No. 02145 MAR 28 2003

In The
Supreme Court of the United States

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE and DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Cross-Petitioners,

v.

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CONDITIONAL CROSS-PETITION FOR CERTIORARI OF SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER

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QUESTION PRESENTED

In No. 02-1253, petitioners Fred Riggs, Donna Singer and Al Dickson (cross-respondents and plaintiffs below), seek review of the following question: Whether the court of appeals erred in (i) affirming the district court's dismissal of petitioners' claim to enforce certain orders of the Navajo tribal court as against respondents Truck Insurance Exchange and Dennis Ickes and (ii) remanding petitioners' claim as against the Health District and San Juan County respondents for an analysis of subject matter jurisdiction pursuant to *Montana v. United States*, 450 U.S. 544 (1981)?

In this conditional cross-petition for a writ of certiorari, cross-petitioners San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer (respondents in No. 02-1253 and defendants below) seek review of the following question: Did the court of appeals err in reversing the district court's dismissal of the claims against cross-petitioners and holding that the Navajo tribal court's subject matter jurisdiction must be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in tribal court?

PARTIES TO THE PROCEEDINGS

Cross-Petitioners

Cross-petitioners San Juan County Health Services District (the "Health District"), Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer are respondents in No. 02-1253, defendants below, and defendants in the action before the Navajo tribal court.

Cross-Respondents

Cross-respondents Fred Riggs, Donna Singer and Al Dickson are petitioners in No. 02-1253, plaintiffs below, and plaintiffs in the action before the Navajo tribal court.

Additional Parties in this Court

San Juan County, J. Tyron Lewis, Lyn Stevens, Manuel Morgan, Bill Redd, Rick Bailey, Craig Halls, (collectively "San Juan County defendants"), Truck Insurance Exchange ("Truck Insurance") and Dennis Ickes are respondents in No. 02-1253, defendants below, and defendants in the action before the Navajo tribal court.

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Percy Mitchell, Melvin Capitan, Candace Holiday, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional plaintiffs below but were not parties in the action before the Navajo tribal court.

PARTIES TO THE PROCEEDINGS – Continued

Cleal Bradford, John Housekeeper, Gary Holliday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional defendants below but were not parties in the action before the Navajo tribal court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The December 28, 1999 preliminary injunction entered by the District Court of the Navajo Nation, Judicial District of Shiprock, New Mexico, is reprinted in the appendix to the petition for a writ of certiorari in No. 02-1253 ("P. App.") at 70a-104a. The Navajo tribal court entered three additional orders in furtherance of the December 28, 1999 preliminary injunction. These orders, dated March 1, 2000, March 2, 2000, and March 15, 2000, are reprinted in the appendix to the Petitioners' Brief in Opposition to Petition for a Writ of Certiorari in No. 02-1253 ("R. App.") at 1a-20a, 21a-22a and 23a-25a, respectively. In the action below, petitioners in No. 02-1253 sought enforcement of these orders entered by the Navajo tribal court.

The October 30, 2000 decision of the United States District Court for the District of Utah, Central Division, is unreported and is reprinted at P. App. 26a-51a. The October 30, 2000 order dismissed the action seeking enforcement of the Navajo tribal court orders with respect to cross-petitioners and the San Juan County defendants. The December 12, 2000 decision of the district court is unreported and is reprinted at P. App. 52a-69a. Pursuant to the December 12, 2000 order, the district court dismissed the action seeking enforcement of the Tribal court orders with respect to Dennis Ickes and Truck Insurance.

The October 7, 2002 decision of the United States Court of Appeals for the Tenth Circuit is reported at 309 F.3d 1216, and is reprinted at P. App. 1a-25a. On November 8, 2002, the court of appeals denied a petition for panel rehearing submitted by the cross-respondents as well as a

petition for rehearing en banc submitted by the cross-petitioners. The Order denying the petitions is reprinted at P. App. 105a-106a.

BASIS FOR JURISDICTION

The decision of the court of appeals was entered on October 7, 2002, and the court denied the petitions for panel rehearing and rehearing en banc on November 8, 2002. Singer, Riggs and Dickson filed a petition for a writ of certiorari in the United States Supreme Court on February 6, 2003, within ninety days of the denial of the petitions for rehearing. The petition was docketed as Case No. 02-1253 on February 26, 2003.

In reliance on Supreme Court Rule 12.5, this conditional cross-petition for a writ of certiorari is filed within thirty days from the date on which the petition for a writ of certiorari was docketed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Utah Code Ann. § 63-30-2. Definitions.

As used in this chapter:

. . .

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

. . .

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

. . .

Utah Code Ann. § 63-30-3. Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

. . .

Utah Code Ann. § 63-30-4. Act provisions not construed as admission or denial of liability – Effect of waiver of immunity – Exclusive remedy – Joinder of employee – Limitations on personal liability.

. . .

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority,

unless it is established that the employee acted or failed to act due to fraud or malice.

STATEMENT OF THE CASE

The Health District is a special service district organized by San Juan County pursuant to Utah Code Ann. § 17A-2-1204. The individual cross-petitioners are employees of the Health District or members of its board of trustees. The individual San Juan County defendants are officials or employees of San Juan County.

The Health District operates a hospital in Monticello, Utah, as well as several out-patient clinics. Prior to January 1, 2000, the Health District operated an out-patient clinic located in Montezuma Creek, Utah. The Montezuma Creek Clinic is located within the exterior boundary of the Navajo Reservation on fee land held in trust by the State of Utah as part of the Utah Navajo Trust Fund. P. App. at 3a. The Health District provided medical services at the Clinic to Native Americans residing on the reservation pursuant to a contract with Indian Health Services, a federal government agency. Cross-respondents Fred Riggs, Donna Singer and Al Dickson were employed by the Health District at its Montezuma Creek Clinic. *Id.* In approximately November 1998, the Health District terminated Singer's employment, while Riggs and Dickson remained employed by the Health District at the Montezuma Creek Clinic until January 1, 2000, when it ceased operating the clinic.[1]

[1] Since January 1, 2000, the Montezuma Creek Clinic has been owned and operated by Utah Navajo Health Systems, Inc. ("UNHS"), an
(Continued on following page)

In April 1999, cross-respondents filed a Complaint for Damages in the Navajo tribal court, asserting numerous claims under federal and state law along with various Navajo law claims arising out of their employment with the Health District. P. App. at 4a, n.2. Cross-petitioners asserted both sovereign immunity and lack of jurisdiction as defenses to the Navajo tribal court Complaint. *Id.* at 30a.

Nevertheless, on December 28, 1999, the Navajo tribal court issued a preliminary injunction in which it ordered the Health District to reinstate Singer to her previous position and awarded back pay and attorneys' fees (an amount cross-respondents claimed was in excess of $500,000) to each of the cross-respondents. P. App. at 101a-104a. Despite the fact that the Health District owned and operated the Montezuma Creek Clinic, the preliminary injunction order also purported to preclude the Health District from "interfering" with the management of and numerous services provided at the Clinic and directed the Health District to take certain affirmative steps with respect to its operation of the Health District. *Id.* at 102a-104a. Moreover, although in their complaint cross-respondents sought relief only with respect to the employment actions allegedly taken against them by the Health District, the Navajo tribal court provided broad relief to members of the Navajo Tribe in general, including prohibiting the Health District from billing Navajo Tribe members for health care services, whether provided at the

entity of which Singer is the executive director. Riggs, Singer and Dickson have all been employed by UNHS at the Montezuma Creek Clinic since January 1, 2000.

Montezuma Creek Clinic or at Health District facilities off the reservation. *Id.* at 103a. The order also precluded the Health District from eliminating emergency and other services on the reservation. *Id.*

In March 2000, the tribal court entered several orders supplementing the preliminary injunction, including the Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order dated March 1, 2000, R. App. at 1a; the Special Order in Aid to Satisfaction of Preliminary Injunction dated March 2, 2000, *id.* at 21a; and the Order Mandating that All Defendants' [sic] Be Bound by the Preliminary Injunction Order. *Id.* at 23a. Pursuant to these orders, the Navajo tribal court ordered cross-petitioners immediately to pay back wages and attorneys' fees, *id.* at 16a-17a; imposed a $10,000 per day penalty upon cross-petitioners in the event they failed to comply immediately with the Navajo tribal court's orders, $1,000 of which was to be paid by the individual cross-petitioners, *id.* at 20a; and ordered that the penalty would apply during any period of appeal. *Id.* The tribal court also purported to grant cross-respondents leave to seek immediate enforcement of its orders in any Utah or federal court. *Id.* at 22a. Finally, the Navajo tribal court permitted cross-respondents to add as defendants Truck Insurance, the Health District's insurer, and Dennis Ickes, counsel for cross-petitioners and the San Juan County defendants in Navajo tribal court, and the court bound both of them to its previously-entered orders. *Id.* at 24a-25a.

In August 2000, cross-respondents filed this action in the United States District Court for the District of Utah,

seeking to enforce the Navajo tribal court orders discussed above.[2] Shortly after the institution of this action, cross-petitioners moved to dismiss based on their sovereign immunity from suit in tribal court. By Order dated October 30, 2000, the district court dismissed cross-respondents' claim to enforce the Navajo tribal court orders with respect to cross-petitioners and the San Juan County defendants. P. App. at 26a. According to the court, as political subdivisions of the state of Utah and their officials and employees, cross-petitioners and the San Juan County defendants shared in the State's sovereign immunity from suit in the Navajo tribal court. *Id.* at 43a. On December 13, 2000, the district court entered an order dismissing the enforcement claim as against Truck Insurance and Ickes on the grounds the tribal court lacked subject matter jurisdiction over them. *Id.* at 52a.

Thereafter, cross-respondents sought and obtained certification of the October 30 and December 13, 2000 orders pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court's ruling with respect to cross-petitioners and the San Juan County defendants. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); P. App. at 2a. While the court of appeals acknowledged that cross-petitioners may have been entitled to sovereign immunity from suit in the Navajo

[2] In addition to the enforcement claim asserted by cross-respondents, the district court action named as plaintiffs a number of individuals other than cross-respondents. These additional plaintiffs asserted a broad range of federal civil rights and other claims against cross-petitioners as well as other defendants. The claims of these additional plaintiffs are not at issue before the Court.

tribal court, the court held that the district court should have addressed the issue of the tribal court's subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), prior to addressing the issue of sovereign immunity:

> The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Id. at 1226; P. App. at 22a. On this basis, the court remanded cross-respondents' enforcement claim to the district court for a determination of the tribal court's subject matter jurisdiction. *Id.* at 1228; P. App. at 25a. With respect to Truck Insurance and Ickes, the court of appeals affirmed the district court's dismissal, concluding that the Navajo tribal court lacked subject matter jurisdiction pursuant to *Montana*. *Id.* at 1223-24; P. App. at 14a-15a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

The court of appeals reversed and remanded this case to the district court on the basis of its conclusion that the subject matter jurisdiction of the Navajo tribal court must

be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in tribal court.[3] Because this conclusion is erroneous and conflicts with the decisions of this Court and other courts of appeals, cross-petitioners ask the Court to grant a writ of certiorari on the cross-petition.

The court of appeals' conclusion rests on a brief passage in *Nevada v. Hicks*, 533 U.S. 353 (2001), in which this Court addressed a tribal court's jurisdiction over state law enforcement officers who entered tribal land to execute a search warrant against a tribe member. In *Hicks*, the Court rejected an assertion by the concurrence that claims of absolute and qualified immunity should be considered in addressing the jurisdiction of a tribal court:

> There are two problems with th[e] declaration [that claims of absolute and qualified immunity should be considered in addressing the tribal court's jurisdiction]. The first is that it is not true. There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction – much less the tribe's *regulatory* jurisdiction, which is what is at issue here. . . . And the second problem is that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider. The tribe's law on this subject need not be the same as the State's; indeed, the tribe may decide (as

[3] The court of appeals declined to review the district court's conclusion that cross-petitioners enjoyed sovereign immunity from suit in tribal court. *See MacArthur*, 309 F.3d at 1226; P. App. at 21a.

> did the common law until relatively recently) that there is no immunity defense whatever without a warrant.

Id. at 373-74 (emphasis in original) (internal citations omitted).

The court of appeals concluded that the above passage applies to the inherent sovereign immunity defense asserted by cross-petitioners, not just to the qualified and absolute immunity defenses at issue in *Hicks*. Based on this conclusion, the court of appeals held that subject matter jurisdiction and sovereign immunity are "distinct doctrines," that a determination of subject matter jurisdiction under *Montana* must precede the analysis of sovereign immunity, and that the district court erred by addressing sovereign immunity prior to the tribal court's subject matter jurisdiction. *See MacArthur*, 309 F.3d at 1227. The court of appeals' reading of *Hicks* is incorrect and fails to account for key differences between the qualified and absolute immunity defenses asserted in *Hicks* and the sovereign immunity defense asserted by cross-petitioners here.

Qualified and absolute immunity are defenses available to government officials that have arisen from the need of such officials to execute their duties without constant fear of liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (stating that qualified immunity prevents "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without

fear of consequences.'" (citation omitted)). Specifically, absolute immunity protects government officials performing legislative, prosecutorial or judicial functions regardless of their fault or motive. *See generally id.* at 520-24. Qualified immunity protects government officials from liability so long as their "actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 525. The defenses of absolute and qualified immunity do not challenge the court's authority based on the defendant's identity, but instead immunize officials based on the nature of their acts. *See id.* at 521 (explaining that Attorney General's entitlement to absolute immunity rests not on "his position within the Executive Branch, but on the *nature of the functions he was performing in this case*" (emphasis added)).

On the other hand, the inherent sovereign immunity asserted by cross-petitioners in this case "is a common law doctrine which precludes litigation against an unconsenting government." *Montana v. Gilham*, 932 F. Supp. 1215, 1219 (D. Mont. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 895B (1979)), *aff'd*, 133 F.3d 1133 (9th Cir. 1998). Unlike qualified and absolute immunity, inherent sovereign immunity does not flow from the nature of the sovereign's acts. Rather, the assertion of sovereign immunity challenges the tribunal's power to hear the suit based upon the defendant's status as a sovereign.

Due to the nature of sovereign immunity, this Court and certain courts of appeals have repeatedly recognized that assertions of sovereign immunity are jurisdictional in nature and appropriately asserted at the jurisdictional stage. Although these cases do not involve the specific type of sovereign immunity asserted here, i.e., the common-law

inherent sovereign immunity of states and their political subdivisions from suit in tribal court, they are applicable because they involve similar challenges to a court's power or authority on the basis of sovereignty.

For example, this Court has acknowledged that assertions of sovereign immunity by the federal government are jurisdictional in nature:

> Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Sovereign immunity is jurisdictional in nature. Indeed the terms of [the United States'] consent to be sued in any court *define that court's jurisdiction to entertain the suit.*

FDIC v. Meyer, 510 U.S. 471, 475 (1994) (internal citations omitted) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)) (emphasis added); *see also United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1131 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity."); *Dahl v. United States*, 319 F.3d 1226, 1228 (10th Cir. 2003) (stating that the sovereign immunity of the federal government is "jurisdictional in nature").

Subject to certain exceptions, states enjoy sovereign immunity from suit in federal court pursuant to the Eleventh Amendment.[4] As with federal sovereign immunity, this

[4] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Here, cross-petitioners did not assert

(Continued on following page)

Court and other courts have treated assertions of Eleventh Amendment sovereign immunity as jurisdictional in nature that are appropriately raised at the jurisdictional stage. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (concluding that federal courts are "without jurisdiction" to hear suit against arm of the State of Florida due to state's sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one."); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 39 n.2 (D.C. Cir. 2002), *cert. denied*, 2003 WL 1446751 (U.S. Mar. 24) (No. 02-1034) ("Sovereign immunity is a jurisdictional issue that may be raised at any time during the course of the litigation."); *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) ("Sovereign immunity [pursuant to the Eleventh Amendment] is quasi-jurisdictional in nature.").

Finally, courts have also treated assertions of sovereign immunity by foreign countries pursuant to the Foreign Sovereign Immunities Act ("FSIA") as imposing a jurisdictional bar. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983) (explaining that, if a foreign country is immune from suit under the FSIA, the court lacks jurisdiction over the action); *MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661 (5th Cir. 1996) (noting that immediate appeal from order denying sovereign immunity under the FSIA is permitted "because it raises the issue of the court's subject matter jurisdiction").

Eleventh Amendment immunity from suit in *federal* court, but rather common law sovereign immunity from suit in *tribal* court.

Here, cross-petitioners assert common law sovereign immunity from suit in tribal court rather than federal, Eleventh Amendment or foreign country sovereign immunity. However, as in the cases cited above, the sovereign immunity asserted by cross-petitioners challenges the Navajo tribal court's jurisdiction to hear the claims asserted against them on the basis of sovereignty. Accordingly, contrary to the conclusion of the court of appeals, the district court appropriately addressed cross-petitioners' assertion of common-law sovereign immunity prior to addressing the tribal court's subject matter jurisdiction under *Montana*.[5] This Court should therefore grant a writ of certiorari to review the court of appeals' decision.

II. THE ISSUE OF WHETHER A STATE AND ITS SUBDIVISIONS ARE IMMUNE FROM SUIT IN TRIBAL COURT ON THE BASIS OF SOVEREIGN IMMUNITY IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The court of appeals declined to address the issue of sovereign immunity on the merits, concluding that the district court must first address the Navajo tribal court's subject matter jurisdiction. Certiorari should also be granted in this case because the issue of whether states, their political subdivisions, and officials and employees are

[5] Even the court of appeals acknowledged the jurisdictional nature of sovereign immunity in this case, stating that, "[o]n a practical level, . . . both *Montana* and sovereign immunity may divest the Navajo court of the power to adjudicate the parties' suit." *MacArthur*, 309 F.3d at 1226; P. App. at 21a.

entitled to sovereign immunity from suit in tribal courts is an important federal question that has not been addressed by this Court.

A. The State of Utah Is Immune From Suit in the Navajo Tribal Court

As independent sovereigns, states enjoyed sovereign immunity before the Constitution was ratified, and "they retain [it] today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Sovereign immunity was and is such a fundamental aspect of a government's existence that "'the Constitution would never have been ratified if the states and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.'" *Id.* at 727 (quoting *Atascadero*, 473 U.S. at 239 n.2).

Accordingly, while the states relinquished some aspects of their sovereign immunity in joining the Union, they certainly did not relinquish all of it. As the Supreme Court has explained, the states surrendered their sovereignty only to the extent enumerated in the Constitution: "Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the States. . . ." *Monaco v. Mississippi*, 292 U.S. 313, 324 (1933) (quoting Federalist No. 81). As part of the constitutional plan, the states accepted a reciprocal relationship of rights and responsibilities through which the states gave up to the federal government some aspects of their sovereign immunity, in particular as to sister states and the

federal government. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991). As the district court explained, "a state's implicit waiver of sovereign immunity as to suits by the United States or 'sister states' is predicated upon the 'mutuality of concession' inherent in the formation of the Union." P. App. at 41a; *see also Alden*, 527 U.S. at 749 (stating that "the immunity of one sovereign in the courts of another has often depended in part on comity or agreement").

However, the states maintained all other aspects of their sovereignty, including their sovereign immunity from suit in tribal court. *Montana v. Gilham*, 133 F.3d 1133, 1136-37 (9th Cir. 1998) (holding that the State of Montana had sovereign immunity from suit in tribal court); *see also Montana v. King*, 191 F.3d 1108, 1112 (9th Cir. 1999) ("Although the States surrendered some of their inherent sovereignty as a mutual concession to the other States, this surrender was limited to the other States and did not extend to Indian Tribes."); *cf. Blatchford*, 501 U.S. at 781-82 (indicating that states have sovereign immunity in federal court from suit by Indian tribes). In *Gilham*, the plaintiff sued the State of Montana in tribal court for injuries resulting from an auto accident involving a state highway sign, which occurred on a state highway within the exterior boundaries of the Blackfeet Indian Reservation. *See Gilham*, 133 F.3d at 1134. Although Montana asserted sovereign immunity from suit, the tribal court ultimately entered a judgment against the State. *Id.* Montana subsequently filed suit in federal district court, seeking a declaratory judgment that it was immune from suit in the tribal court. *Id.* at 1134-35. The United States District Court for the State of Montana granted the declaratory judgment, and the Ninth Circuit affirmed,

explaining that "tribal courts historically did not possess and have not retained sovereign powers over States" and that "the power to subject other sovereigns to suit in tribal court was simply not a part of the tribal court's inherent sovereignty." *Id.* at 1137-38. Because Montana had not waived its immunity from suit in tribal court, the Ninth Circuit held that the tribal court exceeded its jurisdiction in proceeding forward against a sovereign. *Id.*

Blatchford also supports cross-petitioners' sovereign immunity from suit in the Navajo tribal court. In *Blatchford*, an Indian tribe sued officers of the State of Alaska in federal court based on the State's decision to interpret a revenue-sharing statute written to apply only to "native village governments" as applicable to all unincorporated communities. *Blatchford*, 501 U.S. at 777-778. The State argued that it and its officials were immune from suit under the doctrine of sovereign immunity. *Id.* After noting that the "States entered the federal system with their sovereignty intact," the Court held that sovereign immunity precluded Indian tribes from suing states in federal court absent a state's consent. *Id.* at 782. The Court explicitly rejected the tribe's argument that states had waived their sovereign immunity from suit by Indian tribes by adopting the Constitution. *Id.*

The immunity from suit in state courts enjoyed by Indian tribes also supports the district court's determination that states retain sovereign immunity from suit in tribal court. *See, e.g., Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (holding that an Indian tribe is not subject to suit in state court unless Congress has authorized the suit or the tribe has waived its immunity). As the Supreme Court stated in *Blatchford*:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suit by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 501 U.S. at 782 (internal citation omitted).

In sum, the district court appropriately applied *Gilham*'s reasoning to this case and correctly held that states retained their common law sovereign immunity from suit in tribal court.

B. Cross-Petitioners Share in the State's Immunity from Suit

As a political subdivision of the State of Utah, the Health District shares in the State's sovereign immunity from suit in tribal court. The district court appropriately looked to state law to determine whether the State's sovereign immunity extended to the Health District and its officials and employees. *See Gilham*, 133 F.3d at 1138 (applying state law to determine whether Montana had waived its sovereign immunity from suit in tribal court); *see also In re Allied-Signal, Inc.*, 919 F.2d 277, 280 n.4 (5th Cir. 1990) (common law sovereign immunity is determined by state law); WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3524 at 213-14 (1984) (same); *New York Life*

Ins. Co. v. Plaquemines Parish Comm'n Council, No. 91-0909, 1991 U.S. Dist. LEXIS 11534, at *3 (E.D. La. Aug. 13, 1991) ("[C]ommon law sovereign immunity . . . is created and determined under the laws of each State. . . . " (citing *In re Allied-Signal*, 919 F.2d at 280 n. 4)).

To determine whether the State of Utah wished to cloak its political subdivisions with its sovereign immunity, the district court first looked to the design of the Utah Governmental Immunity Act (the "Act"). Utah Code Ann. §§ 63-30-1 to 63-30-38. As the district court determined, the State shares its immunity under the Act with all "governmental entities," which is defined as the State and its political subdivisions. Utah Code Ann. §§ 63-30-2(3); 63-30-3. Similarly, the Act defines a "political subdivision" as "any county, city, town, . . . *special improvement or taxing district*, or other governmental subdivision or *public corporation*." Utah Code Ann. § 63-30-2(7) (emphasis added). The Health District, created as a special service district pursuant to Utah Code Ann. § 17A-2-1204, clearly falls within this language. *See Carter v. Milford Valley Mem'l Hosp.*, 996 P.2d 1076, 1079-1081 (Utah Ct. App. 2000) (holding that governmental immunity act applies to hospital owned and operated by special service district); *cf. Lyon v. Burton*, 5 P.3d 616, 621-23 (Utah 2000) (concluding that county fire district was entitled to immunity under the governmental immunity act);[6] Based on

[6] As further evidence that the State of Utah cloaks special service districts such as the Health District with its state sovereign immunity, the Act specifically provides that governmental entities are "immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility. . . . " Utah Code Ann. § 63-30-3(1).

Utah's extension of its immunity under the Act to the Health District, Utah's cloak of common-law sovereign immunity clearly extends to the Health District.

That the district court correctly concluded that Utah's sovereign immunity from suit in tribal court extends to its political subdivisions is also demonstrated by the lack of any mutuality of concession between the states and Indian tribes with respect to their political subdivisions. Not only are tribes themselves immune from suit in state court, but their political subdivisions are also immune. *See Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1108 (Ariz. 1989) (tribal immunity applies to subordinate governmental agency); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 656-657 (Ariz. 1971) (same); *see also Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987) (tribal sovereignty applies to tribal housing authority). Given that the tribes have maintained sovereign immunity for their subdivisions, there is no basis for concluding that the political subdivisions of a state are subject to suit in tribal court.

The individual Health District defendants are similarly immune. As the district court correctly found, pursuant to the Act, if the Health District enjoys immunity from suit, then its individual employees cannot be liable in their official capacity. P. App. at 48a. Because a suit against employees in their official capacities is simply another means of suing the entity, employees in their official capacities clearly share the sovereign immunity of the entity.

Moreover, the district court also found that, consistent with Utah Code Ann. § 63-30-4(4), which provides that an employee may not be held liable in his or her individual

capacity unless the employee "acted or failed to act due to fraud or malice," employees in their individual capacities should be able to share in the sovereign immunity of the governmental entity which they serve absent any allegation of fraud or malice. *Id.* Here, the tribal court's orders did not make any such findings against the individual cross-petitioners. *Id.* Thus, the district court correctly held that the Health District's employees and officers were likewise cloaked with the state's common law immunity from suit in tribal court.

CONCLUSION

If a writ of certiorari is granted in No. 02-1253, cross-petitioners respectfully request that this cross-petition also be granted due to the important issues presented herein.

Respectfully submitted,

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