No. 99-1994

In the Supreme Court of the United States

STATE OF NEVADA, ET AL., PETITIONERS

v.

FLOYD HICKS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether a tribal court may exercise adjudicatory jurisdiction over a suit brought by a tribal member against state officials in their personal capacities, where the suit arises out of the state officials' conduct on trust lands within the Tribe's reservation in the execution of a search warrant authorized by a tribal court.

2. Whether, when state officials sued in their personal capacities in tribal court invoke an immunity defense arising under federal law, the state officials ordinarily must litigate the defense in tribal court before proceeding to federal court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes—Continued: Page

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INTEREST OF THE UNITED STATES

The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 & n.20 (1985). Central to tribal sovereignty is proper respect for tribal courts and other tribal institutions. The United States also has a strong interest in the orderly operation of a system of government in which States and Tribes, as coordinate sovereigns, occupy overlapping spheres of authority on reservations. That interest is advanced by recognizing that state officials are entitled, as a matter of federal law, to assert immunity defenses for conduct on a reservation within the scope of their authority and to obtain a federal forum to adjudicate federal claims initially brought against them in tribal court.

STATEMENT

1. "[T]ribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), and many Tribes have formal court systems to adjudicate disputes arising on their

reservations. See U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act* 29-31 (1991); R. Strickland et al., *Felix S. Cohen's Handbook of Federal Indian Law* 332-335 (1982). The United States has provided comprehensive assistance to ensure the availability and quality of tribal courts.[1] Over the past two decades, the number of tribal courts, as well as the number of cases on their dockets, has increased sharply, and there have been significant advances in the professional qualifications of tribal judges and lawyers.[2]

Congress recognized in the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*, that Tribes possess "inherent authority to establish their own form of government, including tribal justice systems," which are "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. 3601(4)-(6). The Senate Report accompanying that Act explained that "tribal courts are per-

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[1] See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 & n.21 (1978); see, *e.g.*, 25 U.S.C. 450, 450a (Indian Self-Determination and Education Assistance Act, providing funding and assistance for tribal government institutions, including courts); 25 U.S.C. 476 *et seq.* (Indian Reorganization Act, providing for reorganization of tribal governments); 25 U.S.C. 1301 *et seq.* (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing bill of rights, and providing for development of model code of Indian offenses for tribal courts); 25 U.S.C. 3601 *et seq.* (Indian Tribal Justice Act, establishing Office of Tribal Justice Support within Bureau of Indian Affairs and authorizing appropriations to assist tribal courts). The Department of Justice has played an important role in fostering the development of tribal courts. See Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996).

[2] See Hon. William Canby, Chair of Ninth Circuit Task Force on Tribal Courts, *Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 1st Sess. 58 (1995) ("Tribal Courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago."); Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

manent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). And the Conference Report stated that "civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). See also Indian Tribal Justice Technical and Legal Assistance Act of 2000, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 (making similar findings and authorizing appropriations for tribal justice systems).

Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law. For example, Congress has affirmed the exclusive jurisdiction of tribal courts to resolve many disputes under the Indian Child Welfare Act of 1978, see 25 U.S.C. 1911(a), and to enforce the Indian Civil Rights Act of 1968, see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). See also 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against reservation homeowners in tribal or federal court). And, although no federal statute generally requires full faith and credit for tribal court judgments,[3] state courts routinely enforce such judgments.[4]

2. a. This case concerns a challenge to the jurisdiction of the Fallon Paiute-Shoshone Tribal Court over two suits brought by respondent Hicks, a tribal member, against

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[3] Congress has, however, imposed full-faith-and-credit requirements for specific categories of adjudications. See, *e.g.*, 18 U.S.C. 2265 (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders); 25 U.S.C. 3106(c) (National Indian Forest Resources Management Act); 25 U.S.C. 3713(c) (American Indian Agricultural Resource Management Act).

[4] See *Fredericks* v. *Eide-Kirschmann Ford, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett* v. *Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger* v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); cf. *Jones* v. *Meehan*, 175 U.S. 1, 31-32 (1899).

officials of the State of Nevada. The suits arise out of state game wardens' execution of two warrants issued by a state court to search Hicks's premises for evidence of a state misdemeanor offense, the killing of a big horn sheep. The wardens sought and received the tribal court's permission to execute the warrants. During each search, the wardens seized a mounted sheep head trophy; the wardens later returned the trophies, concluding that they were not evidence of an offense. Pet. App. A3-A4, B2-B3, E1-G1.

Hicks sued in tribal court to recover money damages allegedly sustained as a result of the execution of the warrants. He named as defendants the State of Nevada and various state and tribal officials in their official and personal capacities. He alleged federal civil rights violations, common law torts, and civil rights violations under tribal law. Pet. App. A4; *id.* at I1-I5 (amended complaint).

The state defendants (petitioners here) specially appeared in tribal court and moved to quash service of process, arguing that service was deficient and that the tribal court lacked personal jurisdiction over them. Pet. App. J1-J7. The tribal court granted the motion. *Id.* at L2. The Inter-Tribal Court of Appeals reversed. It held that service of process was valid and that personal jurisdiction existed over petitioners based upon their voluntary entry onto the Reservation and voluntary submission to the tribal court's jurisdiction in seeking the warrants. *Id.* at C1-C8.

b. Petitioners then filed this action in federal district court. They sought an injunction against the tribal court proceedings and a declaratory judgment that "the Fallon Tribal Court may not exercise jurisdiction over the State of Nevada and its officers and employees." The complaint named as defendants Hicks, the tribal court judge, and the tribal court itself (respondents here). Pet. App. B3-B4.

Hicks moved in tribal court to dismiss all claims against the State and its officers in their official capacities. The tribal court, which had stayed its proceedings during the

pendency of the federal court proceedings, lifted the stay to grant the motion. As a consequence, the district court held that questions regarding the tribal court's jurisdiction over the State and its officers in their official capacities were moot. Pet. App. B4, B18 n.3.

The district court subsequently granted summary judgment for respondents. Pet. App. B1-B24. The court held that petitioners had exhausted their tribal court remedies with respect to the jurisdictional question, as required by *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). Pet. App. B7-B8. The court then held that the tribal court's exercise of jurisdiction over Hicks's suits comported with *Montana* v. *United States*, 450 U.S. 544 (1981), because providing a forum for the adjudication of tribal members' tort claims against nonmembers involving events on tribal or trust land on a reservation is important to a Tribe's political integrity. Pet. App. B13. The court further concluded that the tribal court was not deprived of jurisdiction because petitioners are state officials. The court explained that the potential availability of an immunity defense is not a jurisdictional bar to suit and that petitioners had not exhausted their tribal court remedies with respect to the merits of such a defense. *Id.* at B15-B17.

c. A divided panel of the Ninth Circuit affirmed. Pet. App. A1-A23. The panel held that "[t]he Tribe's unfettered power to exclude state officers from its lands implies its authority to regulate the behavior of non-members on that land." *Id.* at A11. The panel reasoned that tribal sovereignty over trust lands on the Reservation was not diminished by the tribal court's approval of the search warrants, which the panel characterized as allowing state officers to come onto those lands only "for a limited, clearly delineated purpose." *Ibid.* Accordingly, the panel held that, because the Tribe had authority to regulate the conduct of the officers on trust lands, the tribal court has civil adjudicatory jurisdiction over the officers' conduct. *Id.* at A12. The panel

declined to consider the merits of petitioners' immunity defenses because petitioners had not yet presented those defenses to the tribal court. *Id.* at A14-A15.

Judge Rymer dissented. In her view, because the tribal court had authorized the searches of Hicks's residence, the Tribe had ceded its right to exclude petitioners from the Reservation and therefore could not, under *Montana*, exercise jurisdiction over them. Pet. App. A16-A19.

SUMMARY OF ARGUMENT

A. The tribal court has jurisdiction over the claims against petitioners in their personal capacities for federal constitutional violations and tribal-law torts. Those claims arise out of petitioners' execution of search warrants within the Reservation on land held in trust for a tribal member. This Court has recognized that "tribes retain considerable control"—both regulatory and adjudicatory—"over nonmember conduct on tribal land" within a reservation. *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997).

The Court has also recognized that Tribes possess authority over the conduct of nonmembers elsewhere within a reservation where that conduct involves "consensual relationships with the tribe or its members" or affects "the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)). Here, petitioners entered into a consensual relationship with the Tribe because, in order to execute the warrants, they were required to, and did, obtain authorization from the tribal court. Moreover, a Tribe's political integrity and welfare are threatened when state officials, invoking the Tribe's own authority, are alleged to have violated the rights of its members on its reservation.

B. The tribal court should be afforded the initial opportunity to consider petitioners' federal immunity defenses—which include not only qualified immunity under 42 U.S.C.

1983, but also an immunity from tribal-law claims for acts within the scope of their official duties. As the Court recognized in *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), exhaustion of tribal court procedures promotes tribal self-government, enables the tribal court to consider the limitations on its own authority, and avoids simultaneous litigation in tribal and federal court. We have no reason to believe that petitioners' federal immunity defenses could not be adjudicated in tribal court—and then, if necessary, in federal court—before petitioners would be subject to full discovery and trial in tribal court.

C. Although the tribal court has jurisdiction over the claims against petitioners, they, like defendants in state court, should have an opportunity to obtain a federal forum for the adjudication of claims arising under federal law. Under 28 U.S.C. 1441, a state court defendant has a right to remove federal claims (and pendent state claims) to federal court. Here, a comparable result may be obtained by a federal court injunction against tribal court adjudication of the federal claims. See *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 485 (1999).

ARGUMENT

I. THE TRIBAL COURT HAS JURISDICTION OVER CLAIMS AGAINST THE PETITIONER STATE OFFICERS IN THEIR PERSONAL CAPACITIES BASED ON THEIR EXECUTION OF SEARCH WARRANTS ON RESERVATION TRUST LAND

A. Indian Tribes are unique political entities that possess inherent sovereignty "over both their members and their territory." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); see also *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). "[T]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal

sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). For that reason, this Court has recognized that tribal courts are an "appropriate forum[]"—sometimes the exclusive forum—for the adjudication of "disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). The Court has rejected attacks on the institutional competency of tribal courts as "contrary to * * * congressional policy," *Iowa Mut.*, 480 U.S. at 19, and to its own precedents, *Santa Clara Pueblo*, 436 U.S. at 65-66. See also 25 U.S.C. 3601 *et seq.*

The Court has upheld tribal courts' exercise of civil adjudicatory jurisdiction in various contexts affecting non-Indians. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (tribal court has exclusive jurisdiction to adjudicate on-reservation contract dispute brought by non-Indian against Indian; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Santa Clara Pueblo*, 436 U.S. at 65-66 (tribal courts have exclusive jurisdiction to enforce federal guarantees to Indians and non-Indians under Indian Civil Rights Act); *Kennerly* v. *District Court*, 400 U.S. 423 (1971) (per curiam). See generally *New Mexico*, 462 U.S. at 335-336 ("[T]ribes have the power to manage the use of their territory and resources by both members and non-members, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes.").

Moreover, the Court has articulated a prudential rule that federal courts should, in deference to "tribal self-government and self-determination," refrain from considering challenges to a tribal court's exercise of jurisdiction over a case until the challenge has been considered by the tribal court itself. See *Iowa Mut.*, 480 U.S. at 15; *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). Both of those cases

arose out of suits in tribal court against non-Indian defendants—and, in the latter case, "a political subdivision of the State," 471 U.S. at 847—based on their conduct within a reservation. Indeed, the Court recognized in *Iowa Mutual* that such suits "presumptively" are within a tribal court's jurisdiction, "unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18.

The Court recently held that a Tribe does not possess adjudicatory authority over a suit between non-Indians involving events on reservation lands over which the Tribe has relinquished regulatory authority. See *Strate*, 520 U.S. at 455 (involving right-of-way for state highway). At the same time, however, the Court "readily agree[d]" that "tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454; cf. *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* as "deal[ing] with claims against nonmembers arising on state highways," whereas "the events in question here occurred on tribal lands"). It thus remains the case that a Tribe retains expansive authority—including civil adjudicatory authority—over nonmember conduct on "land belonging to the Tribe or held by the United States in trust for the Tribe." *New Mexico*, 462 U.S. at 331. Even on non-Indian fee lands within a reservation, a tribal court may exercise jurisdiction over nonmembers to the extent that they have "enter[ed] consensual relationships with the tribe or its members" or engaged in "conduct that threatens or directly affects the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)).

Petitioners assert (Br. 40-41) that this Court's precedents, including *Montana*, do not "establish[] a distinction" with respect to tribal jurisdiction over nonmembers on a reservation based on "land status." To the contrary, the Court has repeatedly recognized that a Tribe may exercise signifi-

cantly greater authority over the conduct of nonmembers on tribal or trust lands within its reservation. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) ("the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose"). In *Montana* itself, the Court "agree[d]" with the court of appeals' holding that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," or may enforce lesser restrictions on nonmembers' hunting and fishing there. 450 U.S. at 557. The Court then considered whether the Tribe could *also* regulate nonmembers' hunting and fishing on "reservation land owned in fee by nonmembers of the Tribe." *Ibid.* It was in that context that the Court held that the Tribe could not regulate nonmember hunting and fishing, because those activities did not implicate "consensual relationships" with the Tribe or "threaten the Tribe's political or economic security." *Id.* at 566. *Montana* thus drew the very jurisdictional distinction based on "land status" that petitioners seek to avoid. See *New Mexico*, 462 U.S. at 330-331 (describing distinction drawn in *Montana* based on land status).[5]

In subsequent cases, the Court has continued to focus on the status of the land on which the nonmember's activities occurred. Only where a Tribe relinquished its interests in reservation land has the Court confined the Tribe's jurisdiction over nonmembers to the circumstances enumerated in *Montana*. See, *e.g.*, *Strate*, 520 U.S. at 442, 454-456 (federal grant of right-of-way to the State precluded Tribe's exercise of proprietary rights and rendered highway equivalent of non-Indian fee land); *South Dakota* v. *Bourland*, 508

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[5] Petitioners also invoke (Br. 40-41) cases involving Tribes' criminal jurisdiction over nonmembers. But this Court has declined to equate Tribes' civil jurisdiction with their criminal jurisdiction. See, *e.g.*, *National Farmers*, 471 U.S. at 854-855 & nn.16, 17.

U.S. 679, 683, 694-695 (1993) (Tribe retained no inherent authority to regulate nonmember hunting and fishing on reservation lands held by United States for a flood-control project, where Tribe conveyed "all tribal * * * interests" in those lands to United States and "Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing"); *Brendale* v. *Confederated Tribes*, 492 U.S. 408, 433-448 (1989) (opinion of Stevens and O'Connor, JJ.) (distinguishing between fee lands in area where Tribe retained power to control access to, and character of, reservation land and fee lands in area where Tribe did not retain such power).

An approach that distinguishes between a Tribe's authority over tribal and trust lands, as opposed to non-Indian lands, within a reservation is consistent with reasonable expectations. As the Court observed in *Montana*, Congress would not have expected a Tribe to continue to exercise extensive jurisdiction over the activities of non-Indians on reservation lands that were alienated to a non-Indian. See 450 U.S. at 560 n.9. Nor would the non-Indian landowner expect the Tribe to exercise such jurisdiction. But the contrary expectation would exist with respect to reservation lands that are owned by a Tribe outright or that are held in trust for the Tribe or its members. A Tribe would reasonably expect that it retained its inherent sovereignty over such lands and that, because it could deny non-Indians access to those lands, it could regulate the activities there of anyone who was granted access. See *Merrion*, 455 U.S. at 136-148. Correspondingly, a non-Indian would reasonably expect that, in entering such reservation lands, he subjects himself to regulation by the Tribe.[6]

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[6] Contrary to petitioners' contention (Br. 43), an approach that based a Tribe's civil jurisdiction over the activities of nonmembers on a reservation solely on the *Montana* exceptions—and not in the first instance on whether those activities occurred on tribal or trust land—would likely be

B. The court of appeals correctly held that the tribal court possessed jurisdiction over Hicks's claims against petitioners in their personal capacities for federal constitutional violations and tribal-law torts allegedly committed while executing search warrants on the Reservation.

1. It appears to be undisputed that the conduct giving rise to those claims—the search of a tribal member's premises and seizure of his property—took place on reservation land held in trust for an individual Indian. See Pet. App. A3, B2, F1, G1, I2-I3. The tribal court's jurisdiction thus was invoked with respect to "nonmember conduct on tribal land" —conduct over which, as the Court recognized in *Strate*, "tribes retain considerable control." 520 U.S. at 454; see also *New Mexico*, 462 U.S. at 332; *Montana*, 450 U.S. at 557. The Tribe's authority over that land was not "alienated," as petitioners suggest (Br. 44), when they obtained the tribal court's permission to enter the land for the limited purpose of executing the warrants. Indeed, even in circumstances where a Tribe more extensively relinquished its authority to exclude certain non-Indians from tribal lands by entering into a long-term lease with them, the Court held that the Tribe did not thereby relinquish its authority to tax (or, presumably, otherwise to regulate) their activities on the lands. *Merrion*, 455 U.S. at 137-144. Here, moreover, in recognizing that a warrant to search Hicks's premises would be effective only if approved by the tribal court, the state court confirmed the Tribe's jurisdiction over that land. See Pet. App. G1 ("This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court.").[7] The

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less, rather than more, "reliable" or "workable" in practice than the current approach.

[7] As a general matter, although state officials have jurisdiction to investigate and prosecute crimes on a reservation that exclusively involve non-Indians, see *United States* v. *McBratney*, 104 U.S. 621 (1881), they do

tribal court exercised that jurisdiction not only by approving the warrants, but also by imposing conditions on their execution. See *ibid.* (limiting first search "to exterior premises only and to vehicles thereon").

2. The tribal court was entitled to exercise jurisdiction here even if one accepts, *arguendo*, petitioners' (erroneous) view that, unless one of *Montana*'s exceptions applies, a tribal court cannot exercise jurisdiction over nonmembers' conduct even on tribal or trust land within a reservation.

Under *Montana*'s first exception, which recognizes that a Tribe's "inherent sovereign power" extends to "the activities of nonmembers who enter consensual relationships with the tribe or its members," 450 U.S. at 565, petitioners entered into a consensual relationship with the Tribe when they sought and received the tribal court's permission to exercise their state authority within the Reservation for a limited purpose. They would have understood, as the state court advised them (see Pet. App. G1), that they could execute the warrants only with the tribal court's permission. They would also have understood that the tribal court could, and

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not have jurisdiction with respect to crimes involving Indian perpetrators or Indian victims. In addition, on those reservations (unlike this one) where Public Law 280 is applicable, state officials have jurisdiction to investigate and prosecute crimes involving Indians as well. See p. 19 & note 11, *infra*. But, as the state court recognized when it issued the warrants in this case, its jurisdiction did not extend to Indian lands on the Reservation, and, for similar reasons, state officials had no inherent authority to enter onto tribal or trust lands within the Reservation in the circumstances of this case. Cf. *Benally* v. *Marcum*, 553 P.2d 1270 (N.M. 1976) (state officers cannot arrest Indian on reservation for off-reservation crime, but must instead follow tribal procedures); *Arizona* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969) (same for extradition to another State), cert. denied, 396 U.S. 1003 (1970); but cf. *State* v. *Mathews*, 986 P.2d 323 (Idaho 1999) (state officers may execute search warrant in absence of tribal procedures), cert. denied, 120 S. Ct. 1190 (2000). See also *Miccosukee Tribe* v. *United States*, No. 00-3453-CIV (S.D. Fla. Dec. 15, 2000) (enjoining service of subpoena issued by state court to Indians on reservation to appear as witnesses in state criminal case).

indeed did (see *ibid.*), impose conditions on their execution of the warrants. Surely, if petitioners had violated any express condition that the tribal court imposed (*e.g.*, if they had executed the first warrant inside Hicks's residence), the tribal court would not have been powerless to call them to account. Cf. *Merrion*, 455 U.S. at 144 (recognizing that Tribe may "oust" non-Indian granted permission to enter its reservation if he does not comply "with the initial conditions of entry"). Accordingly, much like a non-Indian merchant who chooses to engage in business on a reservation with members of a Tribe, see *Williams*, 358 U.S. at 220, petitioners chose to enter into a consensual relationship with the Tribe and its members.[8]

Under *Montana*'s second exception, which recognizes a Tribe's authority over nonmember "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S. at 566, a tribal court may exercise jurisdiction over nonmembers who are alleged to have invoked the Tribe's own authority to violate the legal rights of its members on its reservation. At least in the circumstances here, where state officers executed a warrant approved by a tribal court and were accompanied by a tribal officer in doing so, the Tribe's "political integrity" and "welfare" are significantly implicated. Indeed, the Indian Civil Rights Act obligates the Tribe, in "exercising powers of self-government," to respect "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures." 25 U.S.C. 1302(2). Cf. *Davis* v. *Muellar*, 643 F.2d

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[8] Contrary to petitioners' assertions (Br. 37), the state game wardens' conduct here does not "parallel[]" the non-Indian truck driver's conduct in *Strate*. It is disingenuous for petitioners to contend (*ibid.*) that "Hicks was not a party to the relationship between the state officials and the Tribe." Hicks and his property were the subject of the state officials' dealings with the Tribe; indeed, Hicks was an intended beneficiary of the tribal court's limiting of the first search to the exterior of his residence.

521, 525 n.8 (8th Cir.) ("refusal of state police officers to recognize legitimate tribal judicial authority while on the reservation is at least to some extent state interference with tribal sovereignty"), cert. denied, 454 U.S. 892 (1981).

C. Petitioners argue (Br. 7), however, that Tribes have been divested of *any* "judicial power over state officials," regardless of the capacity in which they are sued. Petitioners cannot point to any Treaty or Act of Congress divesting Tribes generally, or the Fallon Paiute-Shoshone Tribe specifically, of all power to adjudicate claims against state officers in their personal capacities. Cf. *Iowa Mut.*, 480 U.S. at 18. But petitioners assert (Br. 9-29), based on principles of sovereign and qualified immunity, that state officials may never be sued in tribal court. Petitioners are mistaken.

It is indisputable that the underlying suits in tribal court are against state officers sued solely in their personal capacities. Pet. App. A5, A13, A23 n.13; see pp. 4-5, *supra*. See *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (explaining distinction between personal- and official-capacity suits). The sovereign immunity of a State does not pose any jurisdictional bar to a suit against a state officer in his personal capacity. That is not a rule of recent invention, or one limited to Section 1983 actions. As a leading torts treatise has observed, "[t]he Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers." 5 F.V. Harper et al., *The Law of Torts* § 29.8, at 653-654 (2d ed. 1986). That principle has been repeatedly recognized by this Court in cases involving common-law tort and contract claims as well as claims for federal constitutional violations. In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), for example, the Court explained that, if the "wrongful actions" of "[g]overnment officers" are "such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit

against him." *Id.* at 686. Thus, "[i]n a suit against the officer to recover damages for the agent's personal actions" in the performance of his duties, the "question is easily answered" that the suit is not against the government and thus is not barred by sovereign immunity. *Id.* at 687; accord, *e.g.*, *Hafer*, 502 U.S. at 30 (sovereign immunity does not bar Section 1983 suits against state officials in their personal capacities); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Bad Frog Brewery, Inc.* v. *New York State Liquor Auth.*, 134 F.3d 87, 102 (2d Cir. 1998) (sovereign immunity does not bar federal courts from entertaining suits against state officers in their personal capacities for violations of state law).

Although immunity defenses are available in tribal court to state officers sued in their personal capacities (see Part II, *infra*), the availability of such defenses does not divest the tribal court of jurisdiction. See *Larson*, 337 U.S. at 687 n.7 (contrasting "limitations on the court's jurisdiction to hear a suit directed against the sovereign" with immunity defenses of the sovereign's officers); *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) (explaining that qualified immunity is an affirmative defense and the burden of pleading it rests with the defendant). A tribal court thus has jurisdiction to decide, in the first instance, whether any immunity defenses protect petitioners from suit in this case. See *El Paso*, 526 U.S. at 485 n.7 (recognizing general competence of tribal courts to adjudicate federal defenses).[9]

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[9] There is no occasion in this case for the Court to decide whether sovereign immunity would bar all unconsented suits in tribal court against a State or against state officials in their official capacities. Cf. *United States* v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) (enjoining tribal court injunctive action against federal officers in their official

II. STATE OFFICERS SUED IN TRIBAL COURT ARE ENTITLED TO FEDERAL IMMUNITY DEFENSES, WHICH ORDINARILY SHOULD BE ADJUDICATED INITIALLY IN TRIBAL COURT

In our view, although Nevada's sovereign immunity does not extend to state officials sued in tribal court in their personal capacities, federal law does afford state officers immunity from such suits for conduct within the scope of their official duties. Thus, as we explain below, state officers sued in tribal court, whether under federal or tribal law, may assert federal immunity defenses, although the basis and scope of the defense may differ in the two settings. We agree with the courts below that the prudential tribal court exhaustion rule of *National Farmers* and *Iowa Mutual* ordinarily should apply to those federal immunity defenses as they do to federal jurisdictional defenses.

1. State officials who are sued under 42 U.S.C. 1983 for violations of federal statutory or constitutional rights are entitled to "qualified immunity"—*i.e.*, they are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The same qualified immunity defense applies, as a matter of federal law, whether the Section 1983 action is brought in federal or state court. See *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law."). The defense therefore necessarily applies in

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capacities), cert. denied, 481 U.S. 1069 (1987); 5 U.S.C. 702 (waiving sovereign immunity to such suits only in federal court). We assume for present purposes, however, that a tribal court could not entertain an unconsented suit against the State itself, or a suit for damages against state officers in their official capacities. Cf. *Kiowa Tribe* v. *Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) (sovereign immunity bars unconsented suit for damages against Tribe in state court).

tribal court as well. We do not understand respondents to contend otherwise. See Br. in Opp. 24-25.

2. As to tort claims arising under tribal law that are asserted against state officers, an immunity defense also should be available, as a matter of federal law, to the extent that those officers acted within the scope of any state duties that federal law authorized them to perform on a reservation.[10] An analogous defense should be available to tribal officials sued in state court on state common-law tort claims to the extent that they acted within the scope of their federally protected tribal authority.

Such an immunity defense, based on our constitutional structure relating to Indian affairs, would serve an important federal interest: the orderly operation of a system of government in which the States and the Tribes, as coordinate sovereigns, occupy overlapping spheres of authority. Inevitably, the agents of one sovereign, in the conduct of their official duties, come within the adjudicatory jurisdiction of the other sovereign. It is sometimes essential that they do so. And they ordinarily should be able to act with the assurance that, if they do not exceed the scope of the authority granted them by their own sovereign (and any authority confirmed to them by the other sovereign), they are immune from suit in the other sovereign's courts.

The overlapping spheres of authority of the States and the Tribes are particularly evident with regard to criminal law enforcement on a reservation. Ordinarily, while the United States and the Tribe have jurisdiction over crimes involving Indian perpetrators or victims, the State has jurisdiction over crimes involving non-Indians. See, *e.g.*, 18 U.S.C. 1152, 1153; *United States* v. *McBratney*, 104 U.S. 621 (1881); see

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[10] The Court has recognized federal common-law defenses to state causes of action in a variety of contexts in which important federal interests are implicated. See, *e.g.*, *Boyle* v. *United Tech. Corp.*, 487 U.S. 500 (1988); *Westfall* v. *Erwin*, 484 U.S. 292 (1988); see also *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985).

also *Duro* v. *Reina*, 495 U.S. 676, 680-681 n.1 (1990) (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country). On reservations covered by Public Law 280,[11] however, the State exercises jurisdiction over crimes involving Indians as well as non-Indians (while the Tribe retains concurrent jurisdiction over crimes committed by Indians). And, pursuant to agreements between the United States and a State, see 25 U.S.C. 2804, state officers may be authorized to enforce federal or tribal law on a reservation. Similar agreements may give tribal officers authority to enforce state law on a reservation. See also *Strate*, 520 U.S. at 456 n.11.

The federal statutory scheme thus contemplates—and sometimes effectively requires—that state officers act within a reservation. It is a necessary incident of that scheme that they be entitled, as a matter of federal law, to immunity from suit under tribal law for acts within the scope of their authority. Tribal law cannot make it unlawful for state officers to carry out functions they have been authorized by federal law to perform. Indeed, Congress has specifically provided a degree of protection from liability for state (or tribal) officers performing federal law-enforcement responsibilities on a reservation pursuant to an agreement. See 25 U.S.C. 2804(f) (treating such state or tribal officers as federal employees for purposes of the Federal Tort Claims Act); see p. 21 note 14, *infra* (discussing suits against federal employees). If the rule were otherwise, state officers could be deterred from entering the reservation—and thus from fully carrying out law-enforcement responsibilities assigned

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[11] Public Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321 *et seq.*, and 28 U.S.C. 1360) granted certain States the authority to exercise criminal jurisdiction in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. Nevada, which initially assumed Public Law 280 jurisdiction over reservations in the State, has since retroceded all such jurisdiction. See 40 Fed. Reg. 27,501 (1975); 53 Fed. Reg. 5837 (1988).

to them under federal (and state) law for the protection of the reservation community—for fear of being held personally liable in tribal court under tribal law. Similarly, tribal officers could be deterred from going outside the reservation in the course of their official duties—and thus from carrying out law-enforcement responsibilities they are authorized by federal (and tribal) law to perform—for fear of being held personally liable in state court under state law.[12]

A structural immunity defense that is available, as a matter of federal law, to state officers sued under tribal law and tribal officers sued under state law serves essentially the same purposes as the immunity defenses that have long been available, under the Supremacy Clause and federal common law, to federal officers sought to be held criminally or civilly liable under state law. See, *e.g.*, *Westfall* v. *Erwin*, 484 U.S. 292, 296-300 (1988) (federal officers are entitled to absolute immunity from state-law tort suits arising out of discretionary acts within the scope of their official duties); *In re Neagle*, 135 U.S. 1, 75 (1890) (a federal officer "*cannot* be guilty of a crime" under state law for "an act which he was authorized to do by the law of the United States," "if in doing that act he did no more than what was necessary and proper for him to do"). Such immunity defenses serve to "promot[e] effective government" by freeing government officials from the threat of liability or prosecution that could cause them to be "unduly timid in carrying out their official duties." *Westfall*, 484 U.S. at 295-296. They also assure that one government does not enforce its own laws "in such a manner

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[12] For example, in order to travel from one part of a reservation to another in pursuit of a fleeing suspect, a tribal police officer may need to drive outside the reservation. If a State were to prosecute the officer for exceeding the posted speed limit, or using an emergency light and siren, significant federal interests would be implicated. Cf. *Cabazon Band of Mission Indians* v. *Smith*, 34 F. Supp. 2d 1201 (C.D. Cal. 1998) (similar question), appeal pending, No. 99-55229 (9th Cir.).

as to paralyze the operations of the [other] government" within the sphere of its authority. *Neagle*, 135 U.S. at 62.[13]

It is unnecessary for the Court now to "define the precise boundaries of official immunity" in this context. *Westfall*, 484 U.S. at 299 (declining to do so in similar circumstances). The scope of federal immunity available to state and tribal officers may appropriately be informed by the scope of the immunity available to federal officers in similar circumstances under the Constitution, federal common law, and federal statutes.[14] Here, as we read the bare allegations of the tribal court complaints (see Pet. App. I1-I5), Hicks is seeking to hold petitioners liable in tort simply for executing, in accordance with their terms, facially valid search warrants that were issued by the state court and approved by the tribal court. We submit that, while the matter is not yet ripe for review in this Court, such conduct would fall well within the scope of the applicable immunity, whatever its precise boundaries.

3. Ordinarily, with respect to federal immunity defenses, as with respect to federal jurisdictional defenses, tribal

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[13] A number of courts have recognized that tribal officers are entitled to such immunity defenses. See, *e.g.*, *Boisclair* v. *Superior Court*, 41 Cal. 3d 1140, 1157-1158 (1990); *White Mountain Apache Indian Tribe* v. *Shelley*, 480 P.2d 654, 657-658 (Ariz. 1971); *Turner* v. *Martire*, 82 Cal. App. 4th 1042 (2000); *Hegner* v. *Dietze*, 524 N.W.2d 731, 735 (Minn. Ct. App. 1994); see also *Davis* v. *Littell*, 398 F.2d 83 (9th Cir. 1968), cert. denied, 393 U.S. 1018 (1969).

[14] After this Court's decision in *Westfall*, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which effectively confers immunity on federal employees for all common-law torts committed within the scope of their employment. If the Attorney General certifies that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose," the case is removed to federal court if originally filed in state court, the United States is substituted as the defendant, and the case is governed by the Federal Tort Claims Act. 28 U.S.C. 2679(d); see *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 419-420, 430-432 (1995).

courts should be given "the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers*, 471 U.S. at 856; see also *El Paso*, 526 U.S. at 485 n.7 (noting that "the existence of a federal preemption defenses in the more usual sense would [not] affect the logic of tribal exhaustion" because, "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law"). Applying the exhaustion requirement to immunity defenses would serve several of the salutary purposes identified in *National Farmers*, such as promoting "tribal self-government and self determination," enabling the tribal court to consider the limits on its own authority, avoiding the inefficiency associated with the pendency of a single dispute in two judicial forums, and allowing a full record on relevant factual and legal issues to be developed in the tribal court. See 471 U.S. at 856-857. Moreover, because immunity defenses may also be available by reference to tribal law,[15] the tribal court can consider all such defenses together.

As the Court recognized in *National Farmers*, however, tribal court exhaustion is a prudential rule that may be dispensed with in appropriate circumstances, such as where it "would be futile because of the lack of an adequate opportunity" to raise the challenge. 471 U.S. at 856 n.21. A question could arise as to whether full exhaustion of tribal court remedies should be required if a defendant's federal immunity defenses cannot be fully adjudicated in advance of

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[15] For example, officials of the Fallon Paiute-Shoshone Tribe are entitled to immunity "for any act performed in the course of duty or in the reasonable belief that such actions were within the scope of official duties, unless it is established that such action was taken with malicious intent or in bad faith." Law & Order Code 1-10-040(a). A tribal court might conclude that a comparable immunity should apply to state officials in tribal court, whether based on comity (cf. *Littell*, 398 F.2d at 86), choice of law (see Law & Order Code 1-30-040 (incorporating Nevada civil law)), federal principles of non-discrimination (cf. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989)), or other grounds.

trial. An 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," upon the favorable resolution of threshold legal issues (*e.g.*, whether their alleged conduct violated clearly established rights). *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (internal quotation marks omitted). Arguably, at least, that purpose would be defeated if, for example, a defendant had to wait until after trial to obtain review, in the tribal court system and then in the federal court system, of the tribal trial court's rejection of a federal immunity defense. In those circumstances, a defendant perhaps should be allowed to take his federal immunity defenses immediately to federal court, so as to preserve in a meaningful way any "entitlement not to stand trial or face the other burdens of litigation." *Id.* at 306; but see *Johnson* v. *Fankell*, 520 U.S. 911, 916-923 (1997) (States need not provide for interlocutory review of qualified immunity rulings under Section 1983).

There is, however, no need to resolve that issue here. The present record offers no basis to conclude that petitioners' federal immunity defenses could not be adjudicated in advance of any trial in this case. As the courts below recognized (see Pet. App. A12-A14, B16), petitioners have not yet asked the tribal court to decide whether they have valid immunity defenses to any of Hicks's claims. Although petitioners invoked the doctrines of "sovereign immunity" and "qualified immunity" in the tribal court, they did so only in support of their contention that the tribal court lacked personal jurisdiction over them. *Id.* at A13. Accordingly, we read the tribal courts' rulings—such as the tribal trial court's statement that "it is not prevented by * * * qualified immunity from lawfully exerting personal jurisdiction over" petitioners, *id.* at A12-A13—as addressing only a jurisdictional challenge. We note that the tribal trial court, in the severed portion of the case against the tribal defendants, did

entertain pretrial motions to dismiss on immunity grounds.[16] Thus, given the absence of any showing that petitioners could not obtain a definitive resolution of their federal immunity defenses in advance of any trial, petitioners should be required to present those defenses to the tribal court in the first instance.

III. DEFENDANTS SUED IN TRIBAL COURT, LIKE THOSE SUED IN STATE COURT, SHOULD BE GIVEN THE OPPORTUNITY TO HAVE FEDERAL CLAIMS AGAINST THEM ADJUDICATED IN FEDERAL COURT

The fact that the tribal court has jurisdiction as an original matter over respondent Hicks's claims against petitioners under federal and tribal law does not necessarily dictate that all of those claims must remain in tribal court. Petitioners do not suggest the possibility of a mechanism, parallel to removal, that would enable a defendant sued in tribal court on a federal cause of action to have the case heard in federal court. But we believe that such a mechanism, if requested, would be appropriate in the circumstances of this case.

As noted above (at 8-9), in *Iowa Mutual* and *National Farmers*, the Court articulated a rule of comity that gives a preference to tribal courts for the adjudication in the first instance of claims that are brought there by Indians, involve

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[16] Two of petitioners' co-defendants—the tribal judge who approved the warrants and a tribal officer who participated in their execution—filed pretrial motions to dismiss raising immunity defenses. The tribal court ruled before trial that the judge was not entitled to absolute immunity under tribal law, but was potentially entitled to qualified immunity. *Hicks* v. *Harold*, Nos. CV-FT-91-034 and CV-FT-92-031 (Fallon Tribal Ct. May 18, 1992). Although the court reserved ruling on qualified immunity, apparently to assess whether the evidence demonstrated that the defendants acted with the "malicious intent" or "bad faith" that would defeat immunity under tribal law (see p. 22 note 15, *supra*), it ultimately granted a directed verdict on six counts on, *inter alia*, qualified immunity grounds. Decision and Order Denying All Relief As to Plaintiff's Second Amended Complaint at 4-5, *Hicks* v. *Harold*, *supra* (Sept. 2, 1993).

on-reservation conduct, and arise under tribal (or perhaps state) law. Only after tribal court procedures are exhausted may the federal courts review federal issues that arose in the case, such as whether the tribal court properly exercised jurisdiction over a suit against persons who were not members of the Tribe. See *Iowa Mut.*, 480 U.S. at 16-19; *National Farmers*, 471 U.S. at 855-857.[17]

A different rule would be appropriate, however, where a suit brought in tribal court arises directly under federal law, such as a suit under 42 U.S.C. 1983 alleging violations of federal constitutional or statutory rights. Ordinarily, when a defendant is sued in state court on a claim arising under federal law, the defendant is entitled to remove the case to federal court. See 28 U.S.C. 1441. As a consequence, both the plaintiff *and* the defendant have the right to insist upon a federal forum, rather than a state forum, for the adjudication of a federal cause of action.[18]

Section 1441 refers to removal only from "a State court"; it does not provide for removal from a tribal court. See *Becenti* v. *Vigil*, 902 F.2d 777, 779-780 (10th Cir. 1990) (holding that no right exists under the federal officer removal statute to remove a case from tribal court). It is doubtful, however, that Congress intended to deny tribal court

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[17] The underlying causes of action in tribal court in *Iowa Mutual* and *National Farmers* did not arise under federal law. The only federal question in those cases in federal court was whether the tribal courts had jurisdiction over the non-federal claims. In our view, however, other federal questions arising in cases brought in tribal court should also be subject to review in federal court. See *Stock W. Corp.* v. *Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc) (abstaining to permit tribal court to make choice-of-law determination in the "first instance").

[18] A defendant, like a plaintiff, may perceive various advantages from the choice of a federal forum for the adjudication of federal claims. Such perceived advantages might include rules of procedure providing (*inter alia*) for liberal discovery, the greater availability of summary judgment, the right to a jury trial, geographic proximity, the greater expertise of federal courts in dealing with questions of federal law, and the insulation of life-tenured federal judges from popular pressure.

defendants the right given state court defendants to elect a federal forum for the adjudication of causes of action under federal law. It is more likely that Congress simply did not consider the matter.

The Court faced an analogous situation in *El Paso*. The Price-Anderson Act converts all claims of "public liability" arising out of nuclear incidents into claims under federal law and provides for the removal of all cases raising such claims from state court to federal court. See 42 U.S.C. 2210(n)(2). But Congress was silent on the treatment of similar claims filed in tribal court. The Court concluded that "inadvertence seems the most likely" explanation for "Congress's failure to provide for tribal-court removal." 526 U.S. at 487. Accordingly, the Court held that the federal courts are entitled to decide, without awaiting tribal court exhaustion, whether claims filed in tribal court are encompassed by the Price-Anderson Act and, to the extent they are, to enjoin their prosecution. *Id.* at 487-488. The Court noted that Congress "expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested." *Id.* at 484-485. It then reasoned that an "[i]njunction against further litigation in tribal courts would in practical terms give the same result as a removal"—*i.e.*, "if [the tribal court plaintiffs] then should wish to proceed they would be forced to refile their claims in federal court." *Id.* at 485.

Similarly, here, the general removal statute, 28 U.S.C. 1441, reflects an "unmistakable preference for a federal forum, at the behest of the defending party," *El Paso*, 526 U.S. at 484, for adjudicating claims arising under federal law. Thus, in the absence of any affirmative indication that Congress intended to deny tribal court defendants the same right as state court defendants to have federal claims heard in federal court, tribal court defendants should be afforded

an opportunity to obtain, if necessary, an "[i]njunction against further litigation in tribal courts [that] would in practical terms give the same result as a removal." *Id.* at 485.[19] Since removal typically operates with respect to the entire case—both the federal claims and any pendent state-law claims—such an injunction in this case could operate with respect to the entire case as well. In certain circumstances, however, the federal court should decline to enjoin tribal court litigation of non-federal claims, such as where federal law vests exclusive jurisdiction over those claims in the tribal court or where the governing tribal law cannot readily be ascertained. Cf. 28 U.S.C. 1367(c) (identifying circumstances in which district courts may decline to exercise supplemental jurisdiction); 28 U.S.C. 1441(c) (providing that a district court, "in its discretion, may remand all matters in which State law predominates"). Moreover, since a defendant's right to remove a case from state court is lost if not timely asserted, see 28 U.S.C. 1446(b), the federal court may appropriately deny an injunction against tribal court proceedings if it is not sought early in the case.[20]

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[19] There is no occasion here to consider whether causes of action under federal laws that distinctly concern Indians (as distinguished from generally applicable causes of action such as that under 42 U.S.C. 1983) should be allowed to remain in tribal court.

[20] In our view, a defendant's opportunity to elect a federal forum in lieu of a tribal forum should not extend to cases in which federal jurisdiction would be based solely upon diversity of state citizenship. Cf. *Iowa Mut.*, 480 U.S. at 17-19. The rationale for jurisdiction in federal rather than *state* court where an in-state party may have an advantage over an out-of-state party in that court does not support removal from *tribal* court simply because the parties (Indian or non-Indian) happen to be from different States. Moreover, this Court has not suggested that the interests served by diversity removal are as significant as the interests served by removal based on a federal cause of action or the defendant's status as a federal officer. See *Tennessee* v. *Davis*, 100 U.S. 257, 266-267 (1880) (addressing importance of the two latter types of removal); see also 28 U.S.C. 1441(b), 1446(b); *United Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, 148 & n.6 (1965) (limits on removal in diversity cases).

The procedure that we propose would reflect no disrespect of tribal courts. It would, rather, place tribal courts on an equal footing with state courts with respect to the adjudication of causes of action under federal law that are within the scope of their original jurisdiction but also within the concurrent original jurisdiction of the federal courts. See *El Paso*, 526 U.S. at 485 (observing that Price-Anderson Act's provisions for preemption and removal from state courts demonstrate that "[a]ny generalized sense of comity toward nonfederal courts is obviously displaced"). As this Court has recognized, tribal courts, like state courts, are competent to adjudicate questions of federal law. See, *e.g.*, *id.* at 485 n.7; *Santa Clara Pueblo*, 436 U.S. at 65. But tribal courts, like state courts, ordinarily have no special expertise with respect to those questions. Furthermore, given that a tribal court's rulings on federal jurisdictional issues (and potentially other federal issues) are subject to subsequent review in federal court (see p. 25 note 17, *supra*), a threshold injunction against tribal court proceedings may be significantly more efficient and not significantly more intrusive than remitting the defendant to full tribal-court adjudication in the first instance would be. See *El Paso*, 526 U.S. at 486 (noting "inefficiencies" that would be produced by "duplicative determinations" in tribal court and federal court regarding preemption under Price-Anderson Act).[21]

Of course, a tribal court plaintiff remains the master of his complaint. Thus, a tribal court plaintiff, like a state court plaintiff, may amend the complaint to eliminate federal

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[21] To be sure, as we explained in our brief amicus curiae in *El Paso* (at 25 n.13), the justification for displacing tribal courts upon the defendant's election in cases encompassed by the Price-Anderson Act is stronger than the justification for displacing tribal courts upon the defendant's election in federal question cases generally. Nevertheless, we believe that the clear policy, codified in 28 U.S.C. 1441, of affording the defendant in a case arising under federal law the opportunity to have the case heard in federal court supports the same approach in this setting.

claims, and thereby avoid adjudication of the entire case (including any pendent claims under tribal law) in federal court.[22]

It is uncertain how the parties to this case would respond to the availability of a mechanism, parallel to removal under 28 U.S.C. 1441(a), that would enable the case, as currently pleaded, to be tried in federal court rather than tribal court. If this Court recognizes such a mechanism, and if petitioners elect to invoke it, they should first be required to notify the tribal court of their intention to do so. Such an approach would exhibit an appropriate deference to the tribal court, which could elect to stay its own hand pending the plaintiff's refiling of the case in federal court. It would also afford the plaintiff an opportunity to amend the complaint to eliminate any federal causes of action before the commencement of a federal injunctive action, thereby sparing all parties the

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[22] If a suit were to be brought in tribal court against federal officials in their personal capacities, several other statutory provisions would be relevant. First, the exclusive remedy for common-law torts committed by federal officers or employees within the scope of their office or employment is a Federal Tort Claims Act suit against the United States in federal district court. 28 U.S.C. 2679(b). Such cases may be removed from state to federal court upon certification by the Attorney General. See 28 U.S.C. 2679(d)(2); p. 21 note 14, *supra* (discussing Westfall Act). A tribal court, like a state court, is thus precluded, as a matter of controlling federal law, from providing any alternative remedy. Second, in addition to the right of all defendants to remove a case from state court to federal court based on the existence of a federal cause of action, a federal officer also has a right to remove a case (even one not arising under federal law) based on his status as such, as long as the officer asserts a colorable immunity or other federal defense. 28 U.S.C. 1442 (1994 & Supp. IV 1998); *Mesa* v. *California*, 489 U.S. 121 (1989). A federal officer therefore should be entitled to obtain an injunction against tribal court proceedings based on the assertion of such a defense. Finally, because of the status of the Tribes as dependent sovereigns within the federal system, additional considerations may apply to the exercise of tribal court jurisdiction over federal officers even when sued in their personal capacities. We thus do not foresee any circumstances in which a plaintiff could plead a cause of action in tribal court against a federal officer for acts within the scope of his office that could not be enjoined by a federal court.

unnecessary costs of filing and responding to an action in federal court.[23] Accordingly, while the mechanism that we propose could ultimately provide petitioners with a substantial measure of the relief that they sought in the district court if they choose to invoke it, we do not believe that approval of that mechanism by the Court here would require an alteration of the judgment below, which simply defers to the tribal court's initial exercise of jurisdiction in the current posture of the case.

CONCLUSION

The judgment of the court of appeals should be affirmed, without prejudice to petitioners' timely invocation of the procedure discussed in Part III of this brief.

Respectfully submitted.

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[23] No similar justification existed in *El Paso* for allowing the tribal court plaintiffs an opportunity to replead their claims. Claims asserting liability for a "nuclear incident," even if pleaded under state law, are deemed to be federal claims under the Price-Anderson Act. See 562 U.S. at 477, 484.