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NO. 11-441

IN THE

Supreme Court of the United States

MYRNA MALATERRE, CAROL BELGARDE, AND LONNIE THOMPSON,

Petitioners,

v.

AMERIND RISK MANAGEMENT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Eighth Circuit in this case concluded that Respondent, a tribal business corporation formed pursuant to 25 U.S.C. § 477 with the aim of insuring Indian housing authorities against tort liability, could itself invoke tribal immunity as a ground for avoiding its contractual obligation to provide insurance coverage for liability claims arising from injuries sustained by tribal-member tenants in Indian housing units. Judge Bye, in dissent, invited this Court's review, calling the Eighth Circuit's holding "perverse," because it both thwarted Congress's intent in enacting §477 and rendered federally mandated liability insurance illusory. Pet. App. 22a, 31a-32a (Bye, J., dissenting). This Court's review is warranted.

I. The Court Should Review The Question Presented.

Respondent's brief fails to come to grips with the critically important and nationally significant question presented in the petition. *Not once* in its brief in opposition does Respondent cite *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). *See* Br. in Opp. v-vii (Table of Authorities). The petition, however, explicitly asked (Pet. 14) this Court to revisit *Kiowa Tribe*, which adhered to the rule that tribes are presumed to be immune from suit absent express Congressional waiver. 523 U.S. at 760. That rule is short-circuiting consideration of whether Congress intended tribal businesses chartered under §17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477, to be immune from suit. *See* Pet. 14-16. Section 477's text

is silent on the issue of tribal immunity, and its legislative history demonstrates that Congress did not intend for §477 tribal businesses to be immune from suit. Pet. 15-17. But courts, citing *Kiowa Tribe*, are effectively presuming that §477 tribal businesses enjoy tribal immunity absent an express Congressional waiver, *see, e.g.*, *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), and accordingly are resting their finding of tribal immunity on the slimmest reeds. *See* Pet. App. 8a-9a.

Consider, for example, *Memphis Biofuels,* which held that §477 tribal businesses are entitled to tribal sovereign immunity, and which the Eighth Circuit in this case cited approvingly. Pet. App. 8a-9a. The court in *Memphis Biofuels* correctly noted that the statute's text "is silent as to whether Section 17 incorporated tribes have sovereign immunity." 585 F.3d at 920. It nevertheless concluded, "it is more appropriate to interpret this silence as not abrogating sovereign immunity," *id.*, in part because *Kiowa Tribe* requires courts to presume tribal immunity absent an express Congressional waiver, *id.* at 921. Also, even though the statutory text was otherwise "silent" on the issue of tribal immunity, the court read its language "incorporated tribe" as somehow indicating that Congress intended §477 corporations to be immune from suit. *Id.* at 922.

The Eighth Circuit in this case agreed. Pet. App. 9a. But that reading of §477's text makes sense, if at all, only against a background principle of tribal immunity, and none was explicit in this Court's cases when Congress enacted §477 in 1934. Pet. 14. Without it, the words "incorporated tribe" may not fairly be said to demonstrate that Congress intended

for tribal businesses chartered under §477 to be immune from suit. Again, §477's text is silent respecting tribal immunity, and complete silence on this score in the face of a common-law background that itself did not explicitly recognize a default rule of tribal immunity militates against imputing to Congress an intent to silently bestow immunity on federally chartered tribal businesses. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 729 (1989) (plurality opinion).

The Eighth Circuit also concluded that, because Respondent administers a self-insurance risk pool, it is acting as an "arm of the [Charter Tribes]" rather than as a "mere business," and thus is entitled to the same immunity as the tribe. Pet. App. 9a. Even this conclusion, however, is premised on the existence of tribal immunity. As such, the Eighth Circuit did not credit either what §477 says (or does not say) or what its legislative history indicates. *See* Pet. App. 30a-31a (Bye, J., dissenting) (finding "some support" in legislative history for contrary conclusion).

Tribal immunity is a judicial doctrine first made explicit in 1940. *See United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940) (*USF&G*). And §477 was enacted by Congress in 1934, as part of the Indian Reorganization Act. It makes no sense, therefore, to interpret §477's text against a background presumption of tribal immunity or demand or even expect to find an express waiver from Congress. Under these circumstances, courts should instead be applying traditional rules of statutory construction to determine whether Congress intended for tribal

businesses chartered under §477 to be immune from suit.

Respondent disagrees, Br. in Opp. 14-15, that such a background principle did not exist in 1934. It finds support for this background principle in a law review article that concludes that "the doctrine [of tribal immunity] is neither judicially created, nor exclusively rooted in *Turner* [*v. United States*, 248 U.S. 354 (1919),]" but can be traced back to the days of "early colonial contact" and is an "essential and inherent element of tribal sovereignty." Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 683 (2002). But this article is wrong on both counts. The Court in *Kiowa Tribe* itself recognized that tribal immunity was judicially created. 523 U.S. at 759 ("As with tribal immunity, foreign sovereign immunity began as a judicial doctrine."). Moreover, the Court in *Kiowa Tribe* rejected the view that tribal immunity was rooted in its decision in *Turner*. *Id.* at 757 (concluding that *Turner* "is but a slender reed for supporting the principle of tribal sovereign immunity"). Rather, it identified its decision in *USF&G*, in 1940, as the Court's first "explicit holding that tribes had immunity from suit." *Id.*

A. The Issue Is Properly Before the Court For Its Consideration.

Rather than address what the petition says, Respondent's brief mischaracterizes the issue Petitioners seek to have this Court review on the merits, stating that it concerns whether Congress

has "withheld" or "abrogated" Respondent's sovereign immunity. *See* Br. in Opp. 13. This argument, Respondent contends, was not raised below; is not important and raises no conflict; and is meritless. Br. in Opp. 13a-19a.

Petitioners, however, are not asking the Court to consider whether Congress "withheld" or "abrogated" Respondent's tribal immunity when it enacted §477. Petitioners are seeking review of the Eighth Circuit's holding that Respondent, a §477 tribal business, is an arm of the Charter Tribes and thus entitled to tribal immunity. Pet. 8a-9a. That ruling, because it thwarted Congress's intent in enacting §477 and rendered federally mandated liability insurance illusory, fully merits this Court's review. *See* Pet. App. 22a, 31a-32a (Bye, J., dissenting).

The petition also urged review because the Eighth Circuit's conclusion that the very existence of a "sue and be sued" clause in Respondent's Charter did not effectuate waiver was in conflict with decisions of other courts. Pet. 10-13. Respondent answers that this issue was not preserved for this Court's review. Br. in Opp. 7. Respondent is wrong. The Eighth Circuit expressly found that the "sue and be sued" clause was not effective "absent a resolution" from Respondent's Board of Directors.[1] Pet. App. 14a-15a.

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[1] Respondent characterizes this legal determination as a "passing reference." Br. in Opp. 7-8. Not so. The legal significance of the "sue and be sued" clause was necessary to the court's determination that Respondent had not *itself* waived its immunity when it assumed its predecessor's obligations. *See* Pet. App. 14a-15a. Moreover, having presented that argument,

That conclusion, moreover, conflicts with decisions of other courts. *See* Pet. 10-12. Respondent attempts to distinguish these decisions on the ground that some concerned clauses in tribal ordinances, while others appeared in federal charters. Br. in Opp. 8-10. Whether tribal or federal law governed these clauses, however, is beside the point. The salient point is that courts disagree on whether the very existence of these similarly worded clauses effectuate waiver.

B. Respondent's Disagreement on the Merits Provides No Basis for This Court to Deny Review.

Respondent obviously disagrees with Petitioners on the merits.

For example, it states that the Eighth Circuit correctly concluded that §477's phrase "incorporated tribe" indicates that Congress intended for federally chartered tribal businesses to be immune from suit. But, as discussed above, §477's text is silent in regards to tribal immunity, and courts should not be imputing to Congress an intent to extend to a tribal business corporation a federal common-law "default" rule of tribal immunity that this Court had not even explicitly recognized at the time of §477's enactment. In this instance, "[t]he only fair inference from Congress's silence is that Congress had nothing further to say, its statutory text doing all of the

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which the lower court decided, Petitioners "can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

talking." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 121 (2007) (Scalia, J., dissenting).

Respondent also argues, "nothing in the text of §477 expressly *abrogates* tribal immunity, indicating strongly that Congress did not intend to *divest* tribes of their immunity." Br. in Opp. 11 (emphasis added). But abrogation and divesture assumes a background principle of tribal immunity that simply had not been explicitly recognized by this Court. Congressional silence, then, cannot be said to have embraced a common-law doctrine not recognized by this Court at the time of §477's enactment.

Respondent similarly misunderstands the significance of §477's legislative history, and what it says. According to Respondent, "[e]ven the legislative history is silent about tribal immunity, which further demonstrates that Congress did not intend to divest tribes, which organized under §477, of their immunity." Br. in Opp. 11. By contrast, Petitioners, like Judge Bye, found "some support for the argument that when Congress adopted the Indian Reorganization Act (IRA) in 1934, it did not intend tribal business corporations formed under §477 to have the same immunity that tribal governments formed under §476 would have." Pet. App. 30a-31a; Pet. 15-16. Respondent states that Petitioners are misreading that history. Br. in Opp. 16. But assuming Respondent is correct that the legislative history is "*silent*" in regards to immunity (*see* Br. in Opp. 11, 16-17 (emphasis added)), then there is no basis whatever for inferring that Congress intended for tribal businesses chartered under §477 to be immune from suit.

Three additional merits-related points Respondent raises warrant a brief response at this stage, because they may also relate to whether this is a suitable vehicle for consideration of the question presented, or whether the ruling below warrants review. The first is Respondent's suggestion that Petitioners' dismissal with prejudice of their tort claims against the Turtle Mountain Housing Authority ("TMHA") precludes a finding under tribal law that Respondent is legally obligated to indemnify TMHA for Petitioners' losses. *See* Br. in Opp. 4-5. The second is Respondent's suggestion that federal housing law does not obligate it to maintain liability insurance for third-party losses, and neither does its certificate of coverage. Br. in Opp. 4, 18. The third is Respondent's suggestion that if it is not immune from suit, then "claimants [will have] unfettered access to tribally pooled funds." Br. in Opp. 19.

Respondent calls Petitioners' dismissal of their claims against TMHA "inexplicabl[e]" (Br. in Opp. 5), but Respondent is simply feigning ignorance. As Respondent well knows, and as the petition explains (at 7), the Turtle Mountain Tribal Court of Appeals in this case held that Petitioners could maintain, consistent with longstanding tribal law, a direct action against Respondent, an insurer, because federal housing law mandates insurance to protect against third-party losses and not merely to indemnify the insured (here, TMHA). Pet. App. 65a, 68a. The court explained established tribal law in these terms:

> Even assuming that the [TMHA] may be immune from suit, the Court finds that its decision in *St. Claire* [*v. Turtle Mountain Chippewa Casino*, No. TMAC

> 97-013 (May 11, 1998)] as well as its recent decision in *Gourneau v. Turtle Mountain Band of Chippewa Indians*, TMAC 02-10247 clearly hold that federal or tribal law mandating insurance to protect the public constitutes a limited waiver of the sovereign immunity defense that may be available to the party responsible for indemnifying the immune entity.

Pet. App. 65a. This right of direct action recognizes that, "if [an insurer] has a duty to indemnify the losses sustained by [third parties] it cannot avail itself of immunity [of the insured] to avoid its obligations." Pet. App. 65a; *see also Smith Plumbing v. Aetna Casualty Insur. Co.*, 720 P.2d 499 (Ariz. 1986) (surety of immune tribe not entitled to defend against its liabilities based upon tribe's immunities). Under these circumstances, a direct action may lie against the insurer if the plaintiff proves that the Housing Authority is negligent and breached a duty owed to plaintiffs. Pet. App. 68a. The Housing Authority, even if not a party to the suit, has the duty to assist its insurer in defending against suit, and the tribal court is authorized to enforce that obligation. Pet. App. 68a.

The court then considered whether federal housing law required insurance coverage for third-party losses. The court concluded: "HUD clearly contemplated that third parties would have potential claims against [Housing Authority] recipients of [federal housing] monies when the [Housing Authority] or its employees were negligent. The mandated insurance is therefore designed to cover the losses of tenants occasioned by the negligence of

[Housing Authority] employees." Pet. App. 68a. Judge Bye of the Eighth Circuit similarly read federal housing law as "requiring Indian tribes and tribal housing authorities [to] protect themselves from tort liability (i.e., lawsuits) as a condition of their receipt of federal funds." Pet. App. 29a (Bye, J., dissenting).

The Tribal Court of Appeals, moreover, found that "[t]he actual certificate of coverage . . . provides that [Respondent] Amerind will cover any liability claim for personal injury or property damage up to $1,000,000. The Court has reviewed the policy and finds nothing therein excluding liability claims arising from losses sustained by tenants or guests in Housing units." Pet. App. 67a. Although Respondent contends that its inability to share in the immunity of the tribes would mean that "claimants [have] unfettered access to tribally pooled funds," Br. in Opp. 19, that is not correct. The Tribal Court of Appeals held that liability was limited in accordance with the coverage and limits of TMHA's insurance policy. Pet. App. 67a.

C. If Tribal Immunity Does Not Pertain to a Court's Jurisdiction, Then Reversal Is Warranted.

Respondent argues that the Court should decline review because the decision can be affirmed on an alternate ground—that the tribal court lacked jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981)—and the Court must decide that issue before deciding any issue of tribal immunity. Br. in Opp. 19-21; Pet. App. 22a (Beam, J., concurring specially). This argument need not be

considered here, but if the Court were to consider it, it would require reversal.

To begin with, the views stated in this concurrence provide no warrant for declining review. For one thing, the ruling below, as discussed, had the twin effect of thwarting Congress's intent in enacting §477 and rendering federally mandated liability insurance illusory. That ruling merits review irrespective of the possibility that an alternate ground for decision exists. For another, the Court of Appeals did not rule on this alternate ground; only Judge Beam indicated how he would have ruled. Under these circumstances, the prudent course would be to allow the Eighth Circuit, on remand, to decide the issue in the first instance. *E.g.*, *United States v. O'Hagan*, 521 U.S. 642, 678 (1997).

Respondent disagrees. Br. in Opp. 21. It suggests that the Court would first have to consider tribal court jurisdiction under *Montana*. Respondent finds support for this sequencing in *Nevada v. Hicks*, 533 U.S. 353, 373-74 (2001), which rejected the argument that qualified immunity of state officials should be considered in reviewing tribal court jurisdiction under *Montana* analysis.

Respondent, however, misunderstands the implications of its argument. *Hicks* endorsed that sequence in part because *Montana* analysis pertains to a court's jurisdiction; absolute or qualified immunity does not; and courts should decide jurisdictional issues first. 533 U.S. at 353. A similar sequencing here would not be warranted unless tribal immunity also did not pertain to a court's jurisdiction. Presumably, then, tribal immunity would be forfeitable, as are non-jurisdictional

immunity defenses. *Cf. Chestnut v. City of Lowell*, 305 F.3d 18, 22 (1st Cir. 2002) (Torruella, J., concurring) ("Immunity, whether qualified or absolute, is an affirmative defense that can be forfeited, if not asserted in a timely manner, or waived.").

In this case, Respondent never raised tribal immunity in the District Court or in appellate briefing. Pet. App. 7a. The Eighth Circuit considered the issue *sua sponte* because it concluded that tribal immunity pertained to the court's jurisdiction. *Id.* If Respondent's sequencing theory were correct, then reversal would be warranted on the ground that Respondent forfeited any tribal immunity defense. *See Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1306 n.3 (8th Cir. 1997) (declining to consider grounds not decided by the district court or raised by the parties absent extraordinary circumstances).

In any event, *Hicks* did not concern tribal immunity, and Respondent can point to no decision of this Court holding that *Montana* analysis must precede consideration of tribal immunity because tribal immunity does not pertain to a court's jurisdiction. The Court should consider the issue presented and, if necessary, allow the Court of Appeals, on remand, to rule in the first instance on any *Montana* issue.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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