader form of immunity from suit in the

arbitration context than that possessed by foreign states does not justify a different conclusion. As the Court recognized in *Kiowa Tribe*, under the FSIA Congress has abrogated the immunity of foreign states from suit with respect to commercial activities. See 523 U.S. at 759; 28 U.S.C. 1605(a)(2). Congress has not, however, abrogated the sovereign immunity of Indian Tribes in connection with commercial activities. Accordingly, in *Kiowa Tribe*, this Court held that Tribes "enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities." 523 U.S. at 760.[6]

D. The Contract Provisions Relied Upon By Petitioner Do Not Constitute Unequivocal Consent To Suit In State Court If An Enforcement Action May Be Brought In Tribal Court

1. While the Court does not require a sovereign to invoke particular words or phrases when it desires to waive its sovereign immunity from suit, the standard established by this Court's precedents for determining whether a Tribe has waived such immunity is stringent: "[i]t is settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted); *Felix Cohen's Handbook of Federal Indian Law* 324 (R. Strickland *et al.* eds., 1982) (1982 Cohen); *College Sav. Bank*, 527 U.S. at 678 ("[T]here is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence."); *Black's Law Dictionary* 1370 (5th ed. 1979) ("unequivocal" means "[c]lear; plain; capable of being understood in only one way

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[6] In *Hydaburg Cooperative Ass'n* v. *Hydaburg Fisheries*, 826 P.2d 751, 753 (1992), the Alaska Supreme Court relied on Section 456 of the Restatement in concluding that an agreement to arbitrate waives tribal immunity from suit. In so holding, however, the court did not discuss any of the considerations discussed above based on the text, legislative history, or judicial interpretation of the FSIA.

* * * or without doubt").[7] As noted above, the standard applied by this Court in determining whether the United States or the States and their instrumentalities have waived their sovereign immunity from suit is similarly strict. See pp. 10-11, *supra*; note 10, *infra*.

Nothing in the contract in this case explicitly addresses the Tribe's sovereign immunity from suit, or explicitly states that the Tribe has waived that immunity. As a result, in arguing that the Tribe has waived its immunity from suit, petitioner points (Br. 16-17) to the contract terms quoted above (pp. 3-4, *supra*) that provide for arbitration (Art. 10.8), enforcement of arbitration awards "in any court having jurisdiction thereof" (Art. 10.8), and choice of law (Art. 19.1). In addition, petitioner (Br. 17) goes beyond the four corners of the contract and relies on provisions of the Oklahoma Uniform Arbitration Act. See Pet. Br. 2-3. We agree with the state court below that, when strung together, those provisions might establish "a waiver * * * based on implication." Pet. App. 7. But, as discussed above, implication has never been sufficient under this Court's precedents to establish a valid waiver of tribal sovereign immunity. See pp. 10-11, *supra*; *Pan American Co.* v. *Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ("Consent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*" that "tribal sovereign

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[7] Consistent with the rule that a waiver of sovereign immunity must be *express*, the Court has declined to rely on secondary sources to establish a waiver. See *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text.'") (quoting *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). There is no reason to adopt any different approach with respect to alleged waivers that do not appear clearly in any contractual text.

immunity remains intact unless surrendered in express and unequivocal terms.").[8]

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[8] In *Pan American*, the court of appeals refused to conclude that an Indian Tribe's agreement to arbitrate disputes arising out of a contract and to subject itself "to the jurisdiction of the American Arbitration Association" and its rules waived the Tribe's sovereign immunity from suit. 884 F.2d at 419 (quoting agreement). At most, the court held, such an agreement supported a waiver by implication, but not the "express and unequivocal" waiver required by this Court. *Ibid.* The fact that that interpretation might leave a party "without judicially enforceable remedies" for breach of the underlying contract did not justify finding a waiver. *Ibid.* As the court explained, "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Ibid.* (citing *United States Fidelity & Guar. Co.*, 309 U.S. at 513). See also, *e.g.*, *Calvello* v. *Yankton Sioux Tribe*, 584 N.W.2d 108, 113 (S.D. 1998) ("for purposes of sovereign immunity, consent to arbitrate is not consent to a lawsuit") (citing *Pan American*, 884 F.2d at 418-419); *Danka Funding Co.* v. *Sky City Casino*, 747 A.2d 837, 840, 844 (N.J. Super. 1999).

Some lower courts have reached a contrary conclusion, holding that Indian Tribes waived their immunity from suit by agreeing to contractually binding arbitration provisions. See, *e.g.*, *Sokaogon Gaming Enter. Corp.* v. *Tushie-Montgomery Assocs.*, 86 F.3d 656, 660 (7th Cir. 1996); *Rosebud Sioux Tribe* v. *Val-U Constr. Co.*, 50 F.3d 560, 562-563 (8th Cir.), cert. denied, 516 U.S. 819 (1995); *Native Village of Eyak* v. *GC Contractors*, 658 P.2d 756, 760 (Alaska 1983). In so holding, however, those courts did not discuss the principles established by foreign sovereign immunity law, discussed above (pp. 14-18, *supra*), or by this Court's Eleventh Amendment immunity precedents, discussed below (pp. 22-26, *infra*). Instead, the courts approached the waiver issue from the standpoint of a more conventional contract analysis. In addition, those lower court decisions—which were decided prior *Kiowa Tribe*—may have been at least partly influenced by doubts as to whether Indian Tribes enjoy their traditional immunity from suit when they engage in business transactions. Cf. *Sokaogon Gaming*, 86 F.3d at 659-660 (expressing "doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit" in a "business" contract). As discussed above, however, any such doubts were eliminated by *Kiowa Tribe*.

Petitioner (Br. 29) and the amici States suggest that it is "nearly impossible" for a Tribe to waive its sovereign immunity from suit in clearer terms. Br. for Amici Texas *et al.* 13 (internal quotation marks omitted). But experience proves the contrary. See, *e.g.*, Heidi L. McNeil, Practising Law Institute, *Corporate Law and Practice Course Handbook Series, Doing Business in Indian Country* 20-25 (Dec. 1994) (quoting model provisions waiving a Tribe's sovereign immunity); *Bruce H. Lien Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412, 1415 n.4 (8th Cir. 1996) (quoting waiver provision); *Bank of Okla.* v. *Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992) (same); see also *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) ("[T]he Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court."), aff'd, 455 U.S. 130 (1982).[9]

Moreover, it is not surprising that the contract in this case does not explicitly address the sovereign immunity of the Tribe; the contract is based on a standard form agreement copyrighted by the American Institute of Architects. See Br. in Opp. 12; Pet. App. 33. In the vast majority of cases, that form agreement is used by private parties who do not

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[9] In *Nevada* v. *Hicks*, cert. granted, No. 99-1994 (Oct. 10, 2000), the Fallon Paiute-Shoshone Tribe made a similarly explicit waiver of sovereign immunity. See 99-1994 Pet. App. B4; Resolution No. 94-F-074 of the Tribe (June 28, 1994), attached to the Tribal Defendant's Answer, *Nevada* v. *Hicks*, No. CV-N-94-351-DWH (D. Nev.) (filed July 11, 1994) ("Now therefore be it resolved that the Fallon Business Council hereby waives the sovereign immunity from suit in federal court of the Tribal Court and the Tribal Judge Joseph Van Walraven for the limited purpose of remaining in the federal court action * * * to defend the claims for non-monetary declaratory relief raised by the plaintiffs regarding the issue of tribal court civil jurisdiction over the underlying action against state officials.").

possess any sovereign immunity, and the form presumably was drafted with those private parties in mind. When considered against that backdrop, there is further reason to question whether the contract in this case should be regarded as an unequivocal expression of a waiver of tribal sovereign immunity. As we explain below, however, there is no reason to resolve that question here because, at least as this case comes to this Court, the agreement does not in any event unequivocally express the consent of the Tribe to be sued in *state* court.

2. a. Even when a sovereign has unequivocally consented to suit, this Court is vigilant in ensuring that the sovereign has consented to suit in courts other than its own. As the Court has observed in the Eleventh Amendment context, a "State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99.

Thus, for example, in *Feeney*, 495 U.S. at 306, this Court refused to conclude that States had consented to suit in *federal* court simply because they had "expressly consented to suit in expansive terms." The waiver provision in *Feeney* stated "that the States 'consent to suits, actions, or proceedings of *any* form or nature at law, in equity or otherwise . . . against the Port of New York Authority.'" *Ibid.* (quoting state statute; emphasis added). Only the fact that a separate provision of state law expressly consented to venue in a "'judicial district * * * established by * * * the United States,'" justified the conclusion that the States had waived their immunity from suit in *federal* court, rather than just in their own courts. *Id.* at 307-308 (quoting statute). See also, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985) (consent-to-suit provision does not waive Eleventh Amendment immunity, because it "does not specifically indicate the State's willingness to be sued in federal court"); *Florida Dep't of Health* v. *Florida Nursing*

Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 465 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944); *Smith* v. *Reeves*, 178 U.S. 436, 441 (1900).

While Indian Tribes, which were not parties to the constitutional convention, do not possess Eleventh Amendment immunity from suit, they do possess a federally-protected sovereign immunity from suit. In deciding whether or when to relinquish that immunity, the sovereign Tribes share the interests of the sovereign States in avoiding suit in foreign tribunals.[10] Furthermore, because the sovereignty of Indian Tribes has always included as bedrock elements a separation from the jurisdiction of the State and an immunity from its laws, see, *e.g.*, *Worcester* v. *Georgia*, *supra*; *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867); *United States* v. *Kagama*, 118 U.S. 375, 755 (1886), courts must be especially reluctant to construe ambiguous expressions as consent by a Tribe to be sued in state court.

No provision of the contract in this case explicitly refers to jurisdiction or venue in the Oklahoma state courts. Petitioner relies heavily on the fact that the arbitration provision (Art. 10.8) makes arbitration awards enforceable in "any court having jurisdiction thereof." But that language only

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[10] This Court applies the same stringent standard in determining whether a State has waived its Eleventh Amendment immunity from suit as it does in determining whether an Indian Tribe has waived its sovereign immunity from suit—*i.e.*, "[i]n the absence of an *unequivocal* waiver," the Court "decline[s] to find that [a state] has waived its * * * immunity." *Atascadero State Hosp.*, 473 U.S. at 241 (emphasis added). See also *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 397 (1998) ("[T]he Court's recent cases have disfavored constructive waivers of the Eleventh Amendment and have required the State's consent to suit be unequivocal") (Kennedy, J., concurring). As a result, the Court's Eleventh Amendment waiver jurisprudence is instructive here; the meaning of "unequivocal" should not fluctuate between the Eleventh Amendment immunity and tribal sovereign immunity contexts.

begs the question whether the state courts have jurisdiction in the first place—notwithstanding the Tribe's customary sovereign immunity from suit in those courts. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). To answer that problem, petitioner turns (Br. 16-17) to the contract's choice-of-law provision (Art. 19.1), and argues (Br. 17) that "[b]y operation of the Oklahoma Uniform Arbitration Act * * *, jurisdiction was properly exercised by the Oklahoma State Court." But the Oklahoma Uniform Arbitration Act presents the same problem as the contract; it merely provides for enforcement of arbitration awards in a "court of competent jurisdiction." Okla. Stat. tit. 15, § 802(B) (1993) (quoted at Pet. Br. 2).[11] Petitioner's reliance on the application of Oklahoma law is further undercut by Congress's approach in the context of foreign sovereign immunity. As discussed above (see p. 15, *supra*), the history of the FSIA indicates that, at most, Congress regarded the fact that a sovereign "has agreed that the law of a particular [sovereign] should govern a contract" as evidence of an "*implicit* waiver." H.R. Rep. No. 1487, *supra*, at 18 (emphasis added).

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[11] Section 802(B) of the Oklahoma Act goes on to state that "[t]he making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." Okla. Stat. tit. 15, § 802(B) (1993). But the Oklahoma legislature cannot abrogate the sovereign immunity of Indian Tribes that enter into arbitration agreements subject to Oklahoma law, any more than it can abrogate their sovereign immunity from suit in Oklahoma courts altogether. See *Three Affiliated Tribes*, 476 U.S. at 891 ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."). Nor, for similar reasons, may the State deem a Tribe's making of an agreement that provides for arbitration to be a constructive waiver of the Tribe's sovereign immunity from suit. See *College Sav. Bank*, 527 U.S. at 676-686.

b. As the Oklahoma Court of Civil Appeals observed, while the record in this case "does not give us any information regarding the Tribe's legal system," a "reasonable implication of the language of the contract might be that [the] Tribe's own courts are the 'court[s] having jurisdiction thereof' mentioned in the contract." Pet. App. 7 n.1. If that is so, then the Tribe has not unequivocally waived its sovereign immunity from suit in state court. That conclusion squares with the approach taken by this Court in *Feeney* and the other Eleventh Amendment immunity decisions cited above in determining whether "expansive" (*Feeney*, 495 U.S. at 306) consent-to-suit provisions waived a State's immunity from suit in federal as well as state courts. See p. 22, *supra*.

Moreover, in the Eleventh Amendment context, this Court has repeatedly recognized that a State does not waive its immunity from suit in federal court "merely * * * by authorizing suits against it 'in any court of competent jurisdiction.'" *College Sav. Bank*, 527 U.S. at 676 (citing *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946)); *Ford Motor Co.*, 323 U.S. at 465; cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 75 (2000) (federal statute providing for suit in "'in any *Federal or State* court of competent jurisdiction' * * * eliminates the ambiguity identified in *Kennecott Copper*—whether Utah intended to permit suits against the sovereign in state court only, or in state and federal court") (emphasis added); *Employees of the Dep't of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279, 287 (1973). Those precedents establish a general rule of construction that, out of respect for state sovereignty, a State's consent to suit in "any court of competent jurisdiction" should be construed narrowly as the State's consent to be sued in its *own* courts of competent jurisdiction, and not its consent to be subjected to suits in *another* sovereign's courts.

At a minimum, those Eleventh Amendment precedents demonstrate that the phrase "any court having jurisdiction thereof" in the arbitration clause at issue in this case does not have the touchstone significance that petitioner assigns to it in arguing that the Tribe has waived its sovereign immunity from suit in the Oklahoma courts.[12] That conclusion, moreover, promotes "proper respect for tribal legal institutions" and tribal sovereignty. *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 16 (1987). As this Court has explained, "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Id.* at 14-15 (citation omitted). See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. at 856; *United States* v. *Wheeler*, 435 U.S. at 332. Just as proper respect for state sovereignty calls for construing a State's consent to suit in "any court of competent jurisdiction" as consent to suit only in its own courts and not federal courts, proper respect for tribal sovereignty warrants construing that language as consent to suit only in a Tribe's own courts and not state courts. The same or similar language should not be read one way for purposes of waiving Eleventh Amendment immunity and another for purposes of waiving tribal sovereign immunity. See note 10, *supra.*

c. As this case comes to this Court, it is not clear whether the Tribe's own courts would have jurisdiction to adjudicate disputes arising under the contract at issue or to

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[12] When it comes to their *own* immunity, the amici States are more sensitive to the ambiguity inherent in the "any court having jurisdiction thereof" language. See Br. for Amici Texas *et al.* 17 n.11 ("Of course, the arbitration clauses in this case would have no effect on a state's Eleventh Amendment immunity from suit in federal court unless the arbitration clause evidenced the state's intent to subject itself to the jurisdiction of the federal courts."). Similarly, the same language should have no effect on a Tribe's immunity from suit in state court unless it unequivocally evidences the Tribe's consent to suit in state court.

enforce arbitration awards entered under that contract. The availability of tribal court jurisdiction, however, would refute petitioner's contention that the contract provisions on which it relies—which do not mention state courts—must be read to waive the Tribe's immunity from suit in state court. Until the question of the availability of a tribal forum is resolved, moreover, it is not possible to decide whether a determination that the Tribe is immune from suit in state court would render the enforcement provision of the arbitration clause involved in this case without operative effect. Accordingly, if the Court is not able to resolve the question of the availability of tribal court jurisdiction in the current posture of the case, the Court may wish to vacate the judgment of the Oklahoma Court of Civil Appeals and remand the case to that court for consideration of the availability of tribal court jurisdiction in these circumstances or for referral of that question to the tribal court. Cf. *Fiore* v. *White*, No. 98-942, 2001 WL 15674 (Jan. 9, 2001).[13]

At the very least, the Court should make clear that an Indian Tribe's agreement to arbitrate disputes arising out of a contract with a private party, and to enforcement of arbitration awards "in any court having jurisdiction thereof," should not be construed as an unequivocal waiver of sovereign immunity from suit in state court when it is evident that the Tribe's own courts would have jurisdiction to entertain enforcement actions.

3. Important policy considerations support a narrow construction of purported waivers of tribal sovereign immunity from suit, in accordance with this Court's settled practice. As this Court has recognized, Congress's consistent recognition of and support for tribal sovereign immunity has been

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[13] As pointed out above, the Oklahoma Court of Civil Appeals specifically noted this issue, but it did not resolve it because the court concluded that the alleged waiver was inadequate in other respects urged by the Tribe. See Pet. App. 7 n.1.

predicated in part on its "desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks omitted). Those goals could be compromised by exposing Tribes to the burdens of litigation and the enforcement of money judgments against tribal treasuries, including the seizure of tribal tax revenues.[14] Governments traditionally have been cautious in waiving their immunity from suit and exposing themselves to suits for money damages. But tribal governments have reason to be especially reluctant to do so: in the case of many Indian Tribes, with relatively small membership rolls and operating budgets, a single damages award could seriously threaten the Tribe's very existence. Cf. *Santa Clara Pueblo*, 436 U.S. at 65 n.19.

E. The Court Should Decline To Consider In The First Instance The Applicability Of 25 U.S.C. 81 To The Parties' Contract

The Tribe alternatively argued in the courts below that the arbitration award in this case should not be enforced on the ground that the underlying contract is void and unenforceable for lack of approval by the Secretary of the Interior in accordance with 25 U.S.C. 81. See Br. in Opp. 2 n.3, 3 n.6, 4 n.9; note 3, *supra*. That argument was not addressed by the courts below and it is not within the scope of the question on which this Court granted certiorari, which is limited to whether the contract's arbitration provision effects a waiver of the Tribe's sovereign immunity. See Pet. i. This Court should decline to address that issue in the first instance here. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 469-

[14] Where an Indian Tribe has waived its immunity from suit in its corporate capacity, only assets held by the Tribe in that capacity would be available to satisfy a judgment entered against the Tribe. See 1982 Cohen, *supra*, at 325-326.

470 (1999) (refusing to reach "alternative theories" advanced by respondent in defending judgment in this Court, when theories were not decided below) (citing cases); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below.").

The Court's traditional reluctance to address questions that were not passed upon below is particularly warranted here. Section 81 was first enacted in 1872, in an era in which the economic independence and role of Indian Tribes bore little resemblance to the circumstances of many Tribes today. Section 81 obligated the Secretary of the Interior to review and approve certain contracts made with Indian Tribes, and provided that contracts "made in violation of this section shall be null and void." 25 U.S.C. 81. While historically most contracts that have been reviewed by the Secretary pursuant to Section 81 have concerned tribal trust lands or trust funds—categories that do not cover the contract in this case—confusion has arisen over the past century regarding the reach of Section 81. See S. Rep. No. 150, *supra*, at 2-7 (discussing background of Section 81); 65 Fed. Reg. 43,952 (2000) (discussing "confusion over exactly what contracts Section 81 did or did not cover"). This past year, Congress amended Section 81 and clarified its application to tribal contracts. 2000 Act, § 2, 114 Stat. 46.

As amended, Section 81 requires secretarial approval only of tribal contracts "that encumber[] Indian lands for a period of 7 or more years." 2000 Act, § 2(b), 114 Stat. 46. The term "Indian lands" is defined as trust lands and tribal lands "subject to a restriction by the United States against alienation." § 2(a)(1), 114 Stat. 46. That intervening amendment clarifying Congress's intent provides another compelling reason for this Court to "deal with the case as it came here and affirm or reverse based on the ground relied on below," *Peralta*, 485 U.S. at 86, and thereby avoid any consideration of

Section 81 that might cast doubt on the validity of contracts (such as the one at issue here) that were entered into prior to the 2000 amendment.

CONCLUSION

The Court should hold that if the arbitration agreement or award in this case could be enforced in tribal court, the Tribe has not unequivocally waived its sovereign immunity from suit in state court. The Court may wish to vacate the judgment of the Oklahoma Court of Civil Appeals in this case and remand the case to that court for consideration in the first instance of the availability of a forum in tribal court, or for referral of that issue to the tribal court.

Respectfully submitted.

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