No. 15-4170

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VANCE NORTON, et al.,
Plaintiffs-Appellees,

vs.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al.,
Defendants-Appellants.

Answer Brief of State Officers: Dave Swenson, Jeff Chugg, Rex Olsen, Craig Young, and Sean Davis

Appeal from an order granting preliminary injunction of the U.S. District Court of Utah, Central Division, Civil Action 2:13-CV-984, Honorable Dee Benson, District Court Judge

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ORAL ARGUMENT **NOT** REQUESTED

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Prior or Related Appeals

This Court has heard two prior and directly related appeals: *Jones v. Norton*, Case No. 14-4040 (appeal of summary judgment); and *Jones v. Norton*, Case No. 14-4144 (appeal from taxation of costs).

This Court disposed of both appeals in a published opinion, *Jones v. Norton*, 809 F.3d 564 (10th Cir. 2015). Both appeals were from a lawsuit – involving most of the same parties to this appeal – arising "from the death of Ute Tribe member Todd R. Murray on April 1, 2007, following a police pursuit." *Id.* at 568. Murray's parents and his estate had alleged "various constitutional violations under 42 U.S.C. § 1983, conspiracy to violate civil rights under 42 U.S.C. § 1985, and state tort claims." *Id.* Those allegations were made "against nine individual law enforcement officers, their government employers, and a private mortuary." *Id.* Among those officers were four State Troopers employed by the Utah Highway Patrol, Dave Swenson, Jeff Chugg, Rex Olsen, and Craig Young; and an Investigator employed by the Utah Division of Wildlife, Sean Davis (collectively "State Officers").

This Court concluded that the "extensive" summary judgment record showed "no genuine dispute of fact that the shooter was anyone

but Murray himself" and "could only lead a reasonable jury to conclude that no other person . . . was within 100 yards of Murray when he was shot, and so Murray is the only person who could have inflicted a contact wound." *Id.* at 574-75. This Court also concluded that "no reasonable jury could find a seizure had occurred in the moments before shots were fired because there is no evidence that Murray ever submitted to any show of authority." *Id.* at 574.

This Court affirmed the dismissal of all claims against all defendants. *Id.* at 582 ("[w]ith the exception of the taxation of costs," which was dismissed for lack of jurisdiction, "the judgment of the district court is affirmed in Case Nos. 14-4040 and 14-4144"). This Court concluded that Swenson and Young committed no constitutional violation, *id.* at 574-76; and Davis, Olsen, and Chugg arrived after the shooting and their involvement was so "minor" that it "need not be recited" in the opinion. *Id.* at 570. This Court also affirmed the district court's denial of the plaintiffs' motion for spoliation sanctions. *Id.* at 580-83.

Jones relates to this case because, after losing summary judgment there, Murray's parents and estate, joined by the Ute Tribe and

represented by the same law firm, sued the same officers again over Murray's suicide, but this time in tribal court. Though the Tribe was not a party in the previous case, it had funded the litigation on behalf of Murray's family and estate. The tribal court lawsuit made numerous factual allegations directly contradictory to the facts as affirmed by this Court in *Jones*.

Certificate of Reasons for Separate Briefing

Pursuant to 10th Cir. R. 31.3(B), State Officers submit the following reasons for filing a separate brief:

As government employees, the rule does not apply to them. 10th Cir. R. 31.3(D).

The other appellees are represented by separate counsel, and were represented separately in the proceeding below.

Separate briefing by State Officers is the most appropriate means to clearly present their positions on this appeal.

Dated this 18th day of May, 2016.

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Jurisdiction

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 to resolve the federal question of whether an Indian tribal court has jurisdiction over a civil tort lawsuit filed by tribal members and the tribe itself against state, county, and city law enforcement officers, who are not tribal members, for conduct occurring in the discharge of their official duties. The United States Supreme Court has repeatedly held that "whether a tribal court has adjudicative authority over

nonmembers is a federal question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985)). Indeed, the Supreme Court has considered the precise question presented here and concluded that it is "clear" that "tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Likewise, the Supreme Court is currently considering a related question of tribal courts' jurisdiction over civil tort claims against private individuals or companies that are not members of the tribe. *See Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (U.S. argued Dec. 7, 2015).

The district court had jurisdiction to grant the preliminary injunction under 28 U.S.C. §§ 2201 and 2202.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's grant of the preliminary injunction. But State Officers dispute Appellants' unsupported assertion that appellate jurisdiction also lies under this Court's "inherent authority and obligation to determine federal court jurisdiction." Aplt. Brf. at 3. This

conclusory assertion is not supported by citation to statute or case law. *See* Fed. R. App. P. 28(a)(4)(B) & (D) (requiring that appellant's brief contain "a jurisdictional statement including . . . the basis for the court of appeals' jurisdiction, with *citations* to applicable *statutory provisions*") (emphasis added); *see also* Fed. R. App. P. 28(a)(4)(D) (requiring "an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on *some other basis*") (emphasis added).

Though the sovereign immunity issues raised in Appellants' motions to dismiss appear to be subsumed in the grant of preliminary injunction, and were so viewed by the district court, Supp. App. 5, this Court also has interlocutory jurisdiction under the collateral order doctrine to review a district court's denial of a motion to dimiss on the grounds of sovereign immunity. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1147 (10th Cir. 2011). But Appellants have not established that this Court has interlocutory jurisdiction over the claim of improper service, nor have Appellants asked this Court to exercise its pendent appellate jurisdiction to review that issue.

Issues Presented

1. Injunctive relief

This Court had held that an Indian tribe's immunity does not preclude claims for prospective injunctive relief, just as Eleventh Amendment immunity does not preclude such claims against states. Did the district court correctly deny the claim of tribal immunity in granting the preliminary injunction?

Preservation of issue

This issue was raised at App. 428-30, 433. The district court ruled on the issue at App. 635.

2. No tribal jurisdiction over the State Officers

Under the *Montana*[1] rule, an Indian tribe presumptively lacks jurisdiction over nonmembers of the tribe. Applying that rule in *Hicks*,[2] the Supreme Court held that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official

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[1] *Montana v. United States*, 450 U.S. 544 (1981).
[2] *Nevada v. Hicks*, 533 U.S. 353 (2001).

duties. Did the district court correctly apply *Montana* and *Hicks* in concluding that the tribal court lacked jurisdiction over civil tort claims filed against state, county, and city law enforcement officers who were sued for their official conduct?

Preservation of issue

This issue was raised at App. 23-25, 169-73, 178-79, 420-28, 460-61, 496-501. The district court ruled on the issue at App. 631-33.

3. Officers not required to exhaust tribal court remedies

In *Hicks*, the Supreme Court also concluded that, because a tribal court lacks jurisdiction over state officials discharging their duties, state officials sued in tribal court need not exhaust tribal remedies before seeking relief from federal courts. Did the district court correctly conclude that exhaustion was not required here, particularly since the officers had previously been sued over the same events, resulting in an adjudication by a federal district court that was affirmed by this Court?

Preservation of issue

This issue was raised at App. 23-25, 169-73, 178-79, 420-28, 461-67, 496-501. The district court ruled on the issue at App. 633-34.

4. Lack of appellate jurisdiction over service of process claim

Appellants have not cited a jurisdictional basis for this Court's interlocutory review of their argument that service of process was invalid because it failed to comply with tribal law. Does this Court lack jurisdiction to review the issue? In any event, does the argument fail because it is unsupported by controlling case law and the plain language of the Federal Rules of Civil Procedure?

Preservation of issue

Review of this Court's interlocutory appellate jurisdiction is unique to this appeal. To the extent this Court determines it has jurisdiction to review this issue, it was preserved at App. 473-76. The district court ruled on the issue at App. 634-35.

Statement of the Case and Facts

Hereafter, the term "the Tribe" is used to collectively refer to the Ute Tribe, its Tribal Officers, and the Tribal Court, who are the only appellants on whose behalf the opening brief was filed. Aplt. Brf. 1. "The Ute Tribe" is used as a singular reference to the tribe alone.

This is an appeal from an order granting a preliminary injunction. The injunction enjoins the prosecution of a civil tort lawsuit filed in the Ute Tribal Court against state, county, and city law enforcement officers who are not tribal members. The tribal court lawsuit was filed by tribe members and the Ute Tribe itself against the officers for conduct occuring during the discharge of their official duties – and over the same events that were the basis of a tort and civil rights lawsuit already adjudicated in federal court and affirmed by this Court.

All three lawsuits – the present matter, the tribal court lawsuit, and the lawsuit previously adjudicated in federal court ("Judge Campbell's decision") – arose out of Todd Murray's 2007 suicide. The complaint here, as well as the motion for preliminary injunction, alleged facts about the suicide, and the events leading up to it, that are consistent with this Court's opinion affirming Judge Campbell's

decision. *See Jones*, 809 F.3d at 568-72. But the Tribe relies on a different version of the facts based solely on the allegations in the tribal court complaint – even though three Appellants were parties to Judge Campbell's case, the same counsel represented them in Judge Campbell's case, and the Ute Tribe funded the litigation.

This statement of facts conforms with the officer's complaint, the verified motion for preliminary injunction, the preliminary findings in the order granting preliminary injunction, and the *Jones* opinion.

Todd Murray's suicide

Murray was a passenger in a car traveling on Highway 40 in Uintah County; Utah State Trooper Dave Swenson observed that the vehicle was speeding. App. 17. Swenson attempted to stop the vehicle, but the driver refused to stop and a high-speed chase ensued. *Id*. After thirty minutes of pursuit, the vehicle ran off the road. App. 18. Murray exited the vehicle and fled the scene, armed with a .380 automatic pistol. *Id*. Thereafter Murray initiated an exchange of gun fire with Norton, after which Murray shot and killed himself. *Id*.

Original lawsuit

The named plaintiffs (collectively "the Estate") in the original lawsuit were Murray's mother, Debra Jones; Murray's father, Arden Post; and Murray's estate. *Jones*, 809 F.3d at 568. Jones and Post are members of the Ute Tribe, as was Murray. *Id.* The defendants included the five State Officers and most of the co-Appellees, who are county and city police officers. *Id.*

The Estate sued in Utah state court, alleging state tort claims, "various constitutional violations under 42 U.S.C. § 1983, [and] conspiracy to violate civil rights under 42 U.S.C. § 1985." *Jones*, 809 F.3d at 568, 572. Those allegations were made "against nine individual law enforcement officers, their government employers, and a private mortuary." *Id.* at 568. The Estate expressly alleged that Utah's state courts had "exclusive, original jurisdiction over any action against Vernal City and the State of Utah and/or their respective employees or agents arising out of the performance of the employee's duties, within the scope of their employment, or under color of authority." App. 168. The Estate further alleged that each of the defendant officers were "at all times . . . acting under color of state laws and as employees of their respective law enforcement agencies." App. 165.

The Estate was represented by Fredericks Peebles & Morgan LLP. App. 16-18. The Ute Tribe funded the litigation. App. 18-19. The Ute Tribe's Business Committee governs the Ute Tribe.[3] App. 22.

The Estate's case was removed to federal court. *Jones*, 809 F.3d at 572. After years of litigation, the district court granted summary judgment to all defendants. *Id*. at 568. This Court affirmed. *Id*. at 569, 582. This Court noted that the "extensive" summary judgment record showed "no genuine dispute of fact that the shooter was anyone but Murray himself" and "could only lead a reasonable jury to conclude that no other person . . . was within 100 yards of Murray when he was shot, and so Murray is the only person who could have inflicted a contact wound." *Id*. at 574-75.

This Court affirmed the dismissal of all claims against all officers. *Id*. at 582 ("[w]ith the exception of the taxation of costs," which was dismissed for lack of jurisdiction, "the judgment of the district court is affirmed in Case Nos. 14-4040 and 14-4144"). This Court concluded

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[3] Among others, the opening brief was filed on behalf of the Ute Tribe's "Tribal officers." Aplt. Brf. 1. Apparently this is a reference to the Ute Business Committee as an entity, and not its individual officers, inasmuch as the Business Committee is a named party below and is an appellant, but the individual officers of the committee are neither. *See* App. 15, 638.

that Swenson and Young committed no constitutional violation (*Id*. at 574-76); and Davis, Olsen, and Chugg arrived after the shooting and their involvement was so "minor" that it "need not be recited" in the opinion. *Id*. at 570. This Court also affirmed the district court's denial of the Estate's motion for spoliation sanctions. *Id*. at 580-82.

Tort claims refiled in tribal court

After the Estate lost on summary judgment, it refiled the tort claims, but this time in tribal court and joined by the Ute Tribe as co-plaintiff. As the district court correctly summarized, the tribal court lawsuit was brought by "the same people that filed essentially the same action in State Court and it was removed to Federal Court and, as we all know, there was an adjudication"; the Tribe's counsel agreed with this summary. Supp. App. 12. The tribal court filing was ostensibly motivated by a statute of limitations deadline for refiling the tort claims after their dismissal by Judge Campbell. Supp. App. 22[4] (counsel for

[4] This position was a reversal of an earlier statement made in the Ute Tribal Court's memorandum opposing the motion for preliminary injunction: "The Ute Court plaintiffs did not refile claims which had been dismissed." App. 490. That earlier position has also been abandoned on appeal: "Thereafter, on March 5, 2015, Todd Murray's parents, the Murray Estate, and the Ute

the Tribe asserting that Murray's "family . . . was facing a statute of limitations issue for *refiling* the case with the Tribal Court").[5]

Despite years of litigating civil rights and tort claims against the officers as state actors, the Estate refiled the tort claims again, but this time asserting that the officers were not state actors and were not acting within the scope and course of their employment. App. 38-40. At the preliminary injunction hearing, counsel for the Tribe asserted that the tribal court complaint should be construed as alleging that the

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Indian Tribe filed suit . . . seeking damages for the tort claims that the U.S. District Court had previously dismissed without prejudice in *Jones v. Norton*." Aplt. Brf. at 6.

[5] Counsel for the Tribe repeatedly characterized the tribal court tort claims as refiled claims:

> That is where we are. We have not got a decision on the merits on any of the common law claims to bring the common law claims within the tribal system, so then we bring them in Tribal Court under tribal law and that is the complaint that we have filed. . . . The family has brought their common law claims in State Court. It is removed to Federal Court. They don't get a decision on the merits there, so now the only forum that we see that we have left is the tribal forum for adjudicating common law complaints regarding this type of action . . . that are the types of torts that are clearly within common law that one can then bring in a judicial forum.

Supp. App. 34-35.

officers were merely acting as private citizens, not as law enforcement officers. Supp. App. 24, 26.

Despite Judge Campbell's conclusion that Murray killed himself, the tribal court complaint alleged that Murray died "after being shot in the back of his head, above and behind his left ear" and that the officers "conspired to concoct" the "self-serving account that Todd Murray shot himself." App. 40-41. The tribal court complaint alleged that the officers were "accessories after the fact to the wrongful death of Todd Murray, and accessories to the officers' conspiracy to cover-up the true facts of how Murray was killed." App. 41. And the tribal court complaint alleged: "on information and belief, Todd Murray did not shoot himself; however, if Murray did shoot himself, he did so only after realizing he was being surrounded at gunpoint and falsely imprisoned by" officers. App. 47.

The tribal court complaint also asserted that Utah's Governmental Immunity Act ("Immunity Act"), "is preempted by federal law and policies and therefore has no application to the Defendants' actions inside the U&O Reservation." App. 49-50. This assertion was contrary to Judge Campbell's interim order concluding that the

Immunity Act did apply to the actions of the officers while on the reservation. On appeal of Judge Campbell's final judgment, the Estate acknowledged this interim order in its opening brief and sought its reversal. *See* Addendum, p. 2. This Court did not reverse that interim ruling.

Officers' lawsuit for injunctive and declaratory relief

After the county and city officers were served with the tribal court lawsuit, they filed the present lawsuit in federal district court, seeking to enjoin the prosecution of the tribal court case and asking for a declaratory judgment to the effect that the Ute Tribe and the Ute Tribal Court lack subject matter jurisdiction over the tribal court case. App. 20.

The officers' complaint alleged facts relating to Murray's suicide that are consistent with this Court's recitation of facts in *Jones*. App. 16-18. The complaint asserted that the Estate, represented by Fredericks Peebles & Morgan LLP, had previously brought the same civil rights and common law wrongful death claims against the officers, and that the federal district court had entered judgment in favor of the

officers. App. 18. The complaint alleged that the Ute Tribe had "fully funded" the previous litigation. App. 18-19. The complaint alleged that Frederick Peebles & Morgan LLP had filed the tribal court complaint on behalf of the Tribe, Jones, Post, and Murray's Estate "again seeking damages arising out of Todd R. Murray's suicide." App. 19. The tribal court complaint was attached to the officer's complaint. App. 34-67.

State Officers filed a motion to intervene as co-plaintiffs, with supporting memoranda. App. 98-124, 150-53. The Tribal Court and the Tribal Court judge opposed State Officers motion to intervene, App. 146-149, and filed a motion to dismiss, which the county and city officers opposed. App. 125-45, 409-58, 459-69. The Ute Tribe also filed a motion to dismiss, which the county and city officers opposed. App. 154-60, 470-78.

The county and city officers filed a verified motion for preliminary injunction with supporting evidence and supporting memoranda. App. 161-405, 493-505. The district court granted State Officers' motion to intervene. App. 406-07. State Officers filed a memorandum opposing the motions to dismiss. App. 459-469. The Ute Tribal Court filed a

response memorandum opposing the motion for preliminary injunction. App. 489-92.

The district court held a hearing on the motion for preliminary injunction, where respective counsel for the Ute Tribal Court, the State Officers, and the city and county officers presented arguments. App. 571; Supp. App. 1-78. The district court entered an order on October 5, 2015, denying the motions to dismiss and granting the motion for preliminary injunction, concluding that the Ute Tribal Court lacked jurisdiction over the officers, and that the officers need not exhaust tribal remedies before seeking relief in the federal court. App. 629-36. Appellants filed a notice of appeal on November 4, 2015. App. 637-38.

Summary of Argument

The district court properly exercised its discretion in granting the preliminary injunction and without legal error. It correctly concluded that tribal immunity is not a bar to a federal court granting injunctive relief, just as a state's immunity under the Eleventh Amendment is not a bar to injunctive relief.

The district court properly applied the *Montana* presumption against tribal jurisdiction over non-tribal members. The court properly applied *Hicks*, which held that a tribal court has no jurisdiction over state officials discharging their official duties. The previous adjudication in federal court was a proper forum to hold the officers accountable for any alleged wrongdoing. The tribal court was not.

And the district court correctly concluded that exhaustion of tribal court remedies was not required because the tribal court clearly lacked jurisdiction under controlling precedent. Additionally, exhaustion was not required because the tribal court case was brought in bad faith and exceeded clear jurisdictional limits in Utah's Immunity Act.

Finally, this Court lacks interlocutory appellate jurisdiction to review the Tribe's claim of ineffective service; but the claim lacks merit, in any event.

Argument

1. Tribal sovereign immunity does not bar the officers' claims for injunctive relief.

Standard of review

Because the only statutory basis the Tribe cites for this Court's jurisdiction is 28 U.S.C. § 1292(a)(1), regarding interlocutory review of a grant of preliminary injunction, this Court should review the subsumed issues under the preliminary injunction standard of review.

The granting of a preliminary injunction is reviewed for an abuse of discretion. *Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 645 (10th Cir. 2004). An abuse of discretion occurs if the district court "commits an error of law or is clearly erroneous in its preliminary factual findings." *Id.*

The Tribe raised its immunity claim in a motion to dismiss and in opposing the officer's motion for preliminary injunction. The district court treated the issue as subsumed[6] within its preliminary injunction

[6] Only the Tribe's claim of improper personal service was analyzed as unique to the motion to dismiss. App. 634 (beginning analysis of the claim by identifying the issue as unique to the motion to dismiss). That claim is addressed in Section 4, below.

analysis, along with the issues of tribal court jurisdiction and exhaustion of tribal court remedies. App. 629-36; *see also* Supp. App. 5.

If this Court reviews the motion to dismiss in its own right, the standard of review for the denial of a motion to dismiss based on tribal sovereign immunity is *de novo*. *Crowe*, 640 F.3d at 1153, *affirming* *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1216, 1222 (N.D. Okla. 2009) (reviewing denial of motion to dismiss separately from preliminary injunction where the district court had analyzed the two separately).

Discussion

The Tribe fails to address the controlling authority relied on by the district court, *Crowe*, 640 F.3d 1140. This Court held there that Indian tribes are not immune from claims for injunctive relief. *Id.* at 1154. Because tribal immunity is similar, though not identical, to state immunity under the Eleventh Amendment, this Court concluded in *Crowe* that tribal immunity is subject to the same injunctive relief exception as state immunity is under *Ex parte Young*, 209 U.S. 123 (1908). *Crowe*, 640 F.3d at 1154. The *Ex parte Young* exception is "an exception to Eleventh Amendment immunity for suits against state

officials seeking to enjoin alleged ongoing violations of federal law." *Id.* In *Crowe*, this Court "join[ed its] sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity." *Id.*

"[T]ribal immunity is a matter of federal common law, not a constitutional guarantee." *Id.* The officers' request for prospective injunctive relief is based on the federal common law limits of tribal immunity. Such a request based on federal common law "does not limit the *Ex parte Young* inquiry to whether federal constitutional or statutory law has been violated." *Id.* at 155. Rather, vindication of the federal common law alone is sufficient to satisfy *Ex parte Young*, and "the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of 'federal law' sufficient to sustain the application of the *Ex parte Young* doctrine." *Id.*

The Tribe mistakenly argues that there is no violation of federal law to enjoin unless and until the tribal court makes a ruling in excess of its jurisdiciton. Aplt. Brf. 14. Improper tribal jurisdiction has already been imposed on the State Officers – when the Ute Tribe and the Estate filed the lawsuit. State Officers were served with

summonses issued under the tribal court's authority, requiring them to answer or face default. To thwart a potential default, the officers were compelled to appear in a forum that had no jurisdiction over them. They expended resources in filing limited appearances to contest tribal court jurisdiction and were burdened with having to continuously monitor the litigation. An adverse ruling could have come at any time, requiring the officers to immediately seek federal relief. If the preliminary injunction had not issued, State Officers would still bear these burdens and face the potential threat of a new tribal lawsuit every time their official duties might take them again onto tribal land. *See Hicks*, 533 at 365 (noting that this type of "harassing litigation will unduly inhibit officials in the discharge of their duties").

That the tribal court has not yet made any rulings does not make the pending tribal court lawsuit any less offensive to federal law or to *Jones*. Under the Tribe's argument, injunctive relief would be delayed indefinitely unless and until the tribal court made some affirmative ruling that could be considered a violation of federal law. This could allow a tribal court case such as this to languish for years if the tribal court declined to make a ruling, all the while burdening state officers

and undermining the state's legitimate interests in, among other things, enforcing its "criminal jurisdiction over reservation Indians for crimes committed off the reservation." *Hicks*, 533 U.S. at 362.

The Tribe cites no precedent holding that a lawsuit filed in a court prohibited by federal common law from hearing the lawsuit cannot be enjoined before that court issues a ruling. Nor has the Tribe cited any federal statute restricting injunctions against tribal courts similar to 28 U.S.C. § 2283, which limits when federal courts may enjoin state court proceedings. Nor do they cite parallel precedent holding that a federal court deciding a motion for injunctive relief to enjoin a pending state court lawsuit must either wait for the state court to issue a ruling or is limited to the facts as alleged in the state court lawsuit.

Appellants ignore that the very pendency of the tribal court lawsuit here contravenes the United States' supreme authority and that State Officers enjoy the "established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power.'" *Crowe*, 640 F.3d at 1156 (quoting *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1225 (10th Cir. 2002)). Accordingly, State Officers ask this Court to

affirm the district court's issuance of prospective relief as a well-established exception to tribal immunity under *Ex parte Young*.

2. The district court properly concluded that the tribal court lacked jurisdiction over the tribal court lawsuit.

Standard of review

The abuse of discretion standard set forth in Section 1, above, applies because the issue of tribal court jurisdiction raised in the motions to dismiss was subsumed into the grant of preliminary injunction.

Discussion

As set forth below, the district court correctly applied *Montana* and *Hicks* in concluding that the tribal court lacked jurisdiction over the State Officers.

A. Tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties.

The Supreme Court held it is "clear" that "tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties." *Hicks*, 533 U.S. at 369. Under "a proper

balancing of state and tribal interests," a tribe has "no jurisdiction over state officers pursuing off-reservation violations of state law." *Id.* at 374. This is because a "State's sovereignty does not end at a reservation's border" and "[o]rdinarily, it is now clear, an Indian reservation is considered part of the territory of the State." *Id.* at 361-62. What's more, when "state interests outside the reservation are implicated, States may regulate the activities *even of tribe members on tribal land*." *Id.* at 362 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151 (1980)) (emphasis added).

The Tribe asserts a position of virtually absolute tribal authority that ignores *Montana*'s presumption against tribal authority over nonmembers. *See Montana*, 450 U.S. at 565. The Supreme Court in *Hicks* rejected this position because it would "unduly inhibit officials in the discharge of their duties." *Id.* at 365. "A state can act only through its officers and agents, and if a tribe can affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws, the operations of the [state] government may at any time be arrested at the will of the [tribe]." *Id.* (citations omitted, brackets in original). The Tribe wants to do that very thing. The Tribe

seeks not only to arrest the legitimate operations of state government, but even of the federal district court – pushing the argument so far as to call the process server who served the federal complaint and the summons in this case a "trespasser" who was "not authorized to trespass onto the Tribe's land." Aplt. Brf. at 28.[7]

B. Appellants rely on erroneous facts.

The Tribe's argument unravels on pages 11-13 of its brief where it erroneously asserts that the district court should have relied on the facts alleged in the tribal court complaint – thereby disregarding the allegations of the complaint actually before the district court, the evidence in support of the verified motion for preliminary injunction, the factual and legal determinations in Judge Campbell's decision, and this Court's decision in *Jones*. The Tribe fails to cite any authority supporting their assertion that the district court was bound by the

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[7] In addition, the Tribe overstates tribal civil authority over nonmembers generally. As noted above, the Supreme Court is currently considering the extent of tribal court jurisdiction generally over civil tort claims against private individuals or companies that are not members of the tribe. *See Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (U.S. argued Dec. 7, 2015). The matter is far from settled, despite the Tribe's overstatements.

allegations of the tribal court complaint, in deciding either the motions to dismiss or the motion for preliminary injunction.

To challenge the preliminary injunction on appeal, the Tribe was required on appeal to show that the preliminary factual findings were "clearly erroneous." *Star Fuel*, 362 F.3d at 645. The Tribe's foundational factual point – that the officers committed the alleged torts merely as private individuals and not within the discharge of their official state duties – has no support whatsoever in the record below. As set forth in the statement of the case, above, the complaint and verified motion for preliminary injunction alleged that the officers were acting under color of law and within the scope of their official duties. App. 21-22, 165, 167, 173, 180. The district court made a preliminary factual finding that the officers were "pursuing their official duties." App. 632. The Tribe has not shown that this preliminary finding is clearly erroneous; it has not cited or analyzed the clearly erroneous standard. The officers' complaint also alleged that the original lawsuit concluded with a grant of summary judgment in favor of all defendants. App. 19.

Yet the Tribe ignores, and wants this Court to ignore, all of these facts and years of litigation in which the Estate, funded by the Tribe, sued the officers as state actors, not private individuals. The Estate and possibly the Ute Tribe and its Business Council – because the Tribe funded the Estate's previous litigation – are judicially estopped from making this and and any other allegations contrary to the factual and legal determinations in *Jones*. *See Estman v. Union Pac. R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberating changing positions according to the exigencies of the moment") (citation omitted). Judicial estoppel applies when a party's subsequent position is "clearly inconsistent with its former position, acceptance of the inconsistent position would create the "perception" that the previous court was misled, and asserting the inconsistent position would give the litigant an "unfair advantage . . . if not estopped." *Id.* The inconsistent factual allegations have clearly been asserted to unfairly subject the officers to tribal court jurisdiction. Perhaps that is why the opening brief initially states that it was filed on behalf of only those Appellants who were not actual parties to *Jones* – to skirt judicial estoppel. *See*

Aplt. Brf. at 1 (stating the opening brief is submitted on behalf of the Ute Tribe, its Tribal officers, and the Tribal Court); *but see* Aplt. Brf. at 1, 3, 7, 9 (defining "Tribal Appellants" as including the Estate and repeatedly making arguments in support of "Tribal Appellants' motion to dismiss"). Regardless of whether judicial estoppel applies, the record below, as outlined above, supports the district court's preliminary finding that the officers were pursuing their official duties.

Even under a motion to dismiss standard, it is black-letter law that the district court and this Court accept as true all the allegations in the *officers' complaint* – not the allegations in the proceeding sought to be enjoined – and make all reasonable inferences in favor of the officers. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, it would have been error for the district court to have disregarded the allegations in the officers' complaint.

That the Tribe does not make an argument based on the correct facts could be construed as a concession that it loses under the correct facts – that the tribal court lacks jurisdiction because the officers were discharging their official duties. In any event, as set forth below, the

district court correctly granted the preliminary injunction and denied the motions to dismiss under the correct facts.

C. Under the *Montana* rule, there is presumption against tribal civil jurisdiction over nonmembers of the tribe.

In what is called the *Montana* rule, the United States Supreme Court held that generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565; *see also Plains Commerce*, 554 U.S. at 340 (citing *Montana* in reaffirming the proposition that "[t]ribal jurisdiction . . . generally does not extend to nonmembers). The *Montana* rule bars civil court jurisdiction over nonmembers because "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Hicks*, 533 U.S. at 367 (making it "clear" that tribal courts "cannot be courts of general jurisdiction").

The limits of a tribe's legislative and adjudicative authority stem from the limits to the tribe's sovereignty. A tribe's sovereignty is "of a unique and limited character," centered on the land held by the tribe and on tribal members within the reservation. *Plains Commerce*, 554

U.S. at 327. Because the "inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe," "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Id.* at 328 (stating that "by virtue of their incorporation into the American republic," Indian tribes "lost 'the right of governing . . . person[s] within their limits except themselves'") (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978)); *see also Montana*, 450 U.S. at 564 (noting that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty").

Under the *Montana* rule, "efforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'" *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). This Court came to the same conclusion regarding a tribe's adjudicatory authority, stating that "*Montana* and its progeny" create a "*presumption* against tribal civil jurisdiction over non-Indians." *Crowe*, 640 F.3d at 1150 (emphasis added).

Thus, as a starting point in the analysis, the Ute Tribe and its Tribal Court presumptively lack jurisdiction over the officers because the officers are not tribal members. The Tribe turns this presumption on its head by misreading the Supreme Court's reference to "plenary" tribal jurisdiction in *Plains Commerce*, 554 U.S. at 328. The Supreme Court noted there that, "once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Id.* But the Court gave no indication that a tribe's plenary jurisdiction is broader than the narrow confines announced in *Montana*; to the contrary, the *Plains Commerce* Court reaffirmed *Montana*'s presumption against tribal jurisdiction and the "burden" on the tribe to overcome that presumption. *Id.* at 330. Likewise, the Court reaffirmed the general principles articulated in *Montana* and *Hicks* for why a tribe's sovereignty is limited and reaffirmed *Montana*'s mandate that its exceptions be narrowly construed. *Id.* at 327-28, 330. Furthermore, *Plains Commerce* cannot be read as retreating from *Hicks* in any way, since the case did not even concern state officers performing official duties, like *Hicks* directly did. *Id.* at 320 (reviewing tribal jurisdiction over sale of land by a private bank).

D. Limited exceptions to the *Montana* rule and the tribe's burden to overcome presumption against jurisdiction.

There are two exceptions to *Montana*'s presumption against tribal jurisdiction, but "[t]he burden rests on the tribe to establish one of the exceptions." *Id.*, 554 U.S. at 330. These "limited" exceptions "cannot be construed in a manner that would swallow the rule" or "severely shrink it." *Id.* As set forth below, neither exception applies here.

E. *Montana*'s first exception does not apply.

One exception to *Montana*'s general rule is that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. The Supreme Court clarified that, when the *Montana* Court enumerated this exception, it "obviously did not have in mind [s]tates or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Hicks*, 533 U.S. at 372 (noting that this clarification was "confirmed by the fact

that all four of the cases in the immediately following citation [after the exception was enumerated] involved private commercial actors").

The district court here correctly concluded that this exception did not apply. The Tribe failed to produce any evidence below of a consensual relationship between the Ute Tribe and the State Officers. Although the Court in *Hicks* expressly did not decide whether "contractual relations between State and tribe can expressly or impliedly confer tribal regulatory jurisdiction over nonmembers," *Hicks*, 533 U.S. at 372, there is no record evidence here of any such contract. And the tribal court complaint, to the extent that it is even relevant, failed to allege the existence of any contractual relationship between the State Officers and the Ute Tribe. App. 32. Without evidence, the Tribe simply argued that there was an implied "consensual relationship that you don't trespass onto other people's land." Supp. App. 31. Even now on appeal, the Tribe speaks not of any mutual agreement, but only of the Tribe's purported "power to exclude non-members" unilaterally. Aplt. Brf. 22. Accordingly, the district court correctly concluded that this exception to *Montana* did not apply.

F. *Montana*'s second exception does not apply.

The other exception may apply "when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). The Supreme Court explained that, in order for this exception to apply, "the conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community," possibly even to a "catastrophic" level. *Id*. (stating that the conduct the tribe sought to regulate in that case "cannot fairly be called 'catastrophic' for tribal self-government"). The ownership status of land – whether it is Indian land or non-Indian fee land – "is only one factor to consider in determining" whether the second exception applies, even thought it "may sometimes be a dispositive factor." *Hicks*, 533 U.S. at 360 (noting that *Montana* "clearly" implied that its general rule "applies to both Indian and non-Indian land").

The Supreme Court squarely addressed the second exception in *Hicks* – "whether regulatory jurisdiction over state officers in the present context is 'necessary to protect tribal self-government or to control internal relations" – and concluded that the exception does not

apply to state officials discharging their duties on tribal land. *Hicks*, 533 U.S. at 360, 364 (stating that "Tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations" and "no more impairs the tribe's self-government than federal enforcement of federal law impairs state government"). Tribal ownership of the land in question was not dispositive in *Hicks* "when weighed against the State's interest in pursuing off-reservation violations of its laws." *Id.* at 370.

Here, as in *Hicks*, "*[s]elf*-government and *internal* relations are not directly at issue," because the "issue is whether the Tribe's law will apply, not to their own members, but to a narrow category of *outsiders*." *Id.* at 371 (emphasis added). And, as in *Hicks*, preserving a state's authority to enforce off-reservation violations of state law is "necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'" *Id.* at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885)). Such enforcement "no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Id.* The *Hicks* majority noted the concurrence's "scant

reasoning" and lack of authority supporting the very position the Tribe takes here. *Id.* at 371.

Accordingly, the district court properly concluded that *Montana*'s second exception does not apply.

G. Appellants have not been deprived a remedy.

The Ute Tribe and the Estate never had a remedy in tribal court. As the *Hicks* court said, "State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for *tortious conduct* and civil rights violations in either state or federal court, but not in tribal court." *Hicks*, 533 U.S. at 374 (emphasis added). In extensive litigation funded by the Ute Tribe, the Estate did that very thing – sued in state court to hold the State Officers accountable for allegedly tortious conduct and alleged civil rights violations. The case was removed to federal court and adjudicated, with the state tort claims being dismissed for lack of pendent jurisidiction. Any purported error in that dismissal (as opposed to a remand back to state court) should have been challenged there, not by the filing of a new lawsuit in a tribal court, and cannot

serve as the basis of a new remedy in tribal court that the Supreme Court has already foreclosed.[8]

3. No need for State Officers to exhaust tribal court remedies.

Standard of review

The abuse of discretion standard set forth in Section 1, above, applies because the issue of exhaustion raised in the motions to dismiss was subsumed into the grant of preliminary injunction.

Discussion

The district court correctly held that State Officers were not required to exhaust tribal remedies before seeking federal relief. Normally, in the interests of tribal self-government and comity, tribal court litigants are required to exhaust their tribal court remedies before seeking review of a tribal court's ruling that it had jurisdiction. *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006). Exhaustion is not a

[8] In the *Jones* appeal, the Estate asked for reinstatement of the pendent tort claims only "[i]f this Court reverses any portion of the district court's rulings." See Addendum, p. 1 (excerpt from the Estate's opening brief *Jones v. Norton*, No. 14-4040). The Estate made no failure-to-remand challenge, instead challenging Judge Campbell's interim ruling that Utah's Immunity Act applies on tribal land. *Id.*, pp. 1-2.

"jurisdictional prerequisite" to federal court review and is subject to several exceptions:

-- first, "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith";

-- second, "where the [tribal court] action is patently violative of express jurisdictional prohibitions";

-- third, "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction";

-- fourth, when it is "plain that no federal grant provides for tribal governance of the nonmembers' conduct on land covered by [the *Montana* rule]"; and

-- fifth, when it is "otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirements would serve no purpose other than delay."

Burrell, 456 F.d 3d at 1168 (internal citations omitted).

Exhaustion is not required here because it is clear that "tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties"; thus, exhaustion here, as in *Hicks*, would "'serve no purpose other than delay,' and is therefore

unnecessary." *Hicks*, 533 U.S. at 369 (quoting *Montana*, 520 U.S. at 459-60, and n.14). The Tribe has failed to demonstrate that this principle from *Hicks* is no longer controlling law. Nor has it demonstrated why the interests of tribal self-rule or comity now outweigh this principle. What's more, the Tribe's argument would effectively eliminate the exhaustion exceptions altogether by requiring exhaustion in every case. The Tribe misreads controlling precedent to say that an exception to exhaustion can apply only in cases where there is a fully developed tribal court record for the federal district court to review. Exhaustion is thus required, under the Tribe's reasoning, to develop a tribal court record that can be used to demonstrate that exhaustion is not required. This is nonsensical. *Hicks* suggested no such conclusion, holding instead that, when a tribal court lacks jurisdiction, exhaustion is unnecessary and would serve no purpose but delay. *Hicks*, 533 U.S. at 369.

The bad faith exception also applies, as evidenced by the Tribe's efforts to repudiate the findings and conclusions in *Jones*. The officer's complaint below alleged that counsel for the Estate and the Ute Tribe "re-filed the case in the Ute Tribal Court" simply "because their clients

were 'not satisfied' with the decision" in *Jones*. App. 17. The tribal court complaint made numerous factual allegations directly contrary to this Court's decision in *Jones*, including the allegations that the officers act outside the scope of their employment and conspired to cover up Murray's wrongful death. Jones, Post, and Murray's estate were parties in *Jones*, yet they made these allegations anyway, despite Judge Campbell's conclusion that Murray shot himself and this Court's conclusion that no record evidence supported any other conclusion. The same counsel who represented the Estate in *Jones* also represented them in making the tribal court allegations. And although the Ute Tribe itself was not a named party in *Jones*, it funded the litigation. The refiled tribal court complaint was an obvious attempt to plead around and completely undermine a federal court judgment, thereby subjecting State Officers to additional litigation. The refiled claims are clearly in bad faith. It would be manifestly unjust and unfair to subject State Officers to years of litigation in tribal court defending claims they have already spent years successfully defending in federal court.

Likewise, exhaustion is not required because it is "plain that no federal grant provides for tribal governance" of these State Officers. As

the Supreme Court in the *Hicks* court noted, "[n]othing in the federal statutory scheme prescribes, or even remotedly suggests, that state officers cannot enter a reservation . . . to investigate or prosecute violations of state law occurring off the reservation." *Hicks*, 533 U.S. at 366 (noting that 25 U.S.C. § 2806 does not alter "'the law enforcement, investigative, or judicial authority of any . . . State, or political subdivision or agency thereof'"). The Tribe has made no showing that any Congressional act has altered Utah's law enforcement authority on the Ute Tribe's lands.

And exhaustion is also not required because Utah's Immunity Act provides that Utah's "district courts have exclusive, original jurisdiction over any action brought" under the Immunity Act. Utah Code Ann. § 63G-7-501(1). The Immunity Act "governs all claims against governmental entities, or against their employees or agents arising out of the performance of the employee's duties, within the scope of employment, or under color of authority." Utah Code Ann. § 63G-7-101(2)(b). The Estate, in litigation funded by the Ute Tribe, expressly acknowledged the Immunity Act's jurisdictional mandate in their original complaint filed in state court, and then fully litigated their

claims that the officers were acting under color of state law and were employees of their respective law enforcement agencies. In its *Jones* briefing in this Court, the Estate further acknowledged an interim order by Judge Campbell applying the Immunity Act to officers' official acts on the reservation. *See* Addendum, p. 2.

4. This Court lacks interlocutory jurisdiction to hear Appellants' claim of insufficient service of process.

Standard of review

To the extent this issue is subsumed within the grant of preliminary injunction, the standard of review in Section 1, above, applies. To the extent this issue is reviewed independently, as part of the Tribe's motion to dismiss, it is reviewed *de novo*. *Jenkins v. City of Topeka*, 136 F.3d 1274, 1275 (10th Cir. 1998).

Discussion

The Tribe has not established that this Court has interlocutory jurisdiction over its claim of improper service, nor has it asked this Court to exercise pendent appellate jurisdiction to review the issue. The Sixth Circuit has held that a personal jurisdiction claim "can be

vindicated on appeal after trial, and thus does not satisfy the third prong of the collateral order doctrine." *Turi Main Street Adoption Servs., LLP*, 633 F.3d 496, 502 (6th Cir. 2011) (citing *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989) (holding that a claimed right to be sued in particular forum is "surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant – and hence does not fall within the third prong of the collateral order doctrine")); *see also Tidewater Oil Co. v. U.S.*, 409 U.S. 151, 171-72 and n.46 (1972) (threshold procedural issue, such as one relating to service of process, may be properly certified for interlocutory appeal under 28 U.S.C. § 1292(b)).

In any event, the argument lacks merit. The Tribe summarily asserts that Ute tribal law governed the service of process of the federal complaint that was filed in federal district court. Aplt. Brf. 27. The Tribe does not state what provision of tribal law applies, nor do they cite any controlling authority from this Court or the United States Supreme Court overriding the plain language of the Federal Rules of Civil Procedure: "[t]hese rules shall govern the procedure in *all* civil actions and proceedings in the United States district courts, except as

stated in Rule 81." Fed. R. Civ. P. 1 (emphasis added). The Tribe does not argue that Fed. R. Civ. P. 81 supports its argument. Nor has it argued that service was defective under the Federal Rules themselves. The Tribe has thus failed to show that the district court erred in concluding that service was proper. This Court should affirm, if it concludes it has jurisdiction to review the issue.

CONCLUSION

Based on the foregoing, State Officers ask this Court to affirm the district court's grant of preliminary injunction.

No request for Oral Argument

Pursuant to 10th Cir. R. 28(c)(4), State Officers do not request oral argument. State Officers believe that oral argument is not necessary to address the straightforward issues and record in this case. However, if oral argument is scheduled, State Officers desire to participate.

Respectfully submitted this 18th day of May, 2016.

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s/ J. Clifford Petersen

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Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

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s/ J. Clifford Petersen

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The undersigned certifies that on the 18th day of May, 2016, a true, correct and complete copy of this document was filed with the Court and served on the following via the Court's ECF system:

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Addendum: excerpt from Appellants' opening brief in *Jones v. Norton*, Tenth Circuit Court of Appeals, No. 14-4040

Addendum: excerpt from Appellants' opening brief in *Jones v. Norton*, Tenth Circuit Court of Appeals, No. 14-4040

Mortuary once the court awarded summary judgment in Blackburn's favor on the emotional distress claim. Plaintiffs requested leave to amend to allege a claim against the Mortuary for negligence, gross negligence, or professional malpractice, explaining that, without the amendment, Plaintiffs would be left without a remedy for the desecration of Todd Murray's body.[94] However, even before the briefing period on Plaintiffs' motion had expired, the district court denied Plaintiffs' motion and did so on the ground that "not every wrong is legally redressable."[95] The court's reasoning is directly contrary to the letter and spirit of Rule 15(a) which declares that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *Forman v. Davis*, 371 U.S. at 182.

The Court should reverse the district court's denial of one, or both, of Plaintiffs' motions to amend relating to the desecration of Todd Murray's remains.

IV. THE DISTRICT COURT ERRED IN DISMISSING THE PENDENT TORT CLAIMS AND IN RULING THAT DEFENDANTS HAVE IMMUNITY FROM THOSE CLAIMS UNDER UTAH STATE LAW

The district court dismissed Plaintiffs' pendent tort claims against Officer Norton for assault and battery and wrongful death under 28 U.S.C. § 1367(c).[96] If this Court reverses any portion of the district court's rulings and remands this case for further proceedings, the Court should also reverse the district court's dismissal

[94] App. V, 1291-1328, Plaintiffs' Motion for Leave to Amend; 1329-1341, Defendant's Objection; pp. 1329-1341.
[95] App. V, 1433.
[96] Dkt. 430, App. XVIII, 5817-18, Section E.

of the pendent tort claims. In addition, the Tenth Circuit should reverse the district court's ruling that the Utah Governmental Immunity Act ("UGIA") immunizes state officers for tortious acts committed inside the Reservation.[97] The district court dismissed Plaintiffs' tort claims against Officer Norton and Vernal City under the Second Amended Complaint on this basis. The dismissal forced Plaintiffs to drop their respondeat superior claims against Vernal City and to fashion tort claims against Officer Norton alleging that he was acting outside the scope of his official capacity at the time of the torts.[98]

This Court should rule that the UGIA has no application inside the Uintah and Ouray Reservation.[99] The Supreme Court recognizes "two independent but related" federal "barriers" to the application of state law on Indian reservations. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (emphasis added). The first barrier is when a state law impermissibly infringes "'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.*, quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). The second barrier is when a state law is preempted, and thus barred, by incompatible federal law and policies. *Id.* Although the two barriers are related, they are separate and "independent" of one another, and thus either barrier "standing alone, can be a sufficient basis for

[97] App. II, 397-399; App. XVIII, 5820.
[98] App. III, 739-744, ¶¶ 159-187.
[99] *See* App. I, 208-24; App. II, 488-98; App. XVIII, 5705-15.