No. 17-1301

In the Supreme Court of the United States

RYAN HARVEY, ROCKS OFF, INC., AND WILD CAT RENTALS, INC.,
Petitioners,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Utah

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Utah Supreme Court err in adopting a state-law policy under which plaintiffs must first exhaust their remedies in tribal court before seeking relief in state courts for cases involving the interpretation of tribal law or the scope of tribal authority to exclude nonmembers from tribal land?

2. Does the tribal exhaustion doctrine require that there be a parallel tribal proceeding, and if so, does a quasi-judicial tribal regulatory proceeding qualify?

PARTIES TO THE PROCEEDING

Petitioners in this case are Ryan Harvey, Rocks Off, Inc., and Wild Cat Rentals, Inc.

Respondents are the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"); Dino Cesspooch, in his individual and official capacities as Ute Tribal Employment Rights Office ("UTERO") Commissioner; Jackie LaRose, in his individual and official capacities as UTERO Commissioner; Sheila Wopsock, in her individual and official capacities as Director of the UTERO Commission; Newfield Production Company; Newfield Rocky Mountains, Inc.; Newfield RMI, LLC; Newfield Drilling Services, Inc.; L.C. Welding & Construction, Inc.; Scamp Excavation, Inc.; Huffman Enterprises, Inc.; LaRose Construction Company, Inc.; and D. Ray C. Enterprises, L.L.C.

CORPORATE DISCLOSURE STATEMENT

D. Ray C. Enterprises, L.L.C., LaRose Construction Company, Inc., and Huffman Enterprises, Inc. are incorporated in the State of Utah. They have no parent corporations and no publicly held corporation owns 10% or more of their stock.

L.C. Welding & Construction, Inc. is a now dissolved company which had been incorporated in the State of Utah. It had no parent corporations and no publicly held corporation owned 10% or more of its stock.

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INTRODUCTION

This Court should deny the petition for a writ of certiorari for four reasons.

1. This is a poor vehicle for resolving the split that Petitioners allege. There is no split in the state courts (or in the federal courts) regarding whether the tribal exhaustion doctrine applies to cases involving tribal laws, tribal jurisdiction, tribal governance, and the scope of tribal authority to exclude nonmembers from tribal land—the issues the Utah Supreme Court referred to the Ute Tribal Court. Petitioners, in asking this Court to hold that such issues may be heard in state court, are not asking the Court to address the exhaustion issue present in the cases it cites, but are instead asking this Court to reverse an unbroken line of decisions by this Court and lower federal courts establishing that, in light of Congress's policy to promote tribal self-governance, tribal courts must be given the first opportunity to interpret tribal law and to determine the scope of the tribe's jurisdiction. There is no split among state or federal courts as to whether exhaustion is appropriate when the issues involve tribal governance. As a result, this Court would likely resolve this case by reliance on this unbroken line of cases and never reach the split to which Petitioners are referring. None of the cases Petitioners cite to show a split involves issues of tribal governance.

2. The Utah Supreme Court's majority opinion is based on Utah law, not federal law. The majority referenced federal law and policy but never claimed to be bound by it. This Court does not adjudicate matters of state law. While the concurring opinion, adopted in its entirety by the majority, does conclude that state

courts are bound by this Court's exhaustion decisions, the majority carefully avoided ever using the term "bound by federal law" or anything comparable. And since the majority relied on Utah law, it would reach the same conclusion in this case *without regard* to how the Court answers Petitioners' first question presented—whether the tribal exhaustion doctrine applies as a matter of federal law.

3. This is an inappropriate case in which to address Petitioners' second question presented—whether the requirement to exhaust tribal remedies should apply when there is no parallel proceeding in tribal court. This case does not present that issue in a straightforward manner. While there is no tribal court proceeding in this case, there is a quasi-judicial proceeding before a tribal regulatory body, which produced the directive of which Petitioners complain. The proceeding gave Petitioners a right to appeal to the Ute Tribal Court, a right not available to Respondents, which Petitioners chose not to exercise based on their unsubstantiated allegation that the Ute Tribal Court would be biased against them. The presence of a quasi-judicial proceeding will likely lead to a narrow ruling on this issue since no other case cited by Petitioners involved such a proceeding.

4. Finally, Petitioners are seeking a writ of review of an interlocutory order of the Utah Supreme Court remanding the case for further proceedings in state, tribal, and/or federal court, which adds to the uncertainty and lack of clarity in this case.

For these reasons, the Court should deny the petition for certiorari.

STATEMENT

1. Based on its inherent authority to govern and exclude others from its lands, and its status as a federally recognized Indian Tribe, the Tribe enacted a Business License Ordinance (Ute Indian Tribe, Ordinance No. 95-002 (1995)), and a Ute Tribal Employment Rights Ordinance ("UTERO Ordinance").[1] The former requires businesses to obtain permission to enter the Tribe's lands, and the latter ensures that companies doing business on the Uintah and Ouray Reservation ("Reservation"), including oil and gas companies, make maximum use of Indian workers and businesses. The UTERO Ordinance created the Ute Tribal Employment Rights Office ("UTERO Commission"). UTERO Ordinance § 4.1. Among other things, the UTERO Ordinance requires that companies doing business on the Reservation obtain licenses from the UTERO Commission. *Id.* § 4.3(C)(3-5).

The UTERO Commission is modeled after federal commissions such as the National Labor Relations Board and the Equal Employment Opportunity Commission. In addition to other duties, it sits as a quasi-judicial forum with authority to enforce the UTERO Ordinance, adjudicate allegations of UTERO Ordinance violations, and impose sanctions on companies doing business on the Reservation that fail

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[1] The 2010 version of the UTERO Ordinance was in effect when Petitioners filed this action in Utah state court, and is the version cited by Petitioners in their pleadings below. It was amended in 2013 by Ute Indian Tribe, Ordinance No. 13-033 (2013). All provisions of the Ordinance relevant to this case are identical in both versions.

to comply with the UTERO Ordinance. *Id.* §§ 11.5, 11.6.

The UTERO Ordinance provides a party aggrieved by a decision of the UTERO Commission the right to appeal to the Ute Tribal Court. *Id.* § 11.10. The Ordinance expressly waives the Tribe's sovereign immunity from suit to permit appeals to Ute Tribal Court from those quasi-judicial decisions by the UTERO Commission. *Id.* § 13.

2. The event that triggered this litigation was that Petitioners, in 2013, had their Ute Business License revoked by the Ute Tribal Energy and Minerals Department, a separate tribal department from the UTERO. While Petitioners had the right to request administrative and then Ute Tribal Court review of the Energy and Minerals Department decision, they chose not to do so. Ute Indian Tribe, Ordinance No. 95-002 § VII.A.

On March 20, 2013, the UTERO Commission, acting through then-Director Sheila Wopsock, sent a letter to oil and gas companies doing business on the Reservation to inform them that because Petitioners had lost their Business License, Petitioners could not comply with the requirements for UTERO licensure, and their UTERO licenses were therefore revoked ("2013 Letter").

The 2013 Letter explained that, as a result of the license revocation, Petitioners were "no longer authorized to perform work on the Uintah and Ouray Reservation."[2]

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[2] In their petition, Petitioners state, contrary to the Utah Supreme Court's analysis of the facts as applicable to the current procedural

3. Upon learning of the 2013 Letter, Petitioners chose not to avail themselves of their right under the UTERO Ordinance to appeal the UTERO Commission's license revocation decision to Ute Tribal Court. Instead, they filed suit in Utah District Court challenging the revocation decision. In their Amended Complaint, Petitioners asked the Utah District Court to enjoin the UTERO Commission and its officials from enforcing the 2013 Letter, on the grounds that issuance of the 2013 Letter and enforcement of its terms was: (i) *ultra vires* (beyond the scope of the UTERO Ordinance), and (ii) beyond the scope of the Tribe's authority. Am. Compl., ¶ 99, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Aug. 29, 2013) ("Am. Compl.").

Both of these issues could have been properly raised in Ute Tribal Court on appeal by Petitioners from the action by the UTERO Commission and/or appeal from the prior business license revocation. Petitioners, however, specifically chose not to file in Ute Tribal Court. They made that choice based on their unsupported contention that the Ute Tribal Court was biased, such that, they claimed, they would not receive a fair hearing. Oral Argument, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Jan. 29, 2016); Pet. App. 26a n.9. The Utah District Court rejected this

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posture, that the 2013 Letter prohibited UTERO-licensed businesses from using Petitioners' goods and services both on- and off-Reservation. The Utah Supreme Court identified this as one of the unresolved issues the Ute Tribal Court would need to resolve. Pet. App. 31a.

argument, finding that Petitioners provided no evidence to support an allegation of bias. Ruling & Order re Tribe's Mot. to Dismiss at 13-14, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Mar. 28, 2016); *see also* Pet. App. 26a n.9. This Court has also rejected similar unsupported allegations as a reason to avoid tribal court exhaustion. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement.") (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985)).

The Amended Complaint further alleged that the actions the UTERO Commissioners took in their official capacities—*i.e.*, prohibiting Petitioners from doing business on the Reservation without a valid UTERO registration, and informing UTERO-registered businesses of the possibility of sanctions for using unlicensed vendors—constituted torts under Utah state common and statutory law, such as blacklisting and conspiracy to violate the Utah Antitrust Act. Am. Compl., ¶¶ 147-54.

All of the Respondents filed motions to dismiss, citing both common and individual grounds. The common theme in all of those motions was that this case belonged in tribal court, not state court. The Utah District Court dismissed the Amended Complaint against all of the Respondents on the grounds that the Tribe was a necessary and indispensable party that could not be joined due to sovereign immunity. Pet. App. 96-97a. The Utah District Court additionally dismissed the claims against LaRose Construction

Company, Inc. and D. Ray C. Enterprises, L.L.C. for failure to state a claim upon which relief can be granted. Pet. App. 128a.

The Utah District Court also addressed the merits of other issues raised by Respondents. Relevant here, it agreed with Respondents that "whether the UTERO officials exceeded the scope of authority given to them by the UTERO Ordinance necessarily requires examining and interpreting the UTERO Ordinance." And, it concluded, "[i]nterpreting tribal laws is outside the scope of a state district court's general jurisdiction." Pet. App. 130-31a (citing *Iowa Mutual*, 107 S. Ct. at 977); Ruling & Order re Individual and Company Defs.' Mot. to Dismiss at 4-5, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Mar. 28, 2016).

4. Petitioners appealed to the Utah Court of Appeals. The Utah Supreme Court then exercised its right to take a case filed with the Utah Court of Appeals and have it transferred directly to the Utah Supreme Court for review.

The Utah Supreme Court issued three opinions: a majority, concurring, and concurring/dissenting opinion. The majority opinion held that the Ute Tribal Court should be given the first right to interpret the UTERO Ordinance and determine if the actions of the UTERO officials were *ultra vires*:

> Whether the tribal officials unlawfully revoked Harvey's permit is a question of tribal law, as the regulation of who may enter tribal lands is a matter of self-governance. The tribal court must

> have the first opportunity to address these issues.

Pet. App. 30a.

The Utah Supreme Court recognized that the actions of the tribal officials complained of in the Amended Complaint amount to an effort by the Tribe to restrict nonmember access to Reservation land. Citing this Court's discussion of federal policy supporting tribal remedies exhaustion, the Utah Supreme Court held that the Ute Tribal Court should have the first opportunity to determine the scope of the Tribe's authority to exclude nonmembers from Reservation land. Pet. App. 30a ("When a case concerns a tribe's right to exclude individuals from their land, plaintiffs should exhaust their remedies in tribal court before getting a review in any other court. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 333 (1983).").

The Opinion of the Utah Supreme Court characterized its holding as resting on "prudential matter" grounds and "'based on principles of comity.'" Pet. App. 27a (citing *Nevada v. Hicks*, 533 U.S. 353, 398 (2001)). The Opinion of the Utah Supreme Court cited various federal policies that support the tribal remedies exhaustion doctrine, including the same policies this Court relied upon in *National Farmers* and *Iowa Mutual* when it held that tribal court exhaustion is required before parties may pursue relief in federal court; specifically, Congress's policy of promoting tribal self-governance. Pet. App. 26-27a, 32-33a. But the Utah Supreme Court never concluded that its courts were bound by this Court's decisions that federal courts must defer federal adjudication pending exhaustion of

tribal remedies. Rather, its decision paralleled this Court's decisions on exhaustion, finding that state principles of prudence and comity require exhaustion, at least when the issue involves interpretation of tribal law, just as this Court found such a requirement under federal principles of comity and prudence.

The Utah Supreme Court explained that if "Harvey does not agree with the tribe's determination of its jurisdiction, he will be able to seek review of the tribal court's order in federal court." Pet. App. 34a.

The Utah Supreme Court further held that the Utah state courts would retain jurisdiction to hear Petitioners' state common and statutory law tort claims (*e.g.*, blacklisting, conspiracy)—the only state law issues raised in the Amended Complaint—but only after the tribal court had an opportunity to rule on the questions of whether the tribal officials had acted *ultra vires* or exceeded the authority of the Tribe. Pet. App. 34a ("If the tribal court, or a reviewing federal court, determines that the tribal officials exceeded their authority or the authority of the tribe, the remaining state law causes of action may proceed.").

The rationale for proceeding in the sequence prescribed by the Utah Supreme Court is plain: if the tribal courts are not given the first opportunity to interpret tribal law, tribal officials properly carrying out their responsibilities will nevertheless live in fear of facing tort actions in state court for actions they lawfully undertook under tribal law.

The Utah Supreme Court remanded the case to the Utah District Court with an instruction for that Court to determine "whether to stay or dismiss the case

under the tribal exhaustion doctrine." Pet. App. 35a. To date, the action remains pending before the Utah District Court.

The concurring opinion agreed that exhaustion of tribal remedies was appropriate in this case. Unlike the majority, the concurrence concluded that state courts are bound to require exhaustion as a result of this Court's decisions mandating exhaustion of tribal remedies in proceedings involving the federal courts.

Justice Lee issued a concurrence in part and dissent in part. His dissent primarily took issue with the concurring opinion, because he concluded that this Court's decisions on tribal court exhaustion are not binding on state courts. Justice Lee also argued that tribal court exhaustion is not required when there is no parallel tribal court proceeding. Because this issue had not been raised by Petitioners until their reply brief to the Utah Supreme Court, Respondents never had an opportunity to point out that there is a quasi-judicial tribal proceeding in this case, with a right to appeal to the tribal court. As a result, Justice Lee did not address whether a quasi-judicial tribal regulatory proceeding qualifies as a parallel tribal proceeding. Justice Lee's opinion was also based in part on the incorrect conclusion that all parties had consented to the jurisdiction of the Utah state courts for the resolution of all issues in the case when, in fact, all Respondents filed motions to dismiss in the Utah District Court.

REASONS FOR DENYING CERTIORARI

This Court should deny the petition for a writ of certiorari for the following reasons:

1. There is no split among the state courts on the aspect of the exhaustion issue that this case presents—whether issues involving tribal governance should be heard in tribal or state court. This Court and the lower federal courts have consistently held that only tribal courts may hear these issues. There is not a single state court decision holding that such issues should be heard by state courts and not a single one of the cases Petitioners cite to show the split involved issues of tribal governance. Rather, they all involved state law tort or contract claims. The Court would be better able to resolve the split by waiting for a case of that nature rather than using this case, which likely would be decided based on the unbroken line of cases regarding which courts should hear cases involving tribal governance, and would not likely reach the broader exhaustion issue.

2. The majority below found the exhaustion doctrine applicable in this case on the basis of Utah law and the principles of prudence and comity under Utah jurisprudence. It referenced federal law and policy but never claimed to be bound by it. As a result, the majority did not reach the issue Petitioners are asking this Court to rule on in their first question presented.

3. This is a poor case for resolving the second question presented: whether there needs to be a parallel proceeding in tribal court for exhaustion to apply. The reason is that, here, the case arises out of a quasi-judicial proceeding before a tribal regulatory

body, which issued an administrative order that remains in effect. The reason there is no tribal *court* proceeding is that Petitioners refused to exercise their right to initiate such a proceeding. That was based upon their unsupported assertion that the tribal court was biased.

4. Petitioners are seeking a writ of review of an interlocutory order of the Utah Supreme Court, which adds to the uncertainty and lack of clarity in this case. The order remanded the case for further proceedings in the Utah District Court, which are currently ongoing. The order also identified outstanding federal law questions which have yet to be briefed by the parties or decided by any tribunal. The future proceedings in state, tribal, or federal court may obviate the need for further appellate review. It is also possible that this Court may conclude, after full briefing, that it lacks jurisdiction to resolve the questions presented because the Opinion of the Utah Supreme Court was based on state law, not federal law. Therefore, this case is a poor candidate for certiorari.

Each of these reasons is discussed in detail below.

I. THIS CASE DIFFERS FROM ALL OF THE EXHAUSTION CASES CITED BY PETITIONERS, BECAUSE IT RAISES TRIBAL LAW AND GOVERNANCE ISSUES.

There is no split among the state courts on the first question presented in this case—which court, state or tribal, should hear cases involving the issue of tribal governance. There is not a single state court case holding that a case involving tribal governance should be heard in state court. By contrast, as discussed

below, there is an unbroken line of decisions by this Court and the lower federal courts holding that only tribal courts may hear issues of tribal governance. As a result, this element of the exhaustion question has already been addressed in black-letter law. There may be a split on the issue of whether state or tribal courts should hear state law tort and contract cases involving Indians, but this case does not involve such matters and is not the proper one to resolve that split. Rather, it will likely be decided based on the established legal principles that only tribal courts may hear cases involving tribal governance.

In the present matter, the Utah Supreme Court correctly determined that the threshold questions all turn on tribal law questions related to tribal governance. They require interpreting a tribal ordinance, determining the scope of tribal jurisdiction, and determining the scope of a tribe's authority to decide who may come on its lands.

Based upon its determination that the first issues to be resolved were core tribal governance issues and issues of interpretation of tribal law, the Utah Supreme Court then decided that the proper mode of proceeding would be for the state court to stay its hand until those threshold tribal issues were resolved. That holding is consistent with all case law on this issue. An unbroken line of decisions by this Court and lower federal courts holds that issues involving tribal governance must be heard in tribal court.[3]

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[3] This Court has repeatedly held that tribal courts are the proper forum for interpreting tribal law. *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding that interpretation of tribal laws is "solely a

As a result, this element of the exhaustion issue is settled. No state court has ever held otherwise, such that there is no split among the states on this issue. Most of the cases cited by Petitioners for evidence of the split in authority are simply cases where the state courts proceeded with claims for which state law issues predominated.[4] No court has ever held that a state

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matter within the jurisdiction of the Courts of that Nation."). *See also Iowa Mutual*, 480 U.S. at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."); *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 894 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018) ("Well-established exhaustion principles [] require that the tribal forum have the first opportunity to evaluate its own jurisdiction over this case, including the nature of the state and tribal interests involved."); *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991) ("the [] Tribe must itself first interpret its own ordinance and define its own jurisdiction."); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004) (holding that "in this Circuit, we defer to the tribal courts' interpretation of tribal law."). The Utah Supreme Court's decision is consistent with this long-standing line of federal court cases. Pet. App. 32-33a ("[A]s a matter of comity, the tribe should be given first right to interpret the March 20th letter and determine the tribe's jurisdiction.").

[4] *Astorga v. Wing*, 118 P.3d 1103 (Ariz. Ct. App. 2005) (Indian plaintiffs sued non-Indian mortuary in tort for wrongful burial and related claims); *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998) (state police officers formerly assigned to tribal casino and former employee of casino sued tribe and tribal gaming enterprise, alleging intentional infliction of emotional distress and other torts); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996) (non-Indian employee of tribal casino sued tribal corporation that owned casino and three of its officers in state court for sexual harassment and related torts); *Maxa v. Yakima Petrol., Inc.*, 924 P.2d 372 (Wash. Ct. App. 1996) (non-Indian employee of a fuel delivery

court could enjoin tribal officials from carrying out governmental activities, because doing so would deeply undermine a tribe's ability to govern itself. Some of the cases cited by Petitioners include a tribe as a party but are state tort or contract disputes that do not raise questions about a tribe's jurisdiction or regulatory authority, nor require an interpretation of tribal law.[5] Others are disputes between private parties that do not implicate a tribe at all.

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company licensed by tribe sought damages from the company and its Indian owner for breach of contract); *Meyer & Assocs., Inc. v. Coushatta Tribe of La.*, 992 So.2d 446 (La. 2008) (tribe sued engineering firm for breach of contract in connection with the design and construction of a power plant); *Michael Minnis & Assocs., P.C. v. Kaw Nation*, 90 P.3d 1009 (Okla. Ct. Civ. App. 2003) (law firm sued tribe for breach of contract due to failure to pay for professional services); *Seneca v. Seneca*, 741 N.Y.S.2d 375 (N.Y. App. Div. 2002) (tribal member sued two other tribal members for breach of contract and conversion); *State v. Zaman*, 946 P.2d 459 (Ariz. 1997) (en banc) (on behalf of Indian mother, state filed action in state court against non-Indian man regarding paternity, custody, and child support to mother).

[5] Many of the cases that Petitioners cite are inapposite cases from "PL280 states." In a portion of Public Law 83-280 which is codified at 28 U.S.C. § 1360, Congress granted PL280 states increased jurisdiction over civil actions from reservations. Utah is not a PL280 state. Instead under the federal law which applies to Utah, Indian tribes must consent to any state assumption of criminal or civil jurisdiction over Indian country. 25 U.S.C. §§ 1321-1326. Although the State of Utah has adopted a statute that accepts jurisdiction over Indian lands subject to Indian consent, no Indian tribe has accepted the State's offer. *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 6.04[3][a], at 537-38 n.47 (Nell Jessup Newton ed., 2012).

But the unbroken line of cases from this Court and other courts firmly establishes that for the claims at issue here, the case falls well within the realm of the tribal systems.

What Petitioners are actually asking the Court to do is not to resolve the split among the states on exhaustion when the case involves state tort or contract issues, but to revisit its entire jurisprudence on the importance of allowing tribal courts to have the right to decide tribal governance issues. Petitioners have failed to provide any good reasons why the Court should revisit this settled law. The basis of these decisions was the Court's desire to support Congress's policy of promoting tribal self-governance. Congress's policy has not changed and so there is no reason to revisit these issues.

The decision of the Utah Supreme Court is consistent with this Court's precedent regarding the roles of the tribal, state, and federal courts. It recognized that the Ute Tribal Court has the responsibility to interpret the UTERO Ordinance and determine whether the tribal officials had acted outside of its scope. It also acknowledged that the Ute Tribal Court should have the initial opportunity to determine whether the UTERO Ordinance is properly within the Tribe's jurisdiction, subject to review by the federal courts.[6]

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[6] This Court has held that tribal courts must be given the first right to determine the scope of the tribe's jurisdiction, subject to federal court oversight. *National Farmers*, 471 U.S. at 855-56 ("[T]he existence and extent of a tribal court's jurisdiction . . . should be conducted in the first instance in the Tribal court

Finally, it directed that the Utah District Court would have authority to adjudicate Petitioners' state law tort claims and related requests for injunctive relief and monetary damages once the Ute Tribal Court had had an opportunity to determine whether the tribal officials had exceeded the scope of their authority under the UTERO Ordinance or exceeded the jurisdiction of the Tribe. As the Utah Supreme Court indicated, the proceedings need to occur in that sequence. If the state court could hear the tort issues first, it could end up finding the tribal officials liable for actions they legally took under tribal law. Pet. App. 30a ("[o]therwise we may be supplanting tribal law that manages tribal government operations with state tort law.").

Contrary to the claims of Petitioners and the State of Utah, the Utah Supreme Court ruling below does not diminish or undermine the authority of state courts; rather, it empowers those courts to do the job for which they were created—to apply state law, not tribal law.[7]

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itself."); Pet. App. 69a n.3 (citing *Wellman v. Chevron, U.S.A., Inc.*, 815 F.2d 577, 579 (9th Cir. 1987)). Further, it has held that tribal courts have exclusive jurisdiction to determine who may come on to tribal land. *Reeves*, 861 F.3d at 899 ("The Supreme Court has long recognized that Indian tribes have sovereign powers, including the power to exclude non-tribal members from tribal land.") (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333).

[7] It is ironic that, in its Brief in Support of Petitioners, the State of Utah accuses its own highest court of undermining Utah state courts, and then turns to the federal court system for help. State Amicus Br. at 11-12. It should not be the role of this Court to mediate between two branches of a state government.

In sum, this is a poor vehicle for resolving the alleged split regarding how the tribal exhaustion doctrine applies to state law tort and contract suits, because it does not implicate that split, such that the Court could decide the case without addressing the split simply by adhering to its rule that cases implicating tribal governance issues must be presented in the first instance to the tribal court.

II. THE MAJORITY OPINION BELOW NEVER STATED THAT EXHAUSTION IS REQUIRED AS A MATTER OF FEDERAL LAW.

Petitioners are asking this Court to reverse what it claims is the Utah Supreme Court's holding that it is bound by this Court's decisions on tribal court exhaustion. In fact, the majority below never held that state courts *are bound* by this Court's decisions on exhaustion. (Petitioners sometimes use the word "bound," sometimes "must," sometimes "required," but all for the same purpose of arguing that the majority opinion found that it had no choice but to require exhaustion based on this Court's decisions.) Rather, the majority concluded, as a matter of prudence and comity, that it would look to the Congressional policy of promoting Indian self-governance in crafting its *own* rule. And it held that, under its own view of comity and prudence in light of Congress's policy of promoting tribal self-governance, the Ute Tribal Court must be given the first opportunity to interpret the UTERO Ordinance and determine the scope of the Tribe's jurisdiction. Pet. App. 26-28a. The State of Utah as *amicus curiae* expressly admits that the Utah Supreme Court decision was based on "federal policy." State Amicus Br. at 7.

Petitioners assert that "[l]ike Utah, Connecticut has held that the tribal remedies exhaustion doctrine 'is binding on [state] courts.' *Drumm v. Brown*, 716 A.2d 50, 64 (Conn. 1998)." Pet. at 17. But the majority never said that state courts are bound by the tribal remedies exhaustion doctrine and never mentioned *Drumm*, much less relied on it. That case was referenced in the concurring opinion.

In fact, there is not a single place in the majority opinion that says that states are bound or required by this Court's exhaustion decisions to require exhaustion. Rather, the majority opinion contains a very narrow holding on exhaustion, finding that, because this case involves an exercise of the Tribe's authority to exclude nonmembers from the Reservation, prudence and comity require that the Ute Tribal Court should have the first opportunity to determinate whether the UTERO and its Commissioners appropriately exercised that right. Pet. App. 28a.

Petitioners also state that the Utah Supreme Court found that, "as a matter of federal law, *National Farmers* and *Iowa Mutual* compelled [the] conclusion [that the tribal remedies exhaustion doctrine applies to state court proceedings]. Pet. App. 29-33a." Pet. at 16. A reading of the pages of the majority opinion cited by Petitioners (Pet. App. 29-33a) shows that the majority never held that it was bound to follow the precedent of those two cases. It simply looked to them for guidance on what comity and prudence suggest.

Petitioners are actually challenging the concurring opinion, which advanced an alternative basis for the majority's holding. That opinion does assert that in *National Farmers* and *Iowa Mutual*, this Court

intended for the tribal remedies exhaustion requirement to apply to all non-tribal courts, both federal and state. Pet. App. 60-62a. All of the quotations in the petition challenging the "binding" nature of the federal tribal remedies exhaustion doctrine upon Utah state courts come from the dissenting opinion's characterization of the majority opinion, or from the concurring opinion, rather than the majority opinion itself.

Admittedly, the majority opinion incorporates the concurring opinion. But Petitioners ask this Court to make a large leap when they assert that this Court should review the legal propositions which are only in the concurrence, instead of the majority's own very different analysis based upon state policy. The majority never said it was bound by this Court's exhaustion decisions. Regardless, there are two important conclusions to be drawn from this: *First*, if it accepts the petition in order to review the question of exhaustion, the Court would be reviewing and potentially reversing the concurring opinion. *Second*, and more importantly, because the majority did not consider itself bound by this Court's precedents on exhaustion for cases in federal courts, and rather applied the principles of Utah law, a ruling by this Court that exhaustion categorically is not binding on states very possibly would not change the outcome on remand. The Utah Justices in the majority would likely continue to require exhaustion, based on their conclusion that state law principles of comity and prudence, and Utah's obligation to further the federal policy of tribal self-governance, mandate exhaustion when the issue involves a tribe's decision about who is allowed on tribal lands. Thus, even if the Court were

to grant certiorari and resolve Petitioners' first question presented in Petitioners' favor, the Respondents would nonetheless likely prevail on remand.

III. BECAUSE THIS CASE ARISES OUT OF A QUASI-JUDICIAL TRIBAL REGULATORY PROCEEDING, AND PETITIONERS ARE THE ONLY PARTY THAT COULD HAVE INVOKED THE JURISDICTION OF THE UTE TRIBAL COURT, IT IS NOT AN APPROPRIATE CASE TO CONSIDER PETITIONERS' SECOND QUESTION PRESENTED.

A. THIS CASE ARISES OUT OF A QUASI-JUDICIAL TRIBAL REGULATORY PROCEEDING.

Petitioners assert that there is no parallel tribal proceeding in this case. Pet. at 12-15, 21-22, 25. Putting aside that neither this Court nor any lower federal court has ever held that there must be a parallel tribal proceeding in order for tribal exhaustion to apply, Petitioners also omit the fact that this case arises out of a quasi-judicial tribal regulatory proceeding by the UTERO Commission, conducted pursuant to the UTERO Ordinance. That proceeding culminated in issuance of the 2013 Letter—the action that Petitioners allege gives rise to their claims. The 2013 Letter remains in full force and effect.

As a result, this case is an awkward vehicle for resolving Petitioners' second question presented, given the central role of tribal regulatory proceedings in this case. If certiorari is granted, the Court would not only have to directly rule on the broad issue of whether there must be a parallel tribal court proceeding in place

in order for exhaustion to be required, but the Court would also have to examine whether a tribal quasi-judicial regulatory proceeding qualifies as a parallel proceeding, and if so, what criteria will apply in the future to the evaluation of tribal regulatory proceedings for exhaustion purposes.

Also, given that the reason Petitioners did not appeal to the Ute Tribal Court is their unsupported claim that the Ute Tribal Court was biased, the Court will also have to decide whether a tribal court proceeding is required when a party asserting the absence of a tribal court proceeding is the one responsible for its absence. In light of these unique facts, this Court would likely have to issue a narrow opinion that does not provide general guidance regarding Petitioners' questions presented.

An additional complication in this case is that the decision on whether to file a tribal court action rested solely with Petitioners. Under the UTERO Ordinance, a party aggrieved by a decision of the UTERO Commission has a right to appeal to Ute Tribal Court. UTERO Ordinance § 11.10. The UTERO Commission may only file an action in Ute Tribal Court when a party subject to a UTERO directive fails to comply and judicial action is necessary to enforce compliance. *Id.* § 11.5. The businesses and individuals subject to the 2013 Letter are in compliance with it, and therefore the UTERO Commission has no basis for initiating a proceeding in Ute Tribal Court.

Justice Lee's dissent inaccurately asserts that the UTERO Commission could have filed a Declaratory Action in Ute Tribal Court, Pet. App. 74a, but that is not a correct interpretation of the UTERO

Ordinance—nor did the UTERO Commission have a need to file such an action, because the 2013 Letter was being complied with.

Petitioners rely on Justice Lee's argument in dissent that the absence of a tribal court proceeding has only an attenuated effect on tribal sovereignty. However, allowing the state court to hear this case would undermine a quasi-judicial tribal regulatory proceeding and therefore would have as much of a negative effect on tribal sovereignty as would undermining a tribal court proceeding.

Finally, Petitioners have failed to support their claim that this is an issue on which there is a split. Five U.S. Circuit Courts of Appeal have considered the issue and not a single one has held that a parallel tribal court proceeding is a required element of exhaustion. All of those Circuit decisions holding that exhaustion is not an element are based on a uniform and persuasive analysis of this Court's discussion of the purposes for the exhaustion doctrine itself.[8]

In sum, the culmination of the unique factors in this case makes it a poor vehicle for addressing the broader issue in Petitioners' second question presented.

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[8] *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80 (2d Cir. 2001); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1299-1301 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995); *Sharber v. Spirit Mtn. Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (per curiam); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991).

B. Since the Inception of the Case, Respondents Have Argued That the Ute Tribal Court, Not the Utah State Courts, Is the Appropriate Tribunal.

Petitioners attempt to leave the impression that Respondents have accepted the jurisdiction of the Utah state courts for the adjudication of the tribal law and governance issues in this case. Pet. at 12-15, 32-33. That is not correct.

Respondents contested Utah state court jurisdiction from the start. Respondents have never consented to the jurisdiction of the Utah state courts for the interpretation of tribal law or the determination of the scope of the Tribe's regulatory authority to exclude nonmembers from the Reservation. The fact that Respondents all filed motions to dismiss in the Utah District Court, including on jurisdictional grounds, is a strong indication that they did not agree with that forum.[9] Additionally, Respondents attempted to

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[9] *See* Defs.' Mot. to Dismiss Verified Compl. & Mem. in Support, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah May 1, 2013); Reply & Mem. in Support of Defs.' Mot. to Dismiss Verified Compl., *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah May 29, 2013); Tribe's Mem. Regarding Special Appearance Issue, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Aug. 2, 2013); Individual & Company Defs.' Mem. on Issue of Special Appearance, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Aug. 2, 2013); Order, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Aug. 12, 2013); Individual & Company Defs.' Mot. to Dismiss Pl.'s Am. Verified Compl. & Mem. in Support, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*,

remove the case to federal court, demonstrating that they did not agree that Utah courts were appropriate for resolving tribal law issues. Mem. Decision & Order, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 13-cv-862 (D. Utah July 1, 2014). Order, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 14-4089 (10th Cir. Aug. 13, 2015).

Therefore, Petitioners' efforts to paint this case as one in which all parties have consented to the jurisdiction of the Utah state courts misstates the position of the Respondents.

No. 130000009 (8th Jud. D. Utah Oct. 7, 2015); Individual & Company Defs.' Reply Mem. Supporting Mot. to Dismiss Verified Compl., *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Nov. 2, 2015); Ind. Defs.' Req. to Submit for Decision & Req. for Reh'g, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Nov. 12, 2015); Tribe's Mot. to Dismiss Am. Verified Compl., *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Dec. 16, 2015); Individual & Company Defs.' Mot. to Join in Tribe's Mot. & Mem. in Support of Mot. to Dismiss Am. Verified Compl., *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Dec. 22, 2015); Tribe's Reply Mem. Supporting Mot. to Dismiss Am. Verified Compl., *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Jan. 6, 2016); Tribe's Mem. in Resp. to Additional Cases Cited by Pls. at Jan. 29, 2016 Hr'g, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 130000009 (8th Jud. D. Utah Feb. 5, 2016); Individual & Company Defs.' Brief, *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 20160362 CA (Utah Ct. App. Nov. 30, 2016).

IV. BECAUSE THE UTAH SUPREME COURT HAS REMANDED THIS CASE FOR FURTHER PROCEEDINGS IN STATE, TRIBAL, OR FEDERAL COURT, INCLUDING FOR THE RESOLUTION OF FEDERAL LAW ISSUES, THIS COURT SHOULD NOT GRANT CERTIORARI.

Petitioners are seeking a writ of review of an interlocutory order remanding this case to a state trial court. This case presents many of the factors which often make interlocutory orders poor vehicles for certiorari: key legal issues have not been briefed, multiple questions of federal law remain unanswered, and the future proceedings in state, tribal, or federal court may obviate the need for further appellate review. Further, as discussed *supra*, an additional complicating factor in this case is the unusual cross-adoption of the majority and concurring opinions. There is the potential that if this Court were to grant certiorari, it would later conclude that it needed to send the matter back to the Utah Supreme Court for clarification of the relationship between the majority opinion and the concurrence, or even conclude on full briefing that it lacks jurisdiction to resolve the questions presented, because the majority opinion is based on Utah state law. 28 U.S.C. § 1257(a); *Jefferson v. City of Tarrant*, 522 U.S. 75, 80-81 (1997).

Whereas the majority opinion stated that exhaustion of tribal remedies is appropriate in this case (Pet. App. 34-35a), the concurring opinion, which as noted *supra* is the order Petitioners would assert in merits briefing is controlling, leaves open the possibility that the proceedings on remand will "perhaps" result in Petitioners never proceeding in the

Ute Tribal Court (Pet App. 73a). The concurrence would direct the Utah District Court to order briefing from the parties on the issue of whether the Ute Tribal Court has jurisdiction over all claims as a matter of Ute Tribal law, and then as a result of that briefing, make its own decision of whether exhaustion is required with respect to all claims. Pet. App. 71-73a.[10]

As explained above, the Utah District Court has not yet taken any action on the remanded matter, and while the Utah Supreme Court has held that its courts cannot proceed with some of Petitioners' claims until the underlying tribal governance-related claims are resolved, it did not order or direct Petitioners to proceed in the Ute Tribal Court. The majority only held that the Utah state courts would not proceed to adjudicate Petitioners' claims until and unless the threshold tribal law issues were first resolved. The uncertainty and lack of clarity in this interlocutory order provide additional reasons why this case is a poor candidate for certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of certiorari.

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[10] The concurring opinion recognized that its discussion of these matters was *dicta*, based upon its own review of tribal law that had not been fully briefed to the state court. In that posture the concurring opinion questioned whether the Tribe's own jurisdictional statutes prevented the Ute Tribal Court from exercising jurisdiction to the fullest extent permitted by federal law. Quite understandably because the issue had not been briefed, the concurring opinion did not identify the controlling tribal law in regard to the way claims against the Tribe are adjudicated.

Respectfully submitted,

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