SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals Hon. RUSSELL E. CARPARELLI, STEVEN L. BERNARD, and KAREN S. METZGER, Judges, Case No. 07CA0582 District Court, City and County of Denver Hon. ROBERT S. HYATT, Judge Case Nos. 05CV1143 and 05CV1144	▲ COURT USE ONLY ▲
CASH ADVANCE and PREFERRED CASH LOANS, Petitioners/Cross-Respondents, v. STATE OF COLORADO ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL FOR THE STATE OF COLORADO, and LAURA E. UDIS, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Respondents/Cross-Petitioners.	Case No.: 08SC639
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RESPONDENTS'/CROSS-PETITIONERS' REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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Paul Chessin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Petitioners would have this Court believe that there are two wholly separate, unrelated, and independent sets of lenders using the names "Cash Advance" and "Preferred Cash Loans": the Nevada corporations associated with the Carson City, Nevada addresses; and *petitioners'* lending businesses.

Specifically, petitioners claim that: their *own* use of the same trade names is mere "circumstance;" they are not "affiliated with" the Nevada corporations; and the State, by suggesting a relationship exists between those "other" lenders and petitioners, "muddle[s] the picture" and engages in "guilt-by-association" (Petitioners' Answer/Reply Brief (Reply) 3).

It is *petitioners* who "muddle the picture." The State's investigation *began* with those "other" lenders: it was those "other" lenders about whom consumers complained, upon whom the State served investigative subpoenas, and against whom the State brought subpoena enforcement and these contempt proceedings (R. 1-3¶¶1-12; 5-12; 14-16¶¶1-12; 18-25; 27-29; 31-32¶¶7-13; 34-36; 39-40¶¶7-13; 42-44; 46-53; 187-218; 1026-1027¶¶2-7; 1032-1048; Supp.R.1st 1-3;

Supp.R.2nd 1-2). If, as petitioners claim, they have no relationship whatsoever with those "other" lenders, then how did petitioners learn about – and *why* did they voluntarily appear and insinuate themselves into – this case? These are questions that petitioners repeatedly and "[p]ointedly . . . refuse[d] to answer" (R. 953; *see* R. 232-234¶¶31(b),(c); 258-261¶¶31-36; 265-268¶¶44-49; 350-351; 639¶9(b); 640¶10; 646-647¶25(a); 698; 766¶19(a); 845).

Indeed, by so distancing themselves from those "other" lenders, petitioners necessarily make themselves interlopers with no standing before this Court. Seeking to avoid a similar standing conundrum, in pleadings filed elsewhere in this case – after they took this appeal – petitioners "*concede[d]*" they "have a relationship with" the non-tribal powers ultimately behind those "other" lenders, the Nevada corporations, and the illegal payday lending enterprise under investigation. Respondent Tribal Entities' Motion to Stay All Proceedings in the Three Consolidated Cases Pending Appeal, filed April 14, 2008, LexisNexis ID 19402688, at 4 (emphasis added); also available at Record on Appeal, *State ex rel. Suthers v. Cash Advance*, Case No. 08CA2092, at 365; *see id.* at 237-239 (alleging then-known

relationships among petitioners, the Nevada corporations, and controlling non-tribal parties); *see also* R. 1415 (district court "[un]persuaded" by petitioners' claimed disassociation from Nevada corporations).

Petitioners cannot have it both ways. Their inconsistencies underscore the State's need to investigate – there is more here than petitioners let on.

I. PETITIONERS' IMMUNITY DEFENSE IS IMPROPERLY REACHED IN SUBPOENA ENFORCEMENT PROCEEDINGS

Petitioners do not deny the broad, statutory investigative authority conferred upon the State. *See* State's Answer Brief (A.Br.) 22. As this Court recently observed, "An administrative agency's authority to request records and undertake other investigatory functions is broad." *Eddie's Leaf Spring Shop & Towing LLC v. Colo. Pub. Util. Comm'n*, 218 P.3d 326, 334 (Colo. 2009). Of necessity, this investigative authority is at least as broad as the agency's regulatory enforcement authority. *See, e.g., id.* at 335 (investigative authority allows agency "to gather information as to probable violations of the law" necessary to perform its "accusatory duties"); A.Br. 18-22; *see also, e.g., Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 677 S.E.2d 591, 593-594

(S.C. 2009) (agency's investigative authority includes whether party is exempt from agency's enforcement authority).

Petitioners also concede the State's "right to investigate" (*e.g.*, Reply 1, 8); and do not deny that an agency, as does a court, always has jurisdiction to investigate its jurisdiction. *See* A.Br. 17.

Further, petitioners do not address whatsoever the court's narrow role in subpoena enforcement proceedings. This role is limited to the three-pronged inquiry whether the agency's investigation "is within [its] authority . . ., the demand is not too indefinite and the information sought is reasonably relevant." *Eddie's Leaf Spring*, 218 P.3d at 335 (citing *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950)); *see* A.Br. 15-22. In this regard, petitioners do not contend that the State's investigation was too indefinite or unreasonably irrelevant; the district court found the subpoenas were well-tailored (R. 27-28¶¶1,8; Supp.R.1st 1-2¶¶1,8).[1]

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[1] Petitioners, making but perfunctory reference to *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (*see* Reply 37 n.18, 53 n.23); leave it to tribal *amici* to address the court's limited three-pronged inquiry (*see* tribal *amici's* reply brief (Tribal *Amici* Reply) 3-5). This is improper. *See Gorman v. Tucker*, 961 P.2d 1126, 1131 (Colo. 1998) (*amicus* not permitted to raise arguments not made by party); *Meridian Ranch Metro. Dist. v. Colo. Ground Water Comm'n*, ___P.3d___, 2009 WL 3765490, *9 (Colo. App. 2009) (same). In any event, tribal *amici* agree that questions of an agency's regulatory coverage – which necessarily

Instead, in contending their immunity defense nevertheless properly is reachable, petitioners (as do tribal *amici*) assume the answer to one of the core questions this case presents: whether petitioners *are* the "true" lenders (*e.g.*, they actually underwrite, make, fund, and collect the loans) that, in turn, are "arms of the tribes" and entitled to tribal immunity from suit. They argue that their asserted immunity effectively operates as a complete block to the State's investigation, *including* any inquiry into the very basis of their asserted immunity (*see, e.g.*, Reply 1 (asserting that, due to their immunity, the State "is precluded . . . from bringing suit against the Tribal Entities" to enforce the State's subpoenas;[2] Tribal *Amici* Reply 25-26 (asserting that "entities that enjoy tribal sovereign immunity may not be subjected" to subpoena enforcement proceedings)).

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subsume whether a party would be immune from a regulatory law enforcement suit – are not proper "in the investigative subpoena stage." Tribal *Amici* Reply 3. Further, the issue here is *not* "the trial court's lack of jurisdiction to enforce the [State's] *regulatory* efforts against" petitioners (*id.* 4; emphasis added); but the State's authority to *investigate*, an authority tribal *amici* also concede (*see id.*).

[2] It bears repeating that the State did not bring the subpoena enforcement proceedings against petitioners. Instead, the State named the Nevada-based lenders, which were the Nevada corporations' trade names. *See* A.Br. 4-6, 9-11.

Petitioners' circular argument "puts the cart before the horse." It would require the State, and the courts, to accept on blind faith their self-proclaimed immunity. Such a claim should not succeed, especially when supported, as here, by nothing more than conclusory affidavits and a few similarly self-serving organizational documents (*see* R. 1406-1413; Supp.R.1st 19-21; 37-39). Instead, a much more substantive, and substantial, showing should be required, such as evidence showing how the businesses operate and account for their revenues. This is information the State sought but petitioners refused to provide. *See* A.Br. 35.

This Court, as did the court of appeals, should reject petitioners' circular argument and elevation of form over substance, lest tribal immunity become "'an asylum for fugitives from justice.'" *Nevada v. Hicks*, 533 U.S. 353, 364 (2001); *see State ex rel. Suthers v. Cash Advance*, 205 P.3d 389, 402 (Colo. App. 2008).

Petitioners next contend that the State's admitted right to investigate "collides with" their claim of immunity (Reply 37). They argue that "paramount federal law" precludes the State from judicially enforcing its investigation (Reply 1). They rely upon *Kiowa Tribe v.*

Mfg. Techs., Inc., 523 U.S. 761 (1998), claiming that there, the U.S. Supreme Court "expressly took account" of subordinate "*tribal entities* whose 'businesses ha[ve] become far removed from tribal self-governance'" (Reply 9; emphasis added). They miscite: the case did *not* involve a subordinate tribal entity, but instead a *tribe*; the Court there spoke of "*tribal* businesses [that] had become far removed." *Id.* at 757 (emphasis added).

Further, the U.S. Supreme Court has never held that tribal immunity prevents a state from judicially enforcing a statutorily-authorized investigation into a subordinate tribal business's off-reservation conduct in violation of state law. Certainly, petitioners do not cite any such case. *Cf. Hicks*, 533 U.S. at 366 (2001) ("Nothing in the federal statutory scheme [concerning federal, state, and tribal law-enforcement relations] prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee lands) to investigate or prosecute violations of state law occurring off the reservation").

Despite no controlling U.S. Supreme Court "paramount federal law" precedent, petitioners nevertheless claim that, because immunity

is a "question of federal law," this Court is forbidden from "displacing governing Federal Indian law" (Reply 5). They contend that "the issue of tribal immunity can[not] be ignored" in these subpoena enforcement proceedings (Reply 6). They similarly contend that this Court cannot pass upon whether, or under what circumstances, a subordinate tribal business may be immune (Reply 19-21).

Petitioners notwithstanding, state courts are well-equipped, and are oft called upon, to decide issues of federal law, including cases involving Indian tribes. *See, e.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 274-276 (1997) (rejecting notion that "state courts are a less than adequate forum for resolving federal questions" as anathema to "basic principles of federalism"). Because there is no "governing Federal Indian law" to "displace," this Court may resolve whether petitioners' "collision" exists.

Next, petitioners argue that requiring them to comply with the State's investigation would render their asserted immunity "meaningless" (Reply 17, 50; *see id.* 37 n.18, 38). The Supreme Court rejected a similar complaint in *Johnson v. Fankell*, 520 U.S. 911 (1997). There, state officials sought an interlocutory appeal from a state court's

denial of their motion to dismiss a 42 U.S.C. § 1983 action on qualified immunity grounds. The state supreme court dismissed the appeal. *See id.* at 913-914. The officials appealed, claiming that *Behrens v. Pelletier*, 516 U.S. 299 (1996),[3] entitled them to an immediate interlocutory appeal and that such an appeal was necessary to protect their immunity, a "substantial federal right." *Johnson*, 520 U.S. at 914.

The Court disagreed. Even though delaying defendants' appeal until after final judgment would subject them to "the burdens of trial" and "'broad-reaching discovery,'" *id.* at 915 & n.2 (as petitioners also complain, *see* Reply 18, 37 n.18, 46, 50); the Court nevertheless held that their immunity defense was "fully protected":

> [T]he [immunity] claim will be reviewable by the [appellate court] after the trial court enters a final judgment, thus providing petitioners with a further chance to urge their immunity. Consequently, the postponement of the appeal until after final judgment will not affect the ultimate outcome of the case.

Id. at 921.

Here, at this juncture, the State merely is *investigating* petitioners' claims that *they* are the lenders making illegal payday loans

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[3] A case petitioners cite, *see* Reply 50.

to Colorado consumers and are doing so as bona fide "arms" of their respective tribes. Whether there is any substance behind their claims awaits this investigation. Just as in *Johnson*, should the State, upon its investigation, ultimately bring a regulatory enforcement action against a potentially immune party, then *at that time* the party might assert its immunity and its defense will be "fully protected." *Id.* Nor do petitioners demonstrate that providing the State with the information it seeks somehow will impair their (or their tribes') asserted sovereignty – "'the right to make laws and be ruled by them.'" *Hicks*, 533 U.S. at 364.

Neither *Mitchell v. Forsyth*, 472 U.S. 511 (1985), nor *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) (Reply 17, 38, 50) compel a different result:

- Both involved the propriety of an interlocutory appeal from a denial of a motion to dismiss on immunity grounds. *See Mitchell*, 472 U.S. at 524-530; *Rush Creek*, 107 P.3d at 405.
- *Mitchell* involved a federal official's qualified immunity, not tribal immunity. *See id.* at 513.
- In *Johnson*, the Court expressly held that *Mitchell* supplied a rule of *federal* appellate procedure and was not binding on the

states. *See Johnson*, 520 U.S. at 915-917.

Next, petitioners claim that, because their immunity divests the courts of subject-matter jurisdiction, the State cannot use the courts to "enforce" its admitted "right to investigate" (Reply 8, 37, 40). Again, petitioners argue circularly; they beg the question of their (and the lenders') entitlement to immunity, *including* whether the lenders are tribal in the first place. They also assume that "immunity" is subject-matter jurisdictional; it is not. *See* A.Br. 53-55; *infra*, pp. 16-25.

In any event, petitioners do not deny that a court always has jurisdiction to determine its jurisdiction. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Davidson Chevrolet, Inc. v. City & County of Denver*, 138 Colo. 171, 174, 330 P.2d 1116, 1118 (1958). Thus, and even assuming immunity is jurisdictional, a court may require disclosure of all facts bearing on a party's immunity claim. *See Tidwell v. City & County of Denver*, 83 P.3d 75, 77, 85-87 (Colo. 2003) (trial court erred in denying plaintiff discovery to disprove governmental immunity defense; parties are entitled to "latitude in discovering . . . evidence tending to prove or disprove jurisdiction"). Petitioners themselves so concede (*see* Reply 18).

Petitioners also claim immunity is reachable because they properly raised it "from the outset" and "at the threshold" of the State's subpoena enforcement proceedings (Reply 14, 37). They misstate: at no time did petitioners (1) move to quash or otherwise object to the State's subpoenas; (2) move to vacate, set aside, or otherwise object to the district court's subpoena enforcement orders; or (3) appeal from those orders. Instead, they waited only until faced with contempt, *after* the subpoena enforcement orders were final and non-appealable, to raise their immunity defense. By not timely raising the defense, they waived it. *See, e.g., Martinez v. Cities of Gold Casino*, 215 P.3d 44, 52 (N.M. Ct. App. 2009) (tribal corporation that did not assert immunity defense in underlying worker's compensation case waived it in subsequent retaliatory discharge case); *see also Rush Creek*, 107 P.3d at 408 (tribe's actions and conduct may waive immunity); *see generally, e.g., Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 681 (Colo. 2007) (failure timely to raise defense waives it); *Duke v. Pickett*, 168 Colo. 215, 218, 451 P.2d 288, 290 (1969) (same).

Further, petitioners' untimely appearance and assertion of their claimed immunity fuels the suspicion that they are not the "true"

lenders, but are instead merely running interference for the true lenders to prevent, or at least delay, the State's investigation. This, again, reinforces the State's need to investigate and learn the true state of affairs.

As to petitioners' (and tribal *amici's*) related claim that they may raise immunity "at any stage" or "at any time" (Reply 13, 14; Tribal *Amici* Reply 18 n.6), as this Court recently reaffirmed, even "[a] party's ability to raise the defense of lack of subject matter jurisdiction is not completely unbounded." *Town of Carbondale*, 169 P.3d at 681 n.5. In particular, the defense may not be raised to attack collaterally a final judgment. *See id.* (citing *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660 (Colo. 2006)). Thus, and even assuming petitioners' immunity defense is subject-matter jurisdictional, they are precluded from asserting it, and the defense should not be reached, in these collateral contempt proceedings.

Petitioners contend that *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940), "expressly" makes preclusion inapplicable to sovereign immunity (Reply 13-14). *USF&G* did *not* create a "sovereign immunity exception" to the general principle that preclusion applies

even to judgments based on erroneous assumptions of subject-matter jurisdiction. Had it, then

> res judicata [would] all but disappear for claims against the United States[4] and make many judgments advisory in the process. The Court did not suggest that its decision had such a sweeping effect, and no later case imputes that consequence to *USF&G*. Indeed, the opinion in *USF&G* vanished from the law of judgments as soon as the ink dried on volume 309 of the United States Reports.

U.S. v. County of Cook, Ill., 167 F.3d 381, 390 (7th Cir. 1999).

Instead, "*USF&G* is about subject-matter jurisdiction rather than a sovereign-immunity exception to the enforcement of judgments" and "has been cited by the Supreme Court only for the proposition that Indian tribes possess sovereign immunity." *Id.*; *see, e.g.*, *Int'l Air Response v. U.S.*, 324 F.3d 1376, 1379-1380 (Fed. Cir. 2003) (even assuming first judgment implicated sovereign immunity considerations, such considerations did not justify "deviation from the rule that 'principles of res judicata . . . apply to jurisdictional determinations – both subject matter and personal;'" reliance on *USF&G* for contrary

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[4] The United States was the party asserting immunity in *USF&G*, as trustee for various Indian tribes. *See id.*, 309 U.S. at 510.

proposition was "misplaced"); *Garrity v. Sununu*, 752 F.2d 727, 737-738 & n.10 (1st Cir. 1984) (state defendants waived Eleventh Amendment immunity in appeal from award of attorney's fees by not raising issue in, and thereby were precluded from collaterally attacking, underlying judgment; "[n]otwithstanding the Supreme Court's decision in [*USF&G*], it is unlikely today that a court's final judgment will ordinarily be open to collateral attack on eleventh amendment grounds"); 18A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4429 at 37, 38 (2d ed. 2002) (*Wright & Miller*) (although *USF&G* "tested" general preclusion principle applicable to erroneous judgments, case nevertheless is "simply . . . one that presented an erroneous judgment;" while open to argument, "[i]n ordinary settings" sovereign immunity does not present "such a compelling policy that it should justify disregard of res judicata");[5] *see also, e.g., E.J.R. v. Dist. Ct.*, 892 P.2d 222, 224 (Colo.

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[5] *USF&G* also relied upon the "corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials." *Id.* at 513. However, as petitioners' cited cases make plain, the Supreme Court since has repeatedly held the opposite. *See, e.g., C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001) (citing *Kiowa*); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

1995) ("whether right or wrong, [final judgments] are not subject to collateral attack for lack of subject matter jurisdiction").[6]

In sum, petitioners' immunity defense should not be reached in these contempt proceedings to enforce orders enforcing the State's subpoenas. In conditioning enforcement upon a *Trinity*-style[7] hearing to determine petitioners' immunity, the court of appeals erred.

II. IMMUNITY FROM SUIT IS NOT SUBJECT-MATTER JURISDICTIONAL

Petitioners correctly state that "'subject matter jurisdiction cannot be waived or conferred by consent'" (Reply 13). Yet, they (as do tribal *amici*) freely concede they can waive their asserted immunity and consent to suit; they further cite a number of cases, including U.S. Supreme Court cases, so holding (*see, e.g.*, Reply 12, 14, 41, 42, 47, 53;

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[6] Tribal *amici* cite *Adams County Dep't of Soc. Servs. v. Huynh*, 883 P.2d 573 (Colo. App. 1994), for the proposition that judgments rendered without subject-matter jurisdiction are "void" (Tribal *Amici* Reply 18 n.6). Because *Huynh* involved a direct appeal and not a collateral attack, it is inapposite. And, in light of such cases as *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982), *Elk Dance, supra,* and *O'Neill v. Simpson*, 958 P.2d 1121 (Colo. 1998), all holding that a final judgment is preclusive as to subject matter, it is incorrect to characterize a judgment as "void" even though subject matter was erroneously assumed. *See also E.J.R.*, 892 P.2d at 225 ("the concept of void judgments is narrowly construed").

[7] *Trinity Broad., Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993).

Tribal *Amici* Reply 16). Accordingly, their contention that immunity divests the courts of subject-matter jurisdiction is "illogical." *People v. McMurtry*, 122 P.3d 237, 242 (Colo. 2005).

It is one of the most basic jurisprudential principles that a court's subject-matter jurisdiction cannot be conferred by a party's consent. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986); *Ins. Corp.*, 456 U.S. at 702; *Gosa v. Mayden*, 413 U.S. 665, 707 (1973) (Marshall, J., dissenting) ("One of the most basic principles of our jurisprudence is that subject-matter jurisdiction cannot be conferred upon a court by consent of the parties"); *Cutler v. Rae*, 48 U.S. 729, 731 (1849); *McCoy v. McCoy*, 139 Colo. 105, 110, 336 P.2d 302, 305 (1959). Thus, because immunity *can* be waived and an otherwise-immune party *can* consent to suit, immunity *cannot* be subject-matter jurisdictional. *See also, e.g., County of Cook*, 167 F.3d at 388 ("For most purposes it overstates the strength of sovereign immunity to analogize it to a lack of jurisdiction"); 18A *Wright & Miller* § 4429 at 38 ("it is difficult to find in archaic principles of sovereign immunity any kinship to the needs of legislative and constitutional control that underlie limits on subject-matter jurisdiction").

Rather, as the State showed and as petitioners acknowledge, immunity is an "entitlement" personal to the immune party and "means that the [immune party] is incapable of being sued." *State v. Nieto*, 993 P.2d 493, 507 (Colo. 2000); *see* A.Br. 54; Reply 45-46 (citing *Nieto*).

Because "immunity" makes one "incapable" of being sued, it is akin to lack of capacity to be sued. As the latter is not subject-matter jurisdictional, *see Currier v. Sutherland*, 218 P.3d 709, 712-714 (Colo. 2009) (lack of capacity "has no bearing upon a court's subject matter jurisdiction over the case"); then neither is the former.[8]

Petitioners seek to distinguish *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004), and *Brown v. Rosenbloom*, 34 Colo. App. 109, 524 P.2d 626 (1974), *aff'd sub nom.*, *Province v. Brown*, 188 Colo. 83, 532 P.2d 948 (1975). They claim that neither case "involved" "immunity from suit," but instead "immunity from liability" (Reply 43-45). Petitioners are mistaken.

In *Krystkowiak*, this Court repeatedly described the First

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[8] *Currier* also observed that, if not pled, lack of capacity is waived. *See id.* at 714. Similarly, because immunity can be waived, it is "'difficult to reconcile the conception of [immunity] as a jurisdictional matter.'" *Id.* (quoting 6A *Wright & Miller* § 1559).

Amendment immunity defense there raised as providing "immunity from *suit*." 90 P.3d at 861, 862, 866 n.6 (emphasis added); *see id.* at 877 (Kourlis, J., concurring) (First Amendment immunity "immunize[s]" and "protects" one "from suit"). In no uncertain terms, the Court held that such immunity "cannot fairly be characterized as asserting lack of subject matter jurisdiction." *Id.* at 871. Nowhere did the Court say the defense provided immunity merely from "liability."

Similarly, *Brown* involved defendants' – court-appointed doctors and expert witnesses – claims they were "immune from *suit* pursuant to common law principles of judicial immunity" and by statute. *Id.* at 111, 524 P.2d at 628 (emphasis added). There, too, nowhere was the defense characterized as merely one from "liability." And, *Brown* held that the defense of "[i]mmunity from suit is an affirmative defense." *Id.* at 113, 524 P.2d at 628.

Petitioners (as do tribal *amici*) support their subject-matter jurisdictional argument by quoting a single sentence from *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977); they assert that "'[a]bsent an effective waiver, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe'" (Reply 42, 47, 49,

53; Tribal *Amici* Reply 16). It is reckless to suggest that, by this isolated sentence, the Supreme Court would so cavalierly toss aside centuries of jurisprudence holding that parties cannot confer subject-matter jurisdiction.

Instead, as in *McMurtry*, 122 P.3d at 241, a "closer analysis" shows that the Supreme Court used "jurisdiction" in its generic sense, and not in petitioners' ascribed subject-matter sense. As *Puyallup* itself explains, while the lower court lacked authority over the defendant tribe, it had authority "over [the individual defendants] whom it properly obtained personal jurisdiction." *Id.*, 433 U.S. at 173. Thus, the use of the word "jurisdiction" was "'jurisdictional' only in the sense of divesting the court of its *authority* over the *person*." *People v. Owen*, 122 P.3d 1006, 1009 (Colo. App. 2005) (emphasis added).

Petitioners also claim their immunity defense properly is "raised by means of a C.R.C.P. 12(b)(1) motion" and "properly challenge[s]" the court's subject-matter jurisdiction (Reply 42, 44). They rely upon *Trinity*, *Tidwell*, and *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007). Their reliance is misplaced:

- Both *Trinity* and *Tidwell* involved the Colorado Governmental

Immunity Act, §§ 24-10-101, *et seq.*, C.R.S. 2009 (CGIA). The CGIA *divests* Colorado courts of subject-matter jurisdiction where governmental immunity exists. *See, e.g., Fogg v. Macaluso*, 892 P.2d 271, 276-277 (Colo. 1995). It is within the General Assembly's prerogative to so limit (subject to Constitutional constraints) a court's subject-matter jurisdiction. *See, e.g., Horton v. Suthers*, 43 P.3d 611, 615 (Colo. 2002) (court's jurisdiction derives from sovereign creating it). Here, no statute divests Colorado courts of subject-matter jurisdiction over Indian tribes.

- *Krystkowiak*, 90 P.3d at 870-871, expressly rejected Rule 12(b)(1)'s application to an "immunity from suit" defense. Instead, the properly employable procedure is summary judgment. *See id.*; *see also Brown* at 113, 524 P.2d at 629 (evaluating immunity defense utilizing summary judgment).
- In *People ex rel. Orcutt v. Dist. Ct.*, 164 Colo. 385, 390-392, 435 P.2d 374, 376-377 (1967), this Court held that the civil procedure rules are inapplicable to subpoena enforcement proceedings. For this reason, too, Rule 12(b)(1) does not apply.

- *Miner*, 505 F.3d at 1009, without any analysis, merely quoted *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302 (10th Cir. 2001), which itself assumed without any analysis that immunity implicated subject matter.
- Because federal courts are jurisdictionally limited whereas Colorado's are courts of general jurisdiction (*compare* Colo. Const. art. VI, § 9, *with* U.S. Const. art. III, § 2), federal court subject-matter precedent is particularly unhelpful in resolving issues of Colorado court jurisdiction. *See Tidwell*, 83 P.3d at 85 (Colorado court jurisdiction is presumed; an attack on federal court jurisdiction "is not analogous to an attack on" state court jurisdiction and the former has "little impact" on the latter); *see also Currier*, 218 P.3d at 712 (Colorado courts have "'unrestricted and sweeping'" jurisdiction); *Lobato v. State*, 218 P.3d 358, 370 (Colo. 2009) (Colorado courts' jurisdiction broader than federal courts'). Nor are lower federal court decisions binding on this Court. *See, e.g., Hill v. Thomas*, 973 P.2d 1246, 1255 (Colo. 1999), *aff'd sub nom., Hill v. Colorado*, 530 U.S. 703

(2000).[9]

Last, petitioners claim that, because they "have already produced evidence" establishing they are "arms" of tribes, "the burden of *production* is not a legitimate concern in the present case" (Reply 50-51 (emphasis in original); *see id.* 16-17 (claiming they "voluntarily produced all documents . . . relevant to the issue of their immunity")). However, proof that petitioners *are* the lenders and, if so, function as "arms of tribes," should require something more than conclusory affidavits and a few organizational documents so proclaiming. The court of appeals agreed. It determined that petitioners had "not yet submitted sufficient evidence" showing that the lenders "are connected with the Tribes," *Cash Advance* at 409; a determination on which petitioners did not seek certiorari. *See Gorman*, 961 P.2d at 1131.

Further, petitioners produced only those documents they *deigned* were "relevant." *See* R. 636-711; *Alexander v. FBI*, 186 F.R.D. 54, 59

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[9] For like reasons, tribal *amici's* reliance upon a string-cite of federal court cases (Tribal *Amici* Reply 16-17) also is misplaced. None of their cases analyzed whatsoever the subject-matter issue or attempted to reconcile waivable immunity with non-conferrable subject matter. One case – *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290 (10th Cir. 2009) – did not even involve tribal immunity.

(D.D.C. 1998) (party may not arrogate unto itself power to determine and unilaterally select those documents it will produce). Thus, and because petitioners' claimed immunity depends on substance, not form, the court of appeals instructed the district court to "reevaluate" the State's discovery motions. *Cash Advance* at 395-397.[10]

Accordingly, because immunity is not subject-matter jurisdictional but instead is a waivable affirmative defense, the burdens of proof – both of production and persuasion – lie on the asserting party. This means that, *if* petitioners' immunity properly is reached and they raise it by motion, they must show, under the "highly stringent" summary judgment standards, *Krystkowiak*, 90 P.3d at 870; that: they *are* the "lenders" *in substance* and not in name only; and, if so, they are "arms

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[10] As is their "arm of tribe" assertion, petitioners' assertion that their corporate officers are "tribal officers" (Reply 27) is similarly without record support. *See Cash Advance* at 407. In asserting these individuals face the "threat of" and "have been cited for contempt" (Reply 27, 29), petitioners conflate. These individuals were *not* individually charged with contempt; the bench warrants, authorized by C.R.C.P. 107(c), resulted from *petitioners'* failures to appear pursuant to *their* contempt citations. *See Cash Advance* at 396-397, 407; Tr. pp. 10, ll.10-14; 11, ll.2-5; 25, ll.1-13. By suggesting the "contempt citations should never have been issued" to these individuals (Reply 29 n.12), petitioners again conflate *and* seemingly raise a non-appealed issue. *See Gorman*, 961 P.2d at 1131.

of tribes" entitled to otherwise-unwaived immunity. *See, e.g., Gristede's Foods, Inc. v. Unkechauge Nation*, 2009 WL 3235181, *34 (E.D.N.Y. 2009) (tribal smoke shop failed to show by preponderance of evidence it was "arm of the tribe" under "arm of tribe" analysis);[11] *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL 705815, **3-4 (E.D.N.Y. 2009) (tribal business bore burden to prove it was immune "arm of tribe"). This, they did not do. *See* R. 951-961; 996-998; 1009-1023.

III. THE "PREPONDERANCE" STANDARD IS INAPPLICABLE TO THE STATE

Assuming petitioners' immunity defense properly is reachable and the State bears any burden to negate it, that burden is the State's statutory "cause to believe" (or "reasonable cause to believe") standard triggering its investigative authority. Once triggered, the State may then invoke a court's aid in enforcing its investigation. Once so invoked, the court retains and has inherent jurisdiction to enforce its orders via contempt. *See, e.g., People v. Lockhart*, 699 P.2d 1332, 1336 (Colo. 1985); *People v. Razatos*, 699 P.2d 970, 974 (Colo. 1985); *see also, e.g., People v. Owens*, 183 P.3d 568, 576 (Colo. App. 2007) (Russel, J., specially concurring) ("Right or wrong, a trial court must be able to

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[11] A case upon which tribal *amici* rely, *see* Tribal *Amici* Reply 17.

enforce its own orders").

To impose any higher burden would require the State "to substantiate its case before it may be allowed to investigate it." *Kohn v. Minn. ex rel. Humphrey*, 336 N.W.2d 292, 296 (Minn. 1983). This "put[s] the cart before the horse." *Id.*

In arguing for a "preponderance" (or higher) standard (Reply 51 and n.22), petitioners confuse the burden applicable to an ultimate merits determination of contempt with the lower statutory standard triggering the State's investigative and concomitant court's enforcement powers in the first instance. *Cf. Cash Advance* at 409-410 (recognizing difference between burdens applicable to contempt's merits with threshold determination of petitioners' immunity). Their reliance upon § 13-25-127(1), C.R.S. 2009, *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2nd Cir. 2001), *Lawrence v. Barona Valley Ranch Resort & Casino*, 64 Cal.Rptr.3d 23 (Cal. Ct. App. 2007), and *Bradley v. Crow Tribe of Indians*, 67 P.3d 306 (Mont. 2003), is misplaced:

- The specific standards of the State's organic subpoena enforcement statutes prevail over the general § 13-25-127(1). *See, e.g.*, § 2-4-205, C.R.S. 2009; *Smith v. Zufelt*, 880 P.2d 1178,

1183 (Colo. 1994).

- Special statutory subpoena enforcement proceedings are not "civil actions" within § 13-25-127(1)'s meaning. *See Orcutt*, 164 Colo. at 390-392, 435 P.2d at 376-377 (subpoena enforcement proceeding is not a plenary "civil proceeding" to which civil procedure rules apply); *see also Borer v. Lewis*, 91 P.3d 375, 380 (Colo. 2004) (statute's application is limited to "substantive action or claim itself").
- Assuming Rule 12(b)(1) is the proper procedural vehicle, nevertheless the statute is inapplicable. *See Borer*, 91 P.3d at 380-381 (statute inapplicable to procedural motions); *see also Tidwell*, 83 P.3d at 85, 86 (plaintiff's burden under 12(b)(1) is a "relatively lenient one" with the plaintiff "afforded the reasonable inferences of his evidence").
- *Lawrence*, *Bradley*, and *Garcia* arose in the context of plenary lawsuits, not subpoena enforcement proceedings.
- Without any analysis, *Garcia*, 268 F.3d at 84, assumed immunity was subject-matter jurisdictional to which the "preponderance" standard applied. *Lawrence*, 64 Cal.Rptr.3d at

26; and *Bradley*, 67 P.3d at 311; merely parrot *Garcia.*

- In *Bradley*, at 311-312, the court *reversed* the case's dismissal, holding that plaintiff sufficiently demonstrated the tribe's waiver of immunity.

Accordingly, if the State bears any burden, it need only show "cause to believe" the lenders are not immune. This, the State did. *See, e.g.*, R. 951-961; 996-998; 1010-1023; *see also Cash Advance* at 396, 409 (observing State's, and petitioners' lack of contrary, evidence showing lenders not tribal); A.Br. 22; R. 28¶8; Supp.R.1st 2¶8 (unappealed orders finding State's investigation was authorized).

CONCLUSION

For the foregoing reasons, and for those stated in the State's prior papers, the Court should reverse the court of appeals, hold that immunity is not reachable, and remand with directions that the district court proceed in accordance with its March 7 and May 22, 2007, orders (R. 1414-1418; Supp.R.1st 109-112). Alternatively, if immunity is reachable, the Court should reverse the court of appeals and remand with directions that the district court consider petitioners' immunity defense employing the proper procedural device and properly allocating

the burdens and standards of proof.

Dated: Denver, Colorado
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the within Respondents'/Cross-Petitioners' Reply Brief, dated December 18, 2009, was duly served upon all parties herein by depositing copies of same in the United States mail, first class mail, postage prepaid, at Denver, Colorado, this 18th day of DECEMBER, 2009, to:

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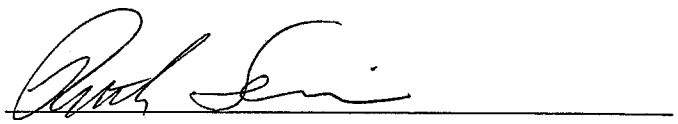

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