No. 15-640

In The Supreme Court of the United States

WASATCH COUNTY, UTAH,
SCOTT H. SWEAT, and TYLER J. BERG,

Petitioners,

v.

UTE INDIAN TRIBE
OF THE UINTAH AND OURAY RESERVATION,

Respondent.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA is interested in this case because the decision below binding a non-party county to a prior judgment and settlement applicable to the State will impose a tremendous and unreasonable burden on counties and municipalities going forward. A pre-

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letter of petitioners and written consent from respondent. All parties were notified of *amicus*'s intent to file this brief more than 10 days prior to its filing date.

sumption that counties are bound by the State's litigation will force counties and municipalities to monitor all state litigation potentially affecting their interests and, where any risk is present, to attempt to intervene to protect those local interests. As a practical matter, however, most municipalities and counties would find such an endeavor impossible or an extremely costly waste of taxpayer money. The far better approach is treating prior decisions as precedential as to non-parties rather than preclusive, thus balancing the needs for consistency, finality, and affording non-parties a fair opportunity to protect their own interests, particularly where circumstances may differ or controlling law may have changed, as here.

SUMMARY OF ARGUMENT

Amicus addresses only the discrete issue whether counties and other municipalities are in privity with the State in which they are located for purposes of binding such entities to the State's litigation decisions and outcomes in cases where such counties and municipalities are not parties and are not expressly being represented by their State.

While the court below applied a presumption that counties are bound in such instances, the more common rule is precisely the opposite. Indeed, any attempt to bind counties and municipalities to judgments to which they were not parties requires a fact-intensive inquiry in order to support such an unusual result. While in rare cases the State may indeed be authorized to represent, and in fact be representing, non-party municipalities, this is not such a case and the Tenth Circuit has adopted a far broader and more

onerous rule to reach what seems to have been a preordained preclusive result. This Court should grant the Petition to, among other things, undo the violence the decision below has done to the law of preclusion and ordinary principles of State and local relations.

ARGUMENT

In concluding that Wasatch County was bound by the judgment in an earlier case to which it was not a party, the court of appeals held that the County was in privity with the State of Utah for purposes of applying preclusion to avoid the Anti-Injunction Act. Pet. App. 15a. The court below claimed that "counties are usually thought to be in privity with their states for preclusion purposes" and that the County had not convinced the court of the mere "possibility" that the County and State lacked a "sufficient identity of interests." *Id.* That reasoning effectively adopted a presumption of preclusion that the court concluded had not been rebutted. Such a presumption, however, is both legally erroneous and practically troubling.

I. Counties and Municipalities Are Discrete Legal Entities from the States in which They Are Located.

It is a fundamental concept reflected in cases and statutes around the country that States and municipalities are discrete legal entities, generally capable of suing and being sued on their own behalves, and generally incapable, absent specific agreement or authority, each to bind the other. Most courts "know and readily assent to all this." Pet. App. 4a (CA10 opinion). It is thus "pretty surprising when [an ap-

pellate court] need[s] a reminder." *Id.* Yet that is, in part, what the Petition in this case is about.

County Sheriffs in Utah, for example, are "the primary law enforcement authority of state law on federal land except as otherwise assigned by law." UTAH CODE § 17-22-31. Counties and municipalities in Utah and elsewhere similarly have primary authority over a variety of matters absent some law assigning such authority to the state executive branch or to other state entities.

Amicus's position is *not* that the State can *never* be deemed the representative of, or in privity with, counties or municipalities, but rather those various entities are independent legal actors presumed to act on their own behalf and not on the behalf of others, absent significant evidence to overcome that presumption. In this case, the Tenth Circuit applied the exact opposite presumption and bound Wasatch County because it did not perceive a reason not to. As noted above, however, state law allocates primary law enforcement authority in a case such as this to the County Sheriff, and that is reason enough to reject non-party preclusion based on the conduct of state actors who do not have such primary authority.

Absent some statute reversing or overriding such law-enforcement primacy, the State's executive branch lacks the authority to supersede the Sheriff's primacy in this area. It thus certainly could not assume the mantle of the Sheriff's *agent* for purposes of overriding that primacy without the express consent and involvement of the County and the Sheriff.

Beyond the particulars of this case, the Tenth Circuit's presumption that non-party counties and other

political subdivisions are bound by the State's litigating positions does violence to the particular choices any given State may make with respect to the degree of autonomy or coordinate power exercised by its subdivisions. Just as federalism allocates certain authority to the States and other authority to the federal government, so too, many States have their own brand of localism that further devolves and distributes power to municipalities. *See generally,* Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (describing the significant powers allocated to local government units notwithstanding the common misperception to the contrary). For a federal court to override those choices and centralize litigation and settlement power under the purview of top-level state actors is no less of an affront to state choices than ignoring the constraints of the Tenth Amendment would be an affront to Our Federalism. Indeed, in many States, power over various issues is devolved to the county or municipal level precisely to allow for local interests to take precedence over state-wide interests and to provide checks and balances against concentrations of power in the state capitol.

II. The Decision Below Conflicts with Appellate Decisions Holding that Counties and Municipalities Are Discrete and Independent Legal Entities For Preclusion Purposes.

As the Petition notes, at 28-32, Wasatch County was not a party to the *Ute V* litigation and cannot be bound by the judgment in that litigation.

The Tenth Circuit's holding that the County is in privity with the State so as to bind it to the *Ute V* judgment is contrary to a raft of decisions in other appellate courts recognizing that counties and States are separate legal entities and are not precluded by each others' litigation decisions and outcomes absent compelling reasons supported by careful analysis of the facts of the case.

In *United States v. Dominguez*, 359 F.3d 839, 843-44 (6th Cir. 2004), for example, the court declined to find privity and hence preclusion as between state and federal prosecutors. Applying the general rules for privity in Michigan, the court observed that "Michigan law does not find privity between governmental units as a matter of law. Quite the contrary, * * * such questions require 'multifaceted analysis and balancing of competing and vaguely defined governmental and private interests.' " 359 F.3d at 843 (citation omitted). Unlike the court of appeals below and its presumption of privity, Michigan "agrees with the modern view of collateral estoppel, that privity will be found only upon consideration of the facts of a particular case." *Id*. Indeed, the Michigan approach applies an even stricter rule to claims of privity between different government entities:

> [B]etween governmental units, unlike private entities, privity is not based upon an identity of interests, but only upon an agency relationship. [*Baraga County v. State Tax Comm'n*, 645 N.W.2d 13, 17 (Mich. 2002)]. The court also expressed its reluctance to find privity between different governmental units, agreeing with the gen-

> eral proposition that "courts have also generally found that no privity exists between state and federal governments, between the governments of different states, or *between state and local governments*." *Ibid.* (quoting 47 Am. Jur. 2d *Judgments*, § 700 (2003)) (emphasis added).

359 F.3d at 844

City of Martinez v. Texaco Trading & Transp., Inc., 353 F.3d 758, 764 (9th Cir. 2003), similarly looks to whether the State in the first litigation was acting in a representative capacity before applying preclusion based on supposed privity. Recognizing that the City had an interest distinct from the State (as does the County Sheriff in this case), *City of Martinez* found that the State "did not act as the City's 'virtual representative,' * * * had no interest in ensuring the City['s]" separate interests were protected, "did not have the authority to settle the City's damage claims, nor is there any evidence that the [State] represented the City's interests in actuality." *Id.*

Froebel v. Meyer, 217 F.3d 928, 934 (7th Cir. 2000), likewise looked, under Wisconsin law, to the lack of actual agency and the different interests of government entities in determining that claim preclusion did not apply in favor of a county where the State had previously prevailed in an earlier litigation. Notably, the County's lack of participation in the prior lawsuit or in the events underlying that suit were important considerations in *Froebel* – though ignored by the court of appeals below in this case. Likewise important was that the State and County were each represented by their own counsel, providing an indi-

cation that their interests were indeed different and "a fact that the Wisconsin Supreme Court suggests is important in evaluating whether parties are identical for preclusion purposes." *Id.* (citation omitted).

Finally, in *Harris Cty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 316-19 (5th Cir. 1999), the Fifth Circuit made the generally applicable observation that a state Attorney General does not "necessarily speak for" county officers in the conduct of litigation to which the County is not a party, and the County in that case was not "in privity with or virtually represented by" another county or the State in a prior litigation. Once again, the critical inquiry was whether the State was in fact representing the interests of the County, an approach consistent across the cases discussed above.

In short, federal courts, often looking to state law for guidance, generally require a significant factual basis for concluding that a State was acting in a representative capacity on behalf of a county or municipality before holding that the latter is precluded by earlier litigation involving the State. In this case the court of appeals required no such factual basis, but instead simply presumed privity and virtual representation.

The cases cited by the court of appeals do not support the notion that "counties are *usually* thought to be in privity with their states for preclusion purposes." Pet. App. 15a (emphasis added). In *County of Boyd v. U.S. Ecology, Inc.*, 48 F.3d 359, 361-62 (8th Cir. 1995), for example, the Eighth Circuit held that under a liberalized version of claim preclusion the County's interests had been "fully represented in the

earlier case" based on the district court's "comprehensive, thorough opinion [holding] that the interests of the [state] plaintiffs in the [earlier] cases and the county were nearly identical." Indeed, in both instances, the state and later county governments were representing the interests of the same county residents. In *County of Boyd*, therefore, the fact that the real-parties in interest – the county residents – effectively changed "lawyers" would indeed be insufficient to avoid preclusion from an earlier adverse decision. That rule, however, is a far cry from the presumption of privity and virtual representation where a county represents its own governmental and law-enforcement interests, which may be in competition with the corresponding interests of its State.

Nash County Bd. of Ed. v. Biltmore Co., 640 F.2d 484, 493-97 (4th Cir. 1981), similarly provides no support for the presumption of privity adopted by the court below. In *Nash*, the State Attorney General brought an antitrust suit and expressly

> declared himself the legal representative, entitled to commence and maintain such suit on behalf of "each public school system in this state which received tax revenue directly or indirectly from the State of North Carolina * * * (for the purchase of) fluid milk to be resold, or given gratuitously, to members of the student body while in registered attendance at such school."

Id. at 494. State law expressly authorized such representative suits by the Attorney General, the claims were identical, and hence, once again, the subsequent case was better viewed as a party merely changing

lawyers rather than not having been represented at all in an earlier action.

In this case the court of appeals simply presumed privity and adequate representation by the State and placed the burden on the County to prove otherwise. That is precisely backwards. Because the County is a separate legal entity, was not a party to the earlier cases, received no benefit from the earlier settlement by the State, and the County Sheriff has statutory primacy over law enforcement in this context, the burden should be on the party asserting preclusion to prove that this extraordinary application of the doctrine is warranted by the particular facts of this case. That is the approach taken in the Circuits discussed above and conflicts with the approach taken below.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amicus Curiae

Dated: December 16, 2015