No. 99-1994

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF MONTANA, ALABAMA, ARIZONA, CONNECTICUT, FLORIDA, KANSAS, MICHIGAN, MISSISSIPPI, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When state officers are sued in tribal court with respect to the performance of activities within the scope of their governmental employment, must they exhaust tribal remedies before seeking a federal court determination of whether an Indian tribe possesses inherent authority over them, and, if not, does the tribe have such authority?

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BRIEF AMICUS CURIAE

The States of Montana, et alia, respectfully submit a brief amicus curiae through their respective Attorneys General pursuant to S. Ct. R. 37.4.

INTEREST OF AMICI CURIAE STATES

This Court held in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress lacked authority under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, to subject States to unconsented suit by persons or entities other than the United States or another State. Several Terms later, the Court ruled that Congress was without the power to subject States to such suit in their own courts. *Alden v. Maine*, 527 U.S. 706 (1999). The decision below raises the seemingly anomalous specter of an Indian tribe, even though a "domestic dependent nation [ ] . . . completely under the sovereignty and dominion of the United States" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831)), possessing the authority to do that which Congress cannot. Indeed, because tribes are not constrained by, inter alia, the Tenth Amendment to the United States Constitution, they would have substantially *more* power to regulate the States than does Congress. Remarkably, the Court of Appeals appeared untroubled by that possibility. The amici curiae States, however, are concerned greatly. Their concern is rooted in "the actual state of things" (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832)) in Indian country today.

As this Court observed in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), with respect to the scope of

state authority on Indian reservations, "[g]eneralizations . . . have become particularly treacherous" because "[t]he conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester* . . . has given way" to a more flexible analytical regime. The breakdown of *Worcester*'s "conceptual clarity" was the inevitable result of changes in congressional and Executive Branch policies that encouraged assimilation of tribal members into nontribal society and the introduction of non-Indians into Indian country. So, for example, this Court held in *Elk v. Wilkins*, 112 U.S. 94, 102 (1884), that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,)" were not "persons" for purposes of the Fourth Amendment. Three years later, Congress enacted the General Allotment Act, 24 Stat. 388 (1887), whose underlying purpose was "to end tribal land ownership and to substitute private ownership" and thereby facilitate assimilation of tribal members. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976) (emphasis supplied).

In addition to allotting reservation lands to tribal members, the General Allotment Act contained an authorization for the sale to nonmembers of parcels remaining after allotment requirements had been satisfied. 24 Stat. at 389-90 (codified as amended at 25 U.S.C. § 348). The allotment process's effect was immense, with a substantial portion of reservation lands passing out of tribal ownership. *See generally* Francis Paul Prucha, II *The Great Father* 896 (1984) (summarizing the types and amounts of land transfer as of 1934). Accompanying this breakdown of tribal territorial exclusivity was the elimination of tribal members' political separation through individual

grants of citizenship in conjunction with the allotment process and, eventually, the extension of citizenship to all Indians in 1924. Act of June 2, 1924, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)). Over the forty-year period between *Elk* and the 1924 act, therefore, Indian country was transformed.

With this transformation came significantly increased state responsibilities. Large numbers of nonmembers now reside within reservations. Statistics in the 1990 census survey indicate that approximately 800,000 persons resided within Indian reservations or on trust land, of whom only 54.1 percent were identified as American Indian, Eskimo or Aleut. Bureau of Census, Dep't of Commerce, *1990 Census of Publication, General Population Characteristics, United States* 541 (Nov. 1992). Many members also look to States and their political subdivisions to provide governmental services. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172-73 (1973). The amici States thus have a substantial presence within Indian country.

This presence has exposed the States increasingly to the exercise, or attempted exercise, of tribal adjudicatory and regulatory authority.[1] While some of these controversies

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[1] *See Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999) (attempted application of tribal employment relations office ordinance to state highway construction crew); *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (attempt to impose damages liability on county and sheriff department officers with respect to on-reservation arrest of tribal member); *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir.) (challenge to inherent authority of tribe to issue water quality standards applicable to state and local government lands pursuant to a grant of treatment-as-State status under § 518 of the Clean Water Act), *cert. denied*, 525 U.S. 921 (1998); *Montana v. Gilham*, 133 F.3d

have been resolved by reference to principles developed under *Montana v. United States*, 450 U.S. 544 (1981), the fact remains that the amici provide their services throughout reservations both on and off lands as to which tribal "gatekeeping" authority may exist. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 483 n.4 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997). Their unique relationship with reservation residents, whether tribal or nontribal, and the nature of their services simply do not admit to efficient application of *Montana* standards as the sole measure for the scope of inherent tribal authority. This Court's resolution of the core federalism issues raised by the decision below therefore will have profound consequences to the amici States not only with respect to maintaining the integrity of the sovereignty reserved by them under the Constitution but also with respect to discharging their day-to-day governmental responsibilities.

The Ninth Circuit's opinion raises these issues in a stark manner. *First*, the Court of Appeals declined to address the merits of what it characterized as the "affirmative defense of sovereign immunity" (Pet. A-13) interposed by Petitioners and, in so holding, requires States and their officials or employees – at least for the purpose of determining that "affirmative defense" – to appear in a tribal court forum. Such a pre-condition to federal court jurisdiction is unsupported by this Court's reasoning in

1133 (9th Cir. 1998) (attempted exercise of tribal court jurisdiction over claim against State seeking damages for negligent highway maintenance); *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (attempted exercise of tribal court jurisdiction for the purpose of challenging county's right to collect state property tax).

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985), but, no less importantly, the Court of Appeals' application of the exhaustion doctrine can have a seriously detrimental impact on States through the delay and potential interference with the delivery of their services to reservations. The tribal court proceedings here, as an example, commenced over nine years ago. *Second*, because the Court of Appeals erred in not resolving Petitioners' sovereign immunity defense, this Court should answer the first question presented by Petitioners: whether the Fallon Paiute-Shoshone Tribe's ("Tribe") inherent authority extends to controlling the State of Nevada's sovereign activities. To conclude that the Tribe may regulate directly or indirectly such activities is to ignore the core principle that Congress's plenary power over Indian affairs, which is incompatible with any claim of tribal inherent authority against the United States, was vested in the States and *delegated* to the Federal Government under the Indian Commerce Clause and that such transfer neither did nor could affect the immunity then possessed by the States with respect to the exercise of inherent tribal authority. Because the amici States believe resolution of these issues disposes of Respondent Hicks' tribal court claims, they do not address the third question presented in the Petition.

SUMMARY OF THE ARGUMENT

1. The Court of Appeals erred in requiring Petitioners to exhaust their sovereign immunity claim before tribal courts. Contrary to the lower court's characterization of such claim as simply an "affirmative defense" to

the tribal court's adjudicatory jurisdiction, Petitioners invoke an *absolute* immunity against the attempted exercise of any form of tribal authority. Requiring Petitioners to submit themselves to a tribal forum for the purpose of litigating their claim negates much of the immunity's value. The Ninth Circuit's reliance on *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), for the exhaustion requirement thus was improper because here, as in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), a categorical prohibition is at stake. None of the comity considerations underlying the *National Farmers* exhaustion rule – avoidance of " 'procedural nightmares,' " the tribal court's articulation of "the precise basis for accepting jurisdiction," and the utility of tribal court expertise – has force in the face of such a factually straightforward and federal law-based prohibition. This conclusion is reinforced by *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). There, the Court noted that exhaustion under even the non-categorical rule adopted in *Montana v. United States*, 450 U.S. 544 (1981), is unnecessary when the presumption raised by the presence of *Montana*'s "main rule" exists.

2. Petitioners possess immunity from the application of the Tribe's inherent authority. That conclusion follows from three propositions. First, this Court's decisions in *United States v. Wheeler*, 435 U.S. 313 (1978), and *Strate* establish that inherent tribal authority encompasses only the application of tribal law. Respondent Hicks' claim under 42 U.S.C. § 1983 against Petitioners therefore is foreclosed, but, in any event, Congress has not granted tribal courts jurisdiction concurrent with federal and state courts over such claims.

Second, fundamental federalism principles establish the immunity of the States to inherent tribal authority. Indian tribes are subject to the plenary power of Congress under the Indian Commerce Clause and accordingly have no inherent authority with respect to the United States. Since that plenary power was ceded to the national government by the States themselves, they necessarily possessed immunity against the exercise of inherent tribal authority at the time of the Nation's founding. This federalism-based conclusion is reinforced by the fact that the status of tribes as "domestic dependent nations" derives from application of the discovery doctrine and that the States, in succeeding to the territorial interests of Great Britain, also succeeded to that country's preeminent relationship to Indian tribes within their borders. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584-85 (1823). The States' cession of power over Indian affairs to Congress under the Indian Commerce Clause, moreover, did not waive their immunity to the exercise of inherent tribal authority. To conclude otherwise means not only to credit the notion that the States' cession intended to grant tribes, who are not subject to the Tenth and Eleventh Amendments or other constraints on federal power imposed under the Constitution, more authority than ceded to Congress but also to ignore the very purpose of the Indian Commerce Clause itself, i.e., to vest a specified power in *Congress*.

Finally, the individual Petitioners partake of Nevada's sovereign immunity because the claims asserted by Respondent Hicks grow out of the performance of duties within the ordinary course of their government employment. That the tribal court suit has been narrowed to claims against them in their personal capacities does not

change this conclusion, since the State is responsible for representing and indemnifying Petitioners and since the effect of prospective or retroactive relief on governmental decision-making is, as a practical matter, the same. Aside from the potential impact of tribal court relief on the State's sovereign activities, a broader rule with respect to the individual Petitioners' immunity than may exist where federal or state law tort claims are involved is warranted in view of the remedies that were available to Respondent Hicks in federal or state court and the non-reviewability of tribal court decisions on the merits.

ARGUMENT

I. PETITIONERS HAVE NO OBLIGATION TO EXHAUST THEIR DEFENSE OF IMMUNITY FROM SUIT. INHERENT IN IMMUNITY IS THE RIGHT NOT TO BE EXPOSED TO PROCEEDINGS IN TRIBAL COURT FOR ANY PURPOSE, AND THE DEFENSE'S DETERMINATION IMPLICATES NONE OF THE COMITY CONSIDERATIONS IDENTIFIED IN *NATIONAL FARMERS*.

The Ninth Circuit construed the tribal court of appeals' decision as not foreclosing Petitioners' sovereign immunity defense and declined to "reach the issue." Pet. A-13. It buttressed its determination on the fact that the tribal court proceeding had been dismissed against the State and the individual Petitioners in their official capacities. *Id.* The court explained in a footnote that it viewed sovereign immunity as an affirmative defense and that "the defense is subject to our tribal court exhaustion rule, even though the issues the defense presents are jurisdictional in nature." Pet. A-23 n.12. The Court of Appeals' perfunctory application of the exhaustion doctrine formulated in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), not only denigrates the central importance of a State's sovereign immunity against unconsented suit but also misapprehends the prudential underpinnings of *National Farmers*.

1. Although the Court of Appeals described Petitioners' sovereign immunity defense by analogy to the Eleventh Amendment (Pet. A-23 n.12), the "jurisdiction" at stake presently is the exercise of a tribe's inherent authority, and the immunity claim necessarily is directed to *any* form of tribal control not affirmatively delegated by Congress. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). This controversy therefore differs from a traditional immunity inquiry because, in asking whether a tribe may adjudicate a particular dispute, it additionally asks whether the tribe may prescribe the rule of decision itself. *See Seminole Tribe v. Florida*, 517 U.S. 44, 103 (1996) (Souter, J., dissenting) (distinguishing between the use of sovereign immunity as a limitation on "the reach of substantive law" and "on the jurisdiction of the courts"). Simply put, the issue is whether Petitioners must suffer the time, expenditure of resources and potential disruption of sovereign activities in an effort to convince a tribal tribunal that it lacks any form of authority over the State or its representatives with regard to the dispute at hand. Denominating the immunity claim as an "affirmative defense" does not further the task of deciding whether a tribal court exhaustion requirement should be adopted as a matter of comity.

2. a. Because "the essence" of immunity from suit "is its possessor's entitlement not to have to answer for his conduct," that immunity "is effectively lost if a case is

erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 526 (1985); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) ("*Mitchell* makes clear that the [immunity] defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery . . . , as "[i]nquiries of this kind can be peculiarly disruptive of effective government" '"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) ("the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice"). So, too, the essence of immunity from the exercise of inherent tribal authority lies not merely in the right to eventual federal court review of an immunity claim but in an entitlement to immediate relief against such exercise. This conclusion follows unavoidably from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *National Farmers*.

b. In *Oliphant* this Court established a per se rule that non-Indians are not subject to tribal criminal jurisdiction. There, as here, "Respondents d[id] not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision" but instead argued that "such jurisdiction flows automatically from the 'Tribe's retained inherent powers of government.' " 435 U.S. at 195-96. There, as here, the non-Indian defendant's claim that the tribe could not prosecute him for lack of inherent authority had not been "exhausted"; he initiated a habeas corpus action under 25 U.S.C. § 1303 after having been charged with a tribal code offense and prior to any determination

either of his guilt or the tribal court's "jurisdiction." 435 U.S. at 194. There, as here with respect to asserting civil authority over state officers, "[t]he effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians . . . [was] a relatively new phenomenon." *Id.* at 196-97. There, as it must here, this Court undertook an analysis ultimately directed to the question whether exercise of the claimed inherent authority was " 'inconsistent with [tribes'] status' " in the aftermath of "ceding their lands to the United States and announcing their dependence on the Federal Government." *Id.* at 208. Lastly, there, as it will be here if sovereign immunity is found, the result reached was categorical. *Id.* at 211 ("[s]uch an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States").

That *Oliphant* precludes requiring Petitioners to exhaust tribal remedies is plain from *National Farmers* itself. This Court emphasized, in fashioning the exhaustion doctrine with respect to challenges to tribal court authority under the less absolute principles enunciated in *Montana v. United States*, 450 U.S. 544 (1981), that the nature of the "jurisdictional" defect in *Oliphant* had demanded a different rule because that defect admitted of no exceptions. *National Farmers*, 471 U.S. at 855 ("the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require"). In the absence of a categorical prohibition, the Court concluded that comity principles warranted adoption of an exhaustion rule which, it believed, would assist in

avoiding " 'procedural nightmare[s]' " through development of a "full record" before the tribal court, "encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction," and "provid[ing] other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 856-57. None of these factors, however, counsels exhaustion when a categorical prohibition is involved. The sovereign immunity defense is factually straightforward and capable of being litigated without significant exploration of the controversy's merits (*Mitchell*, 472 U.S. at 528-29), while the likely absence of factual dispute and the wholly federal law-based nature of the required inquiry significantly diminish the value either of a tribal court's explanation of the basis for exercising jurisdiction or of its expertise in tribal law.

The prudential nature of the *National Farmers* exhaustion rule was made clear in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), even with respect to *Montana*-based challenges to tribal inherent authority. This Court held in *Strate* that a state highway located within a reservation constituted the functional equivalent of nonmember-owned fee lands for purposes of *Montana*'s "main rule," which presumes the absence of inherent authority where a tribe attempts to regulate through its positive laws or courts the conduct of nonmembers on such lands. *Id.* at 453-56. It concluded the opinion with a footnote discussing the need for exhaustion in situations where the main rule had been shown to apply:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay.

Id. at 469 n.14 (citation omitted). Similarly, if Petitioners' position is accepted, a bright-line principle will be established that precludes the exercise of inherent tribal authority over States or their officials and that directs claims of the sort here to federal or state court for determination. While they are the first litigants to present the issue to this Court, Petitioners should not be denied resolution of their claim merely because they are the first. *Oliphant* once more is instructive and, together with the fundamental purpose underlying sovereign immunity – freedom from the burden of responding to another's assertion of authority – compels reversing the Court of Appeals with respect to its exhaustion holding.

II. TRIBAL INHERENT AUTHORITY DOES NOT EXTEND TO REGULATING OR ADJUDICATING THE RIGHTS OF STATES OR THEIR OFFICERS WHEN CARRYING OUT SOVEREIGN RESPONSIBILITIES.

The amended complaint filed by Respondent Hicks alleges five causes of action, four under tribal law and one for violation of his "civil rights under federal law." Pet. I-4. The latter reference is to 42 U.S.C. § 1983. Br. Opp'n Pet. Writ Cert. at 3, 15-16, 24-25. The question is

thus whether the Tribe's inherent authority permits its courts to apply tribal law or § 1983 to impose a monetary damages judgment on the individual Petitioners. The amici States believe that answering this question requires, first, identifying the nature of the law that may be applied by a tribe pursuant to its inherent authority; second, reconciling the reach of such authority with two core principles of federalism – the delegated quality of congressional power under, inter alia, the Indian Commerce Clause and the States' retained sovereignty; and, third, determining whether the individual Petitioners share in Nevada's sovereign immunity although nominally sued in their personal capacities.

1. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court summarized the nature of inherent tribal authority with particular reference to laws imposing criminal sanctions:

> The powers of Indian tribes are, in general, "inherent powers of a limited sovereign, which have never been extinguished." . . . Before the coming of the Europeans, the tribes were self-governing sovereign political communities. . . . Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws. [¶] Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." . . . Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision

> they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

Id. at 323-24 (citations and footnote omitted); *see also National Farmers*, 471 U.S. at 851 ("tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled North America"). The Court continued on in *Wheeler* to conclude that the dual sovereignty doctrine – which deems successive prosecutions by different sovereigns for the same conduct unaffected by the United States Constitution's double jeopardy prohibition – allowed prosecution of a tribal member under the Major Crimes Act, 18 U.S.C. § 1153, for conduct previously punished by a tribal court, since the tribal proceeding was brought pursuant to the tribe's own laws and thus "not 'for the same offence[ ]' " for Fifth Amendment purposes. 435 U.S. at 330. *Wheeler*'s significance here, aside from an explanation of the source and scope of tribal inherent authority, lies in its recognition that, when acting pursuant to such authority, a tribe is implementing *its own* laws, not those of another sovereign.

This Court in *Strate* made the same point in the civil context. There, the issue was whether a tribal court could exercise "jurisdiction" over claims brought against a nonmember with respect to a motor vehicle accident on a state highway within a reservation. In resolving that issue, the Court was guided by the "pathmarking" decision in *Montana* concerning the scope of inherent tribal authority and, in distinguishing the exhaustion requirement in *National Farmers* and a deferral rule established in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), reasoned:

> These decisions do not expand or stand apart from *Montana*'s instruction on "the inherent sovereign powers of an Indian tribe." . . . While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." . . . Regarding activity on non-Indian fee land within a reservation, *Montana* delineated . . . the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." . . . As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding.

520 U.S. at 453 (citations omitted). Stated alternatively, the authority of tribal courts is limited to applying tribal law as the rule of decision on the merits. A necessary corollary is the lack of any authority to entertain a purely federal law-based claim.

That general principle applies with particular force to Respondent Hicks' cause of action under 42 U.S.C. § 1983. First, § 1983 provides a remedy only for violations of federal constitutional or statutory rights. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980); *Monroe v. Pape*, 365 U.S. 167, 180 (1961). Second, this Court has emphasized that "Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts" and that, "in doing so, Congress was adding to the *jurisdiction of the federal courts*, not subtracting from that of the state courts." *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (emphasis supplied). Consequently, while state courts have a general obligation to

enforce the statute (*see, e.g., Martinez v. California*, 444 U.S. 277, 283 n.7 (1980)), that obligation extends only to litigants over whom adjudicatory jurisdiction exists otherwise.[2] Here, even were tribes properly viewed as comparable to States for purposes of enforcing § 1983, the requisite preexisting "jurisdiction" is absent for the reasons developed immediately below.[3]

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[2] The requirement of preexisting jurisdiction was discussed in an analogous context by Alexander Hamilton in *The Federalist*:

> [T]his doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance. It is not equally evident in relation to cases that may grow out of, and be *peculiar* to the constitution to be established: For not to allow the state courts a right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority.

The Federalist No. 82, at 554-55 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). While Hamilton was concerned with particular causes of action, his reasoning plainly applies to instances where the court lacks adjudicatory jurisdiction over a party. *See Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("[l]egal or equitable rights, acquired under either [the federal or state] system of laws, may be enforced in any court of either sovereignty *competent* to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction") (emphasis supplied).

[3] It bears mention that, even were Petitioners subject to the Tribe's inherent authority, a second consideration animating the concurrent jurisdiction doctrine – the obligation of the *States* to enforce federal law – is irrelevant where a tribal court proceeding is involved. Justice Kennedy thus explained recently:

> It is the right and duty of the States, within their own judiciaries, to interpret and follow the Constitution

2. This Court reiterated in *Printz v. United States*, 521 U.S. 898, 918-19 (1997), that "[i]t is incontestable that the Constitution established a system of 'dual sovereignty' " and that, "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' " *See, e.g., Tafflin*, 493 U.S. at 458 ("[w]e begin with the axiom that, under our federal system, the States possess

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> and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself.

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 275-76 (1997) (plurality op.). It is from this concept of coordinate sovereignty that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Indian tribes are not situated comparably to States in this respect, both because they did not participate in the surrender of powers from the States to the national government on which the Union rests (*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)) and because, unlike the States, they are not bound by the Constitution's provisions (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Consequently, while tribes or their courts presumably can recognize federal law-based claims where inherent authority otherwise exists over the parties, such recognition is discretionary, i.e., "a matter of comity," unless Congress explicitly has directed them to do so. *See Duro v. Reina*, 495 U.S. 676, 693 (1990) (noting certain requirements imposed on tribal courts under the Indian Civil Rights Act). Section 1983 contains no such direction.

sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause"); *Lane County v. Oregon*, 74 U.S. 71, 76 (1869) ("[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to esparate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States"). The *Printz* Court thus emphasized that "[r]esidual state sovereignty was . . . implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, . . . which implication was rendered express by the Tenth Amendment's assertion that 'the powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.' " *Id.* at 919; *see generally* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1907, at 682 (3d ed. 1858) (because the Constitution "is an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld"). The twin concepts underlying this principle of "dual sovereignty" – delegation of state power to the national government and retention of that power not delegated – control determination of the question whether Indian tribes may exercise their inherent authority over the States.

a. "The Union of the States," as this Court observed in *Texas v. White*, 74 U.S. 700, 724-25 (1869), "never was a purely artificial and arbitrary relation." It instead initially "began among the Colonies[ ] and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations." *Id.* at 725. It then

"was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation." *Id.* Among those mutual concerns, of course, were Indian affairs. *See generally* I *The Great Father* at 35 ("[t]he individual colonies were well aware of Indian matters, . . . [b]ut the Indian problem could not be handled adequately by disparate provincial practices").

That specific concern was addressed unsatisfactorily in the Articles of Confederation, where the national government was given "the sole and exclusive right and power of . . . regulating the trade, and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated." Arts. Confed'n, art. IX, ¶ 4, cl. 3. The concluding proviso, as James Madison pointedly remarked in *The Federalist*, appeared to take back what the prior portion of the clause gave:

> The regulation of commerce with the Indian tribes is very properly unfettered from the two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. . . . And how the trade with Indians, though not members of a State, and yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case where the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to

> reconcile a partial sovereignty in the Union, with a complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part and letting a whole remain.

The Federalist No. 42, at 284-85 (James Madison). The practical consequence of this "unsettled construction of the confederation" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) was aggressive incursion by some southern States into tribal territory. *See generally* Francis Paul Prucha, *American Indian Treaties* 59 (1994) ("[i]n the south, the difficulties in dealing with the Indians after the Revolutionary War were, if anything, even greater than in the north" because, given lack of clarity over the reach of congressional authority, four States – Virginia, North Carolina, South Carolina and Georgia – "aggressively pushed their own interests; they strove to satisfy the demands of their citizens for more land and were imbued with a strong sense of their state sovereignty").

The Articles of Confederation's inadequacy as to national control of Indian affairs was remedied in the Constitution through the Indian Commerce Clause. *Cherokee Nation*, 30 U.S. (5 Pet.) at 19 ("[i]ntending to *give* the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it granted in the confederation") (emphasis supplied). That this *grant* of power to Congress was broad was highlighted in *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996), where this Court stated:

> [O]ur inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the

> States. If anything, the Indian Commerce Clause accomplishes a greater *transfer of power* from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

(Emphasis supplied); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law"). The breadth of the power transferred can be seen in the Court's decisions which have held repeatedly that congressional authority under the Indian Commerce Clause is plenary. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). As *Oliphant* and other cases also establish, that plenary power includes the ability to restrict or eliminate inherent tribal authority. *Oliphant*, 435 U.S. at 208; *accord Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 501 (1979). Since Congress has the ability to determine the very scope of tribal powers, no argument can be, or indeed ever has been, made that it is subject to those powers.

Again, however, Congress derived its plenary authority over Indian affairs under the Indian Commerce Clause from the several States. *See The Federalist* No. 42, at 282 (James Madison) (describing Commerce Clause authority as part of the "third class" of powers lodged in the general government). The inference required from the

derivative nature of federal power is that, but for their delegation of authority to regulate commerce "with the Indian tribes," the States would have the same plenary authority. This inference not only comports with the Constitution's structure but also with the doctrinal source of Indian tribes' "anomalous" and "complex" relation to the United States and its people (*United States v. Kagama*, 118 U.S. 375, 381 (1886)): the discovery doctrine.

Under that doctrine, "discovery [of new continents] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title may be consummated by possession." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). Such title "gave to the nation making the discovery the sole right of acquiring the soil from the natives[ ] and establishing settlements upon it." *Id.* "[T]he rights of the original inhabitants," moreover,

> were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle, that discovery gave exclusive title to those who made it.

Id. at 574. As a consequence of this diminished sovereignty, tribes were characterized as "domestic dependent nations" occupying "a territory to which [the United States] assert[s] a title independent of their will" and "in

a state of pupilage" that "resembles a [relation] of a ward to his guardian." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. The States were deemed conceptually no different than the United States for purposes of the discovery doctrine. *Johnson*, 21 U.S. (8 Wheat.) at 584-85 ("[i]t has never been doubted, that either the United States or the several States, had a clear title to all the lands within the boundary lines described in the [1783 Treaty of Paris], and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it"); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting) ("What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits"). It necessarily follows that, as sovereigns succeeding to Great Britain's territorial interests, the States were possessed of immunity from the exercise of inherent tribal authority at the time of the Constitution's framing.

b. No basis exists on which to conclude that the States' grant of power over Indian affairs to Congress *waived* their preexisting immunity from regulation by the tribes themselves. As an Article I power, the Indian Commerce Clause's exercise is subject to the constraints of not only the Tenth and Eleventh Amendments but also the States' sovereign immunity "inher[ing] in the system of federalism established by the Constitution." *Alden v. Maine*, 527 U.S. 706, 730 (1999); *see also Seminole Tribe*, 517 U.S. at 59-63; *New York v. United States*, 505 U.S. 144, 167-69 (1992). In *Seminole Tribe*, the Court held that the

Eleventh Amendment precluded Congress from subjecting States to unconsented suit by tribes under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 to 2721, while in *Alden* the Court held that congressional abrogation of the States' immunity from private suit in state court under a statute enacted pursuant to Commerce Clause powers was precluded by the absence of " 'compelling evidence' that the States were required to surrender this power [of abrogation] to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 731. In *New York*, this Court invalidated under the Tenth Amendment a "take title" provision in the Low-Level Radioactive Waste Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C), that required a State or a "compact region" composed of States to take possession of low-level radioactive waste under certain circumstances. In so doing, the Court emphasized that "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166.

No like limitations exist under the Constitution with respect to the exercise of inherent authority by Indian tribes. As this Court has long held, tribes are extra-constitutional quasi-sovereigns not constrained by the Bill of Rights (*Talton v. Mayes*, 163 U.S. 376, 384 (1896)) or, presumably, any other provision of the Constitution. *See Blatchford*, 501 U.S. at 782. The lack of such constraint means that a tribe could use its inherent authority to subject States to suit for monetary relief for failing to comply with tribal law or for prospective relief to require compliance with such law. It also means that the nature of the tribal law obligation that may be imposed is

unbounded except to the extent positive federal law forecloses the particular obligation's application – and even there a litigant may be required to present the preemption defense to a tribal forum from whose decision no right of collateral review exists as to merits. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n.7 (1999); *Iowa Mutual*, 480 U.S. at 19. States could be directed to provide services they do not currently provide, modify the manner in which they provide services, or cease certain activities that they currently perform within a reservation; i.e., state agencies or officials could be "commandeer[ed]" to carry out tribal objectives or programs. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981). To conclude that the States surrendered their preexisting immunity against the exercise of inherent tribal authority through their cession of power under the Indian Commerce Clause thus means that they intended to expose themselves to greater regulation by tribes than by Congress.

Such a conclusion would tear dual sovereignty notions apart. States would no longer be sovereign except to the extent their sovereignty is diminished by the appropriate exercise of congressional power or their own internal laws. They instead would be subject to broad tribal authority which not only is inapplicable to the Federal Government but also is potentially far more intrusive than that possessed by Congress. No less importantly, such authority would run at direct cross-purposes with the Indian Commerce Clause's objective of vesting *Congress* with the responsibility for adjusting the relationship between States and tribes with respect to Indian country matters.

In sum, the authority conferred by the States upon Congress under the Indian Commerce Clause represents the whole of their cession as to Indian affairs. That clause, in turn, did not abandon the States' preexisting immunity from the exercise of inherent tribal authority. The States' immunity accordingly remains an incident of their sovereign powers.

3. Respondent Hicks' amended tribal court complaint asserted liability against the individual Petitioners in their official and personal capacities. Pet. I-2 (Am. Compl. ¶ 2). Following initiation of the federal district court proceeding, he dismissed in tribal court the claims against Petitioners in their official capacities. Pet. A-5. Respondents contended in their brief opposing the Petition that individual capacity suits are not suits against the State and that the individual Petitioners therefore do not partake of Nevada's sovereign immunity. Br. Opp'n Pet. Writ Cert. at 18-21.

Respondents are incorrect for two reasons. First, an "individual capacity" suit under 42 U.S.C. § 1983 (*see, e.g., Hafer v. Melo*, 502 U.S. 21, 25 (1991)) is unavailable because, as discussed *supra* at 16-17, the tribal court lacks concurrent jurisdiction under that statute. Any such claims instead should be maintained in federal or state court. Second, to the extent individual liability is sought to be imposed under tribal law-based claims, the practical effect of the relief sought, not pleading devices, should control. As this Court recognized in *Alden* with respect to claims directly against States:

> Private suits against nonconsenting States – especially suits for monetary damages – may threaten the financial integrity of the States. It is indisputable that, at the time of the founding,

> many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, unlimited congressional power to authorize suits in state to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. This potential national power would pose a severe and notorious danger to the States and their resources.

Alden, 527 U.S. at 750. The Court also identified "more subtle risks" since the surrender of immunity "carries with it substantial costs to the autonomy, the decision-making ability, and sovereign capacity of the States." *Id.*

Notwithstanding the fact that the relief nominally sought here is against the individual Petitioners in their personal capacities, comparable risks exist because they are entitled statutorily to legal representation and indemnification by Nevada and because the specter of prospective or retroactive liability in this or other contexts may affect the State's exercise of its sovereign responsibilities within the Reservation.[4] "A general [tribal] power to

[4] Nevada statutes require the State to provide representation through the "official attorney" when such attorney "has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith." Nev. Rev. Stat. Ann. § 41-0339.2 (Michie 1998). Indemnification for judgments additionally is required except under limited circumstances. *Id.* § 41-0348. The State's direct responsibility is reflected by the obligation that it be named as a defendant, at least where state law causes of action are involved, when a "tort action arising out of an act or omission within the scope of [the officer's or employee's] public duties or employment" is brought. *Id.* § 41.0337. The individual Petitioners have been provided representation and potential indemnification pursuant to these provisions.

authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden*, 527 U.S. at 750-51. Much the same reasoning would apply were prospective relief affecting the performance of state responsibilities at issue. *See, e.g., Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act' ") (citations omitted).

While distinctions between official and personal capacity suits have been recognized with respect to federal and state law-based tort claims seeking only monetary relief (*see, e.g., Westfall v. Erwin*, 484 U.S. 292 (1988); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687-91 (1949)), none of those cases has involved the unique circumstances here – i.e., the attempt by an Indian tribe with no authority to regulate or adjudicate the rights or liability of a State to impose damages on persons admittedly carrying out functions on behalf of the State. Moreover, unlike the ordinary sovereign immunity situation, precluding application of tribal law will not deny Respondent Hicks any otherwise appropriate "direct compensation simply because he had the misfortune to be injured by a [state] official." *Westfall*, 484 U.S. at 295. He

had state or federal forums fully capable of addressing his claims. The issue, in other words, is not "absolute immunity for [state] officials" (*id.*); it is immunity from the use of tribal law or courts to determine the rights and obligations of state employees for actions taken in the course of discharging their official responsibilities. Given the availability of adequate federal or state court remedies, the nonreviewability of tribal court decisions on the merits, and the potential of such decisions to burden or disrupt seriously the provision of state services, sovereign immunity should extend to state officers or employees whenever they are carrying out duties within the scope of their governmental responsibilities.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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