No. 17-

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

PETITION FOR A WRIT OF CERTIORARI

JOHN D. HANCOCK
JOHN D. HANCOCK LAW GROUP
72 North 300 East,
Suite A (123-13)
Roosevelt, Utah 84066
(435) 722-9099

WILLIAM S. CONSOVOY
Counsel of Record
CAROLINE A. COOK
CONSOVOY MCCARTHY
PARK PLLC
3033 Wilson Boulevard,
Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

Date: March 7, 2018

277903

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until the parties have exhausted parallel tribal court proceedings, applies to state courts as well.

2. Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction.

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; 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, LLC.

CORPORATE DISCLOSURE STATEMENT

Rocks Off, Inc. and Wildcat Rentals, 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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ryan Harvey, Rocks Off, Inc., and Wild Cat Rentals, Inc. submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Utah.

OPINIONS BELOW

The opinion of the Supreme Court of Utah is reported at 2017 UT 75 and is reproduced in the Appendix ("App.") at 1a-93a. The opinion of the Eighth Judicial District Court for Duchesne County, Roosevelt State of Utah is available at 2016 WL 2956729 and is reproduced at App. 94a-135a.

JURISDICTION

The Supreme Court of Utah rendered its decision on November 7, 2017. App. 1a. On January 16, 2018, Justice Sotomayor extended the time to file this petition for writ of certiorari to March 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

It is a settled principle of law that courts have a general duty to exercise their properly invoked jurisdiction. But in two cases, this Court carved out a narrow exception to this principle in the context of federal suits challenging Native American tribes' jurisdiction over pending tribal court proceedings. In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), this Court required the parties seeking

federal relief to exhaust ongoing tribal court proceedings before challenging them. This nonintervention principle was intended to serve the congressional policy of promoting tribal self-governance. It was further motivated by judicial economy interests because exhaustion facilitates federal courts' judicial review of tribal judgments.

In the wake of these decisions, there has been widespread confusion in the lower courts as to the doctrine's proper application, particularly among the states. The two questions that have generated the most division are squarely presented by this petition: whether the doctrine applies in state courts, and whether it applies absent parallel tribal court proceedings. The disagreement on these issues among the lower courts has persisted for nearly two decades, subjecting Native American tribes, states, and litigants from every region of the country to different treatment based on their location. Guidance from this Court is long overdue.

Moreover, these questions raise critically important issues of tribal and state sovereignty, the resolution of which will significantly affect litigants' rights. The Utah Supreme Court largely disregarded these interests below, holding that this Court's decisions strip state courts of their jurisdiction over state-law claims. But *National Farmers* and *Iowa Mutual* neither require nor support such a sweeping holding. The tribal remedies exhaustion doctrine does not apply to state actions, nor to cases in which the parties have declined to invoke a tribal court's jurisdiction. This Court should grant the petition.

STATEMENT OF THE CASE

A. The tribal remedies exhaustion doctrine.

This Court first articulated the tribal remedies exhaustion doctrine in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985). In that case, a Crow tribe member sued a Montana public school in Crow Tribal Court for injuries sustained in a motorcycle accident on school property. The school was located on state-owned land that fell within the boundaries of the Crow reservation. *Id.* at 847. The tribal court entered default judgment against the school district and, instead of appealing within the tribal judicial system, the school district filed suit in federal court challenging the tribe's jurisdiction over the action. *Id.* at 848. The district court agreed that the tribe lacked jurisdiction and granted an injunction barring enforcement of the tribal court's judgment. *Id.* at 848-49. The Ninth Circuit reversed and vacated the injunction, holding that it was the federal district court that lacked jurisdiction. *Id.* at 849 & n.4.

This Court reversed. It held that the district court did have subject matter jurisdiction, because discerning the limits of tribal jurisdiction is a federal question over which Congress gave federal courts jurisdiction. *Id.* at 853 (citing 28 U.S.C. § 1331). Nevertheless, the Court concluded that the district court should have abstained from hearing the case "until after the Tribal Court … had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Id.* at 856-57 (footnote omitted). "Exhaustion of tribal court remedies," in other words, was a prerequisite to the parties' federal action. *Id.* at 857.

To justify this exhaustion requirement, the Court first pointed to Congress's "policy of supporting tribal self-government and self-determination." *Id.* at 856. The Court explained that this "policy favors a rule that will provide the [tribal] forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* The Court further reasoned that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id.* Finally, it noted that when tribal remedies are pursued first, tribal courts can "provide other courts with the benefit of their expertise in … matters [concerning tribal jurisdiction] in the event of further judicial review" by federal courts. *Id.* at 857.

The Court clarified that it was "not suggest[ing] that exhaustion would be required" in all cases. *Id.* at 856 n.21. Specifically, it recognized three circumstances in which the exhaustion doctrine would not apply: (1) when "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; (2) when "the action is patently violative of express jurisdictional prohibitions"; and (3) when "exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." *Id.*

In *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), the Court once again applied the tribal remedies exhaustion doctrine. Like *National Farmers*, this case involved a defendant who had received an unfavorable outcome in tribal court and, instead of pursuing tribal appellate review, filed suit in federal court.

Id. at 11-13. Although the Court applied the exhaustion requirement, it noted that the doctrine does not "deprive the federal courts of subject-matter jurisdiction." *Id.* at 16 n.8. The Court made clear that the exhaustion requirement is "a matter of comity, not [] a jurisdictional prerequisite," emphasizing that the tribal court's "determination of tribal jurisdiction is ultimately subject to review" by the federal courts. *Id.* at 16 n.8, 19.

In later decisions, the Court recognized a fourth exception to the tribal remedies exhaustion doctrine. When "it is clear … that tribal courts lack jurisdiction," such that "adherence to the tribal exhaustion requirement in such cases 'would serve no purpose other than delay,'" it is "unnecessary" to apply the doctrine. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)).

B. Factual background.

The oil and gas industry serves as the bedrock of the Uintah Basin economy. App. 2a. The industry relies heavily on access to the Uintah and Ouray Reservation of the Ute Indian Tribe. *Id.* This gives the tribe immense leverage over the industry itself and the local businesses that support it. In the case of Rocks Off, Inc. and Wild Cat Rentals, Inc., this leverage was illegally used to extort a small business owner and effectively shut him out of the industry altogether.

Ryan Harvey and his wife own Rocks Off and Wild Cat Rentals. App. 4a. Both companies are located outside reservation boundaries on privately owned land. *Id.* Rocks Off provides dirt, sand, and gravel to oil and gas

production companies, including Newfield Production Co., Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. (collectively "Newfield"). These products are utilized on private, county, state, federal, and, in some cases, reservation land. Wild Cat Rentals leases equipment to other companies. *Id.*

In late 2012, Commissioner Dino Cesspooch of the Ute Tribal Employment Rights Office ("UTERO"), a subdivision of the Ute tribal government, began threatening to shut down Rocks Off and Wild Cat Rentals if Harvey did not purchase an access permit and business license from UTERO. *Id.* Harvey explained that he never engaged in business on reservation land, but Cesspooch was relentless, even going so far as threatening to impound Harvey's equipment. Fearing destruction of company property and financial ruin, Harvey acquiesced to Cesspooch's demands and obtained a license and permit for Rocks Off. *Id.*

Cesspooch then accused Harvey of forging the documents. App. 5a. Harvey met with the Commissioner to correct this misunderstanding and believed the matter to be settled. *Id.* But shortly thereafter, while Harvey was driving on a nontribal road, Cesspooch pulled his vehicle alongside Harvey's and forced him off the road. *Id.* In a nearby parking lot, the two then had a conversation in which the Commissioner told Harvey that he "sure needed a good riding horse." *Id.* Harvey understood this to be a demand for a bribe, but he did not agree to make any payments. *Id.*

Not long after this incident, Harvey received a letter from UTERO, signed by Director Sheila Wopsock,

informing him that his access permit was revoked "effective immediately." *Id.* It concluded that Rocks Off "fail[ed] to meet the minimum standard to perform work under the provisions of the UTERO Ordinance." App. 5-6a. Namely, UTERO found "reason to believe that [Rocks Off] ha[d] been engaging in potentially fraudulent activities, including the submission of false and inaccurate official tribal, state, and federal documents." App. 6a.

A few days later, UTERO sent a letter to "all Oil & Gas Companies," stating that Rocks Off was "no longer authorized to perform work on the Uintah and Ouray Reservation" due to its "failure to comply with the UTERO Ordinance." *Id.* The letter warned that "[a]ny use of [Rocks Off] by an employer doing work on the Reservation after receipt of this Notice may result in the assessment of penalties and/or sanctions … to the fullest extent of the law." *Id.* As a result of this letter, Newfield and all of Rocks Off's other oil and gas customers terminated their business relationships with Rocks Off and with any other businesses who dealt with Harvey. App. 6-7a. This included work on private, county, state, and federal land located outside reservation boundaries.

Meanwhile, Commissioner Jackie LaRose, another tribal official who had been present during many of these encounters between Cesspooch and Harvey, had been receiving bribes from Rocks Off competitor Huffman Enterprises, Inc. App. 7a. LaRose, who partially owns LaRose Construction Company, Inc., was allegedly induced by these bribes to abuse his authority by helping divert business away from Rocks Off. *Id.*

C. Procedural history.

Harvey filed suit in state court against the tribe, tribal officials, Newfield, LaRose Construction, Huffman Enterprises, and several other companies. App. 1a, 7a. Harvey brought two federal claims alleging that the tribe and its officials exceeded their jurisdiction and several state-law claims alleging tortious interference with economic relations, extortion, Utah Antitrust Act violations, blacklisting, and civil conspiracy. App. 7a. Harvey sought a declaration, an injunction, and damages. *Id.*

The defendants moved to dismiss on a number of grounds. The tribe argued that claims against it should be dismissed for lack of subject matter jurisdiction, under Utah Rule of Civil Procedure 12(b)(1), due to tribal sovereign immunity and, alternatively, failure to exhaust tribal administrative remedies. *Id.* The tribe further argued that once the claims against it were dismissed, the rest of the complaint should also be dismissed for failure to join an indispensable party (namely, the tribe), under Rule 12(b)(7). All defendants joined in this 12(b)(7) argument. Finally, Newfield, LaRose Construction, and D. Ray C. Enterprises also moved to dismiss the claims against them for failure to state a claim, under 12(b)(6). App. 7-8a. After oral argument on these motions, Harvey moved to supplement his amended complaint to include incidents that occurred after the complaint had been filed. App. 8a.

The district court denied Harvey's motion to supplement as untimely, App. 131-34a, and dismissed the amended complaint with prejudice, App. 135a. The court concluded that it lacked subject matter jurisdiction because

the tribe had not clearly waived its sovereign immunity, App. 97-106a, and that the case could not proceed without the tribe because it was an indispensable party, App. 107-116a. The court thus dismissed the complaint against all defendants. App. 117a. In the alternative, the court granted the 12(b)(6) motions, holding that the complaint failed to state a claim against defendants Newfield, LaRose Construction, and D. Ray C. Enterprises. App. 119-28a.

The district court declined to expressly "decide th[e] issue" of exhaustion, which was "moot" in light of the complaint's dismissal on other grounds. App. 106a. Nevertheless, it opined that "the tribal court … is better situated to determine if the Plaintiffs followed their procedures under the UTERO Ordinance." App 107a. Later in its opinion, when concluding that the individual claims against the tribal officials would have alternatively warranted dismissal for lack of subject matter jurisdiction, the court explained that "[i]nterpreting tribal laws is outside the scope of a state district court's general jurisdiction." App. 130-31a. It asserted that "[a]djudication 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." App. 131a (quoting *Iowa Mut. Ins.*, 480 U.S. at 16).

Harvey appealed to the Supreme Court of Utah. The court unanimously agreed with the district court that the tribe had not clearly waived sovereign immunity and therefore affirmed its dismissal of the tribe for lack of subject matter jurisdiction. App. 3a, 10-15a. The court also unanimously affirmed the dismissal of Newfield, LaRose Construction, and D. Ray C. Enterprises for failure to

state a claim. App. 3a, 38-52a. It held, however, that the tribe was not an indispensable party and therefore vacated the district court's dismissal of the remaining defendants. App. 22-25a. The court also vacated the district court's denial of Harvey's motion for leave to supplement his amended complaint. App. 36-38a. It held that, although the district court did not abuse its discretion in disregarding the supplemental facts for the purposes of these motions to dismiss, it should not have disallowed the amendment going forward. *Id.*

The court then turned to the exhaustion issue to determine whether the suit against the remaining defendants could proceed in state court. The majority held that the tribal remedies exhaustion doctrine must be applied to these state proceedings. App. 26-34a. The court concluded that "[w]hether 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." App. 30a. Accordingly, the federal policy of promoting tribal self-governance required Utah courts to abstain from hearing this case; in short, "[t]he tribal court must have the first opportunity to address these issues," because "[o]therwise [the state courts] may be supplanting tribal law that manages tribal governmental operations with state tort law." *Id.* The court added that the other justifications for exhaustion outlined in this Court's cases, namely judicial economy and the benefit of tribal expertise to the reviewing federal court, also counseled in favor of applying the doctrine. App. 33a. The case was remanded to the district court for a determination of whether it should be dismissed or stayed pending tribal adjudication. App. 34-35a.

Justice Himonas issued a concurrence, which the majority adopted. App. 3a. In it, he further developed the majority's argument for applying the federal exhaustion doctrine to state proceedings, relying on dictum in *Iowa Mutual* that "[a]djudication of [reservation affairs] by *any* nontribal court … infringes upon tribal law-making authority." 480 U.S. at 16 (emphasis added); *see also* App. 60a. He asserted that "[w]hen a state court assumes control over litigation that could also proceed in tribal court it has the exact same effect on tribal self-determination as when a federal court assumes such control," noting that "in both instances, the federal policy of 'encourag[ing] the[] development … [of] [t]ribal courts' is subverted." App. 63a. Justice Himonas claimed that this Court's precedent "does, indeed, require exhaustion … not abstention," drawing a distinction between the two concepts in order to support his conclusion that exhaustion is required in this case, even though no concurrent tribal proceedings exist. App. 68-70a.

Associate Chief Justice Lee, joined by Chief Justice Durrant, concurred in part and dissented in part. Justice Lee agreed with the court's adjudication of every matter on appeal except the exhaustion issue. App. 74a. He concluded that there is "no basis in federal law for a rule of exhaustion that is binding on state courts," noting that the cases from this Court on which the majority relied all concerned proceedings in *federal* court. App. 77a.

Justice Lee explained that exhaustion is generally "a principle that regulates the timing of proceedings in tribunals that operate in a hierarchical relationship," pointing to the analogous federal rule requiring exhaustion of administrative remedies with an agency before seeking

judicial review. App. 78-79a. He further explained that "tribal courts are subordinate to federal courts on questions of jurisdiction" because their "decisions on [such] issues are subject to direct review in federal court," whereas tribal courts "have no such relationship with state courts." App. 80a n.11.

Justice Lee acknowledged this Court's recognition of a congressional policy of promoting tribal self-governance but noted that "these generalities tell us nothing about … how far that policy goes and how to balance it against countervailing considerations" in state court. App. 82a. In his view, this congressional policy is not binding on state courts given the "difference between federal *policy* and federal *law*." App. 83a. "Here," he explained, "there is no applicable law." *Id.* Pointing to the Indian Child Welfare Act and the Major Crimes Act as counterexamples, Justice Lee noted that "[i]f Congress meant for both federal and state courts to yield to tribal courts in every circumstance where tribal courts have a colorable claim of jurisdiction, there would be no reason for [these] statutes [which] giv[e] tribal courts exclusive jurisdiction." *Id.* at 82-83a. Absent binding law to the contrary, then, Utah's "courts have a general duty to exercise [their] jurisdiction" when properly invoked by parties who have "the general prerogative of choosing an appropriate forum." App. 75a. "This is no arbitrary rule," but rather "a core premise of [Utah's] judicial system … aimed at protecting the federal constitutional right to due process and the state constitutional right to open access to court." *Id.* (citing U.S. Const. amend. V; Utah Const. art. I, § 11).

Finally, Justice Lee concluded that even if the exhaustion doctrine applied to state court proceedings,

the relevant Supreme Court precedent does not "require exhaustion in the absence of a pending case filed in tribal courts." App. 84-85a. He noted that no party to this case had filed suit in tribal court, and by forcing them to do so the majority was "not respecting [the tribe's] right of self-governance" but rather "overriding it." App. 91-92a. In Justice Lee's view, when a tribal court "*potentially* has jurisdiction over a matter … but no proceeding is pending before it, the attenuated effect on the tribal court's authority of a nontribal court's adjudication … is not sufficiently compelling to outweigh the general obligation upon a court to exercise its jurisdiction when it has been properly invoked." App. 92a (quotation omitted).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons. First, the Supreme Court of Utah "has decided an important federal question in a way that conflicts with the decision of another state court of last resort." Sup. Ct. Rule 10(b). There is deep division among the states over whether this Court's tribal remedies exhaustion doctrine applies to state court proceedings. In Minnesota, Louisiana, Arizona, Oklahoma, and Washington, the answer is no. But Connecticut and now Utah have held that, if a claim potentially falls within tribal jurisdiction, parties must exhaust tribal remedies before they can file suit in state court.

There is also division among the states and circuits over whether the tribal remedies exhaustion doctrine applies in the absence of parallel tribal court proceedings. Connecticut, New York, and several federal courts have held that the doctrine only applies when there are pending

proceedings in tribal court to which the nontribal court can yield. But in the First, Ninth, and Tenth Circuits, and now in Utah, concurrent proceedings are not required—the doctrine is applied even when the parties have not invoked a tribal court's jurisdiction. These two splits are prevalent and thoroughly entrenched.

Second, these "important question[s] of federal law … [have] not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). This case squarely presents questions that are critically important to the sovereignty of both states and Native American tribes, as well as to litigants. The states have long grappled with the delicate balance between judicial comity and sovereignty, which often comes at a cost to litigants' ability to access courts or select their home forum. Moreover, resolution of these questions significantly affects the complex relationships that exist between the federal government, states, and tribes—relationships that are currently in flux given the ongoing judicial discord regarding tribal exhaustion.

Third, the Utah Supreme Court's extension of the tribal remedies exhaustion doctrine cannot be reconciled with this Court's precedent. Sup. Ct. Rule 10(c). There is no binding federal law that compels state-court plaintiffs to file suit in tribal court. This is unsurprising for several reasons. To the extent that this exhaustion doctrine has any validity, it can be only when tribunals exist in a hierarchical relationship. Because state courts, unlike federal courts, lack the power to review tribal court decisions, an exhaustion requirement serves none of the judicial economy interests set forth in *National Farmers*, all the while unduly burdening the rights of litigants. Congress's general policy of promoting tribal

self-governance is not hindered by state courts exercising their properly invoked jurisdiction.

But even if the Court disagrees, no decision of this Court justifies imposing an exhaustion requirement when, as here, no concurrent tribal proceedings even exist. A nontribal court's adjudication of such a case has far too attenuated an effect on tribal self-governance to warrant forcing the plaintiff out of their chosen forum, especially when no party to the action has even invoked the tribal court's jurisdiction.

I. Lower courts are divided over the proper application of the tribal remedies exhaustion doctrine.

The lower courts are in discord over whether and when the tribal remedies exhaustion doctrine applies. State courts are divided over whether it applies to state actions. And both state and federal courts disagree over whether tribal exhaustion is required absent parallel tribal court proceedings.

A. States are divided over whether the tribal remedies exhaustion doctrine applies in state court.

The tribal remedies exhaustion doctrine is a "prudential rule" that was established by this Court "as a matter of comity." *Iowa Mut. Ins.*, 480 U.S. at 16 n.8, 20 n.14. Under this rule, when faced with a claim challenging tribal jurisdiction, federal courts should generally defer to any ongoing litigation in the tribal court system and abstain from hearing the case "until after the Tribal Court … ha[s] a full opportunity to determine its own jurisdiction

and to rectify any errors it may have made." *Nat'l Farmers Union Ins.*, 471 U.S. at 856-57. This Court has only applied the exhaustion requirement once after its creation in 1985. *See Iowa Mut. Ins.*, 480 U.S. 1; *cf. Strate*, 520 U.S. 438 (declining to apply the exhaustion requirement); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (same); *Hicks*, 533 U.S. 353 (same). As a result, much remains unclear about this doctrine, including what conditions trigger its application. But the first question presented here—whether the tribal remedies exhaustion doctrine applies to state court proceedings—has generated the most confusion and division among state courts.

In the decision below, the Supreme Court of Utah held that it does. The court found that, as a matter of federal law, *National Farmers* and *Iowa Mutual* compelled that conclusion. App. 29-33a. The majority therefore held "Harvey must exhaust his remedies in tribal court, even if the tribal court must end up applying some state law." App. 33a. In his concurrence, which was adopted by the majority, Justice Himonas wrote that "[w]hen a state court assumes control over litigation that could also proceed in tribal court it has the exact same effect on tribal self-determination as when a federal court assumes such control," noting that "in both instances, the federal policy of 'encourag[ing] the[] development … [of] [t]ribal courts' is subverted." App. 63a.

The majority rejected Justice Lee's criticism. According to Justice Lee, "the comity considerations implicated in a case like this one [are] quite distinct from those addressed by the [Supreme Court of the United States] in [*National Farmers* and *Iowa Mutual*]." App. 76a n.3. Those decisions, he explained, "all involved

the interplay between actions filed in federal court and competing cases filed in tribal court." App. 77a. He concluded that because tribal courts are not "subordinate" to state courts—that is, their decisions cannot be reviewed by state courts—a requirement like exhaustion, which exists for tribunals in a "hierarchical relationship," is ill-suited for state courts. App. 78-81a. He concluded that, absent binding law to the contrary, state courts must "yield[] to parties the general prerogative of choosing an appropriate forum" and abide by their "duty to exercise [their] jurisdiction." App. 75a. Although there is a "federal policy of leaving Indians free from state jurisdiction and control" in certain circumstances, "[t]here is a difference between federal *policy* and federal *law*." App. 82-83a (internal quotation marks omitted).

Like 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). The Connecticut Supreme Court acknowledged that this Court's "cases do not conclusively indicate that the exhaustion rule is substantive federal law"—which it presumed would be "binding in state courts pursuant to the supremacy clause of the federal constitution"—"as opposed to merely a federal procedural rule." *Id.* at 62-63. Nevertheless, it determined that "there are strong suggestions that the rule is substantive in nature." *Id.* at 63. It held that, even if this Court "intended its exhaustion holdings … to constitute only a federal court procedural rule based upon, but severable from, the federal policy of supporting tribal self-government and self-determination, deference to that same policy counsels … adopt[ion of] the doctrine for [state] courts." *Id.*

Minnesota took the opposite approach in *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996). There, the Supreme Court of Minnesota considered an employment dispute between a nontribal employee and a Shakopee Mdewakanton Sioux (Dakota) Community business entity. *Id.* at 287. The court held that "[a]lthough the question is a close one," Minnesota courts are not required to "defer to the tribal court on the question of … sovereign immunity," because the Supreme Court's precedents do not require exhaustion of tribal remedies in state courts. *Id.* at 292. Permitting state courts to consider issues like "sovereign immunity does not undermine the authority of tribal courts nor infringe on the ability of Indian tribes to govern themselves." *Id.* (internal quotation marks omitted). The court explained that "Minnesota state courts have a strong interest in determining for [Minnesota] citizens the nature of legal claims that they may assert against tribal business entities." *Id.* In conclusion, the court clarified that it was "tak[ing] jurisdiction only to establish Minnesota law on the issue" not to "change the tribal laws" or "reduce the community's ability to govern itself." *Id.*

Louisiana reached the same conclusion in *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, 992 So.2d 446 (La. 2008). There, the Supreme Court of Louisiana considered a contract dispute between the Coushatta Tribe and a nontribal corporation. Some of the contracts between the parties contained waivers of sovereign immunity and forum-selection clauses designating Louisiana state courts as the proper forums. *Id.* at 448. The state district court therefore rejected the tribe's argument that the state courts lacked subject matter jurisdiction. *Id.* at 449. But the court of appeals reversed, holding that the district court should have

applied the tribal remedies exhaustion doctrine and stayed the case until the tribal court had an opportunity to determine whether the tribe had waived its sovereign immunity. *Id.*

The Supreme Court of Louisiana reversed. In so doing, it described the tribal remedies exhaustion doctrine as a "discretionary policy," "based in comity," that applies "when federal and tribal courts have concurrent jurisdiction." *Id.* at 449, 451. The court noted that "the United States Supreme Court has never held that [it] applies to the states." *Id.* at 450. Pointing to Louisiana's "major interest in contractual disputes involving its corporations and municipalities," and the fact that "state courts, unlike federal courts, do not have the power to review a tribal court's exercise of jurisdiction over non-members," the court held that the district court properly declined to apply the federal exhaustion doctrine to that case. *Id.* at 451-52.

Arizona courts also decline to require exhaustion of tribal remedies. The Supreme Court of Arizona has all but held that the exhaustion doctrine does not apply in state court, declaring: "Even if such a doctrine applied, we believe it would be unwise to hold that the state court should refrain from exercising certain state court jurisdiction in favor of uncertain tribal court jurisdiction." *State v. Zaman*, 946 P.2d 459, 464 (Ariz. 1997).

And the Arizona intermediate courts have been even more explicit in their rejection of the doctrine. In *Astorga v. Wing*, 118 P.3d 1103 (Ariz. Ct. App. 2005), members of the Navajo Nation sued an Arizona mortuary alleging wrongful burial and other claims. *Id.* at 1105. The

plaintiffs originally filed their claims in tribal court, but they then filed a duplicative suit in Arizona state court to ensure compliance with the relevant state limitations period. *Id.* The plaintiffs later requested a stay from the state court, which it denied. *Id.* at 1105-06. The state court of appeals affirmed, holding that "the principle of exhaustion recognized by federal courts in this context does not similarly operate in Arizona state courts." *Id.* at 1106. Exhaustion is only proper in the federal context because "the relationship between the [tribal] courts and the federal courts is … a vertical one" and "federal courts retain the power to review an Indian court's [decision]." *Id.*

The courts of appeals in at least two other states have reached the same conclusion, further deepening this split. Oklahoma's Court of Civil Appeals recognized the tribal remedies exhaustion doctrine as an exclusively federal rule. *See Michael Minnis & Assocs., P.C. v. Kaw Nation*, 90 P.3d 1009, 1013-14 (Okla. Ct. Civ. App. 2003). In addressing a contractual dispute between the Kaw Nation and an Oklahoma corporation, the state appellate court unequivocally concluded that "the exhaustion doctrine does not apply in state court actions." *Id.*

A Washington appellate court has held the same. *See Maxa v. Yakima Petrol., Inc.*, 924 P.2d 372, 373 (Wash. Ct. App. 1996). In so doing, the court of appeals characterized *National Farmers* and *Iowa Mutual* as "involv[ing] *federal* jurisdiction issues," and noted that "[s]tate civil adjudicatory authority over litigation involving tribe members … is not specifically preempted by federal law." *Id.* at 373 (emphasis added). The court concluded that, due to "the State's interest in interpreting and enforcing contracts made with its citizens, and the negligible threat

to tribal self-government," the tribal remedies exhaustion rule need not apply in state actions. *Id.* at 375.

B. Federal and state courts are divided over whether the tribal remedies exhaustion doctrine applies in the absence of parallel tribal court proceedings.

The division among the states primarily concerns whether the tribal remedies exhaustion doctrine applies to state court proceedings. But the current state of the law is so confused that even those states that extend the doctrine in this way disagree over when it applies. Connecticut and Utah agree that the exhaustion doctrine applies in state courts, but they disagree as to whether it requires exhaustion when the parties have declined to file suit in tribal court. Several federal courts have weighed in on this issue too—making the division on this question that much more pronounced.

A majority of the Utah Supreme Court agreed with Justice Himonas's position that, as a matter of federal law, Utah courts must always refrain from hearing a case raising questions of tribal jurisdiction, even if there are no concurrent tribal proceedings to defer to. App. 68-70a. A number of federal circuits agree. *See, e.g., Ningret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ("Where applicable, this prudential doctrine has force whether or not an action actually is pending in a tribal court."); *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) ("[T]he exhaustion rule does not require an action to be pending in tribal court."); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (stating that the existence of concurrent tribal proceedings is "irrelevant").

Justice Lee, in contrast, concluded that even if the exhaustion doctrine applied to state court proceedings, it would not be triggered absent a parallel case in tribal court. App. 84-93a. Connecticut is in agreement with Justice Lee and has held "that exhaustion is not required in the absence of a pending action in tribal court." *Drumm*, 716 A.2d at 64. The Connecticut Supreme Court explained that "the impact on a tribal court's authority of a nontribal court's adjudication of a matter over which the tribal court could, but has not, exercised jurisdiction is much more attenuated," and "[a]ny such effect is speculative and indirect, consisting merely of a lost opportunity or a potential unrealized." *Id.* at 65. A New York appellate court has reached the same conclusion. *See Seneca v. Seneca*, 741 N.Y.S.2d 375, 379 (N.Y. App. Div. 2002) (holding that the tribal remedies exhaustion doctrine "does not apply to this case because there is no action pending in a … tribal court"). And a number of federal courts have held the same. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993) (declining to apply the exhaustion doctrine in the absence of parallel proceedings pending in tribal court); *Ute Dist. Corp. v. Sec'y of Interior of the U.S.*, 934 F. Supp. 1302, 1311-12 (D. Utah 1996) (same); *Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905, 911 (S.D. Miss. 1996) (same).

* * *

In sum, lower courts are in need of guidance regarding the scope of this Court's tribal remedies exhaustion doctrine. As many state court justices have recognized, the split over whether the rule applies in state court is entrenched. *See, e.g., Meyer & Assocs.*, 992 So.2d at 461 (Kimball, J., dissenting) (lamenting Louisiana's

split with Connecticut); *Drumm*, 716 A.22d at 61 nn.10-11 (acknowledging Connecticut's split with Minnesota and Washington); *see also* App. 77a n.4 (acknowledging that Connecticut, Louisiana, and Arizona are part of the split Utah now joins). The deep division over whether the doctrine applies absent parallel tribal court proceedings has likewise been recognized by the lower courts. *See, e.g.,* App. 89-93a (highlighting Utah's split with Connecticut); *Seneca*, 741 N.Y.S.2d at 379 (acknowledging New York's split with federal circuits); *Drumm*, 716 A.2d at 64 nn.16-17 (citing federal courts on either side of the split).

Over the past two decades, the division has only continued to fracture and deepen, affecting states in every region of the country. These splits are so prevalent that some tribes, like the Navajo Nation, are subjected to different jurisdictional rules based on whether the parties file suit in Arizona or Utah. The Court should not continue to allow this confusion and disagreement to fester and spread, leaving litigants of different states with different degrees of due process protections, and allowing Native American tribes to be subjected to different rules of jurisdiction under federal law based on which courts they are haled into.

II. This petition raises unsettled federal questions that are critically important to state and tribal sovereignty and to litigants' rights.

Even if there were no split among lower courts, this case would still warrant review because it presents unsettled and important federal questions that should be resolved by this Court. The exhaustion requirement has been enforced only twice by this Court, and both cases

presented the same narrow set of circumstances: A non-tribal defendant, after receiving an unfavorable ruling from a tribal court, files a federal lawsuit challenging the tribal court's jurisdiction over the ongoing tribal proceedings, which were initiated in tribal court by a tribe member. *See Nat'l Farmers Union Ins.*, 471 U.S. 845; *Iowa Mut. Ins.*, 480 U.S. 9. The Court has rejected every attempt to expand the doctrine beyond these limited facts. *See, e.g., Strate*, 520 U.S. at 445-53 (declining to read *National Farmers* and *Iowa Mutual* as "establish[ing] tribal-court adjudicatory authority" beyond simply "allowing tribal courts initially to *respond* to an *invocation* of their jurisdiction" (emphasis added)); *El Paso Nat. Gas*, 526 U.S. at 482-88 (holding that the tribal remedies exhaustion doctrine does not apply to claims brought under the Price-Anderson Act); *Hicks*, 533 U.S. at 369 (refusing to apply the exhaustion requirement to claims against state officials "relating to their performance of official duties").

Nothing in this Court's cases suggests that the tribal remedies exhaustion doctrine applies in state courts. For starters, the only two cases in which the Court has applied the doctrine were *federal* cases. As Justice Lee recognized below, "the comity considerations implicated in [state cases are] quite distinct from those addressed by [this Court]" in the federal cases. App. 76a n.3. In fact, when this Court was faced with a state case in which a federally recognized Native American tribe was the defendant, the tribal remedies exhaustion doctrine was not even discussed. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (concluding that the tribe was entitled to sovereign immunity without even suggesting that the tribal court should have had the first opportunity to decide the question). The Court has never addressed

whether the tribal remedies exhaustion doctrine applies to the states, but if anything can be gleaned from the Court's related precedents, it's that the Court would answer that question in the negative. *See Michael Minnis & Assocs.*, 90 P.3d at 1014 (citing *Kiowa* to support the court's conclusion that "the exhaustion doctrine does not apply in state court actions"); *Meyer & Assocs.*, 992 So.2d. at 452 (Calogero, J., concurring) (same).

Neither has the Court indicated that the tribal remedies exhaustion doctrine applies in the absence of parallel tribal court proceedings. In fact, the language employed by this Court's decisions suggests the opposite. *See, e.g., Nat'l Farmers Union Ins.*, 471 U.S. at 857 ("Exhaustion of tribal court remedies … will encourage tribal courts to explain … [their] precise basis for *accepting* jurisdiction." (emphasis added)); *Iowa Mut. Ins.*, 480 U.S. at 17 ("Until [tribal court proceedings are] *complete* … federal courts should not *intervene*." (emphasis added)); *Strate*, 520 U.S. at 445-53 (describing the exhaustion doctrine as a rule "allowing tribal courts initially to *respond* to an *invocation* of their jurisdiction" (emphasis added)).

These questions are not only unsettled but also of critical importance to tribal and state sovereignty and to principles of due process. To hold that the tribal remedies exhaustion doctrine applies in state court is to hold that a state's jurisdiction may be abrogated by a mere policy of Congress, absent a duly enacted law implementing such a policy. This would raise grave concerns for state sovereignty and would contradict the "longstanding judicial policy" against federal interference in state court actions. *Younger v. Harris*, 401 U.S. 37, 40-41 (1971).

Moreover, such an approach to *National Farmers* and *Iowa Mutual* would raise the specter of an Anti-Injunction Act violation. *See Mitchum v. Foster*, 407 U.S. 225, 228-29 (1972) (recognizing that the Anti-Injunction Act serves as "an absolute prohibition against enjoining state court proceedings" unless it is "expressly authorized by Act of Congress [or] … necessary in the aid of [a federal] court's jurisdiction [or] … to protect or effectuate any [federal court] judgment" (quotation omitted)).

These limits on federal interference with state court proceedings are based in interests of comity and federalism that "occup[y] a highly important place in our Nation's history and its future." *Younger*, 401 U.S. at 44-45. The federal Constitution provides for

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. If a state decides to adopt its own policy of comity and thereby require its courts to defer to tribal proceedings, that is the state's prerogative. But under our system of government, federal courts cannot mandate that state courts adopt federal policy unless Congress has cemented that policy into binding federal law. *See City of New York v. United States*, 971 F. Supp. 789, 794-95 (S.D.N.Y. 1997) (noting that "Congress may encourage a state to regulate in a particular way or to provide

incentives to states as a method of influencing a state's policy choices, or may pass appropriate legislation in areas of federal concern that preempts contrary state laws," but it cannot otherwise "require action by the states in pursuit of federal policies").

The resolution of the questions presented also is important to litigants. Under "well-established due process principles[,] ... a State must afford to all individuals a meaningful opportunity to be heard in its courts." *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (internal quotation marks omitted). However, pursuant to its decision below, Utah requires parties to file suit in tribal courts, where constitutional guarantees of due process and equal protection "are not identical" to those in state court. *Hicks*, 533 U.S. at 384 ("Although the Indian Civil rights Act of 1968 (ICRA)" applies "a handful of analogous safeguards" to tribal proceedings, "there is a definite trend by tribal courts toward the view that they ha[ve] leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the U.S. Supreme Court precedents jot-for-jot.") (internal qutation marks omitted). And if a tribal court determines it has jurisdiction over the dispute, the litigants will be barred from later addressing their state-law claims in state court under res judicata. By effectively shutting the state courthouse doors, Utah has impaired litigants' right of "free access to courts of justice." *Downes v. Bidwell*, 182 U.S. 244, 282 (1901); *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002).

III. The Supreme Court of Utah incorrectly decided these important federal questions.

In the decision below, the Utah Supreme Court took the tribal remedies exhaustion doctrine further afield than any court before it, holding that state courts must dismiss a case in which tribal courts potentially have jurisdiction, even when there are no parallel tribal proceedings. App. 29-33a; *see also* App. 68-70. This Court's precedents do not support such a sweeping judgment. *National Farmers* and *Iowa Mutual* boldly elevated a congressional policy of comity and judicial-economy interests above litigants' constitutional rights in a narrow category of federal cases. But that trade-off would be even more problematic in the state-court context because the rationales of congressional policy and judicial economy carry little, if any, weight here. Moreover, this new context implicates important interests of state sovereignty, and the Court has never subjugated state-court autonomy to these same prudential interests absent a congressional statutory mandate.

Despite this Court's emphasis on comity in *National Farmers* and *Iowa Mutual*, the exhaustion doctrine, in practice, does not require the federal government to give much deference to a tribal court's determination of tribal jurisdiction. Federal courts retain the authority to review such tribal court decisions and can therefore ultimately substitute the tribal court's judgment for its own. *See Nat'l Farmers Union Ins.*, 471 U.S. at 853; *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008) ("[T]he civil jurisdiction of a tribal court is a question of federal law, and we review the issue de novo." (citation omitted)). On the other hand, state courts have no opportunity to review tribal court decisions. *See* App. 80a n.11; *Meyer & Assocs.*, 992 So.2d

at 446 ("[S]tate courts, unlike federal courts, do not have the power to review a tribal court's exercise of jurisdiction over non-members."); *Astorga*, 118 P.3d at 1106 ("Unlike Arizona state courts, federal courts retain the power to review an Indian court's exercise of jurisdiction over non-members."). Moreover, if the exhaustion doctrine were to apply in state court, a state's citizens may be bound by a foreign sovereign's interpretations of state law without any opportunity to have the state review them. *See* App. 33a ("Harvey must exhaust his remedies in tribal court, even if the tribal court must end up applying some state law."). This encroachment on state sovereignty cannot stand absent a federal law authorizing it. *See supra* at 25-27.

Although federal courts may choose to adopt a federal policy promoting tribal self-government and self-determination, *see Iowa Mut. Ins.*, 480 U.S. at 14, such a policy cannot compel state courts to relinquish their jurisdiction in order to do the same. As Justice Lee noted below, "[t]here is a difference between federal *policy* and federal *law*." App. 83a. The federal *laws* that "embody" the congressional policy of comity primarily concern the relationship between the *federal* government and Native American tribes. *Iowa Mut. Ins.*, 480 U.S. at 14 n.5 (citing 25 U.S.C. § 5301, which is expressly based on "careful review of the *Federal* Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people," and 25 U.S.C. § 5123, which, in part, limits the actions of the "[d]epartments or agencies *of the United States*" (emphases added)).

There are indeed federal statutes limiting state-court jurisdiction over certain matters involving Native Americans. *See, e.g.,* Indian Child Welfare Act, 25 U.S.C.

§ 1901, *et seq.*; Major Crimes Act, 18 U.S.C. § 1153. But these acts only further evince that federal law does not require state courts to defer to tribal courts in every case in which the tribe maintains a colorable claim of jurisdiction. After all, if that were the case, Congress would have no need to strip state courts of jurisdiction over certain crimes, 18 U.S.C. § 1153, or to grant tribal courts "jurisdiction exclusive as to any state" in child custody proceedings, 25 U.S.C. § 1911(a). *See also Maxa*, 924 P.3d at 373 (noting that "[s]tate civil adjudicatory authority over litigation involving tribe members … is not specifically preempted by federal law"). In the absence of a federal *law* compelling state courts to relinquish jurisdiction in order to promote the goals of Congress, federal *policy* standing alone cannot abrogate state sovereignty. *See supra* at 25-27; *see also City of New York*, 971 F. Supp. at 794-95 ("It is now well settled that the Tenth Amendment and the principles of federalism inherent in the structure of the Constitution limit the ways in which Congress can require action by the states in pursuit of federal policies.") (citing *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)).

The other purported rationales for the tribal remedies exhaustion doctrine are likewise inapplicable in state court. In *National Farmers*, the Court explained that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed," and by allowing tribal courts to "provide other courts with the benefit of their expertise in … matters [concerning tribal jurisdiction] in the event of further judicial review." 471 U.S. at 856-57. These judicial economy interests are

sensibly invoked in the federal context because federal and tribal courts exist in a hierarchical relationship, in the sense that federal courts have the authority to directly review tribal court decisions regarding federal law. *Id.* at 850.

But tribal courts "have no such relationship with state courts." App. 80a n.11. As a consequence, "the orderly administration of justice" in state courts is not served by developing a record in Tribal Court because that record will not be utilized by state courts on review; nor will state courts "benefit" from a tribal court's "expertise … in the event of further judicial review." *Nat'l Farmers Union Ins.*, 471 U.S. at 857.

In fact, outside of a hierarchical relationship, an exhaustion requirement is not about exhaustion at all—it is about disabling state courts from hearing state-law claims involving tribes. The entire concept of exhaustion assumes direct review by the abstaining tribunal after initial adjudication. This is demonstrated in the exhaustion requirements of administrative law and habeas corpus, which both discuss exhaustion as an initial step to be taken before seeking judicial review in a particular tribunal. *See Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) ("[N]o one is entitled to judicial relief for a supposed or threatened injury *until* the prescribed administrative remedy has been exhausted." (emphasis added)); *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) ("First, a state prisoner must exhaust available remedies *before* presenting his claim to a federal habeas court." (emphasis added)).

While the roles of congressional policy and judicial economy are significantly weakened, if not entirely absent,

in the state-court context, the litigants' interests on the other side of the ledger remain as strong as ever. It is a "core premise of our judicial system," that "[w]hen the parties file suit in a court that has … jurisdiction … our courts have a general duty to exercise that jurisdiction." App. 75a; *see also Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-97 (1971) ("[I]t is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it."); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("[Courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). And "plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous []consistent with jurisdictional and venue limitations." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013). As this Court has recognized, the tribal remedies exhaustion requirement is "not [] a jurisdictional prerequisite." *Iowa Mut. Ins.*, 480 U.S. at 16 n.8.

Moreover, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum," which is "entitled to greater deference when the plaintiff has chosen the home forum," as Harvey has here. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981); *see also Norwood v. Kirkpatrick*, 349 U.S. 29, 35 (1955) ("[P]laintiff's choice of forum should rarely be disturbed." (quotation omitted)); *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) ("There is good reason why [a case] should be tried in the plaintiff's home forum if that has been his choice," and "[h]e should not be deprived of [those] advantages."). These principles are "aimed at protecting the federal constitutional right to due process and … open access to court." App. 75a. The rights of litigants, not to mention the states' interests in interpreting and enforcing their

own laws, should not be so readily cast aside for negligible interests in nonbinding federal policy and efficiency. *See Maxa*, 924 P.2d at 375.

At the very least, state courts should not be compelled to abandon their duty to exercise jurisdiction when, as here, parties have come to that court and *only* that court. In such cases, the state courts' exercise of jurisdiction will not "intervene" in tribal court proceedings because no such proceedings exist. *Iowa Mut. Ins.*, 480 U.S. at 17. Likewise, the tribal court would have no need, nor ability, to "explain" its "basis for *accepting* jurisdiction," because its jurisdiction would not yet have been invoked. *Nat'l Farmers Union Ins.*, 471 U.S. at 857 (emphasis added); *see also Strate*, 520 U.S. at 445-53 (describing the exhaustion doctrine as a rule "allowing tribal courts initially to *respond* to an *invocation* of their jurisdiction" (emphasis added)). Hence, "the attenuated effect on the tribal court's authority of a nontribal court's adjudication of the matter [would] not [be] sufficiently compelling to outweigh the general obligation upon a court to exercise its jurisdiction when it has been properly invoked." *Drumm*, 617 A.2d at 65-66. The parties' forum choice, on the other hand, would of course still "deserve[] deference" in the state-court context. *Atl. Marine Constr. Co.*, 134 S. Ct. at 581.

The federal interests motivating the tribal remedies exhaustion doctrine's application in *National Farmers* and *Iowa Mutual* are nonexistent in state court. Meanwhile, the imposition of a federal exhaustion requirement in the decision below rides roughshod over state sovereignty and litigants' rights. The decision of the Utah Supreme Court conflicts with this Court's precedents and should be reversed.

CONCLUSION

For the above stated reasons, the Court should grant the petition.

Respectfully submitted,

JOHN D. HANCOCK
JOHN D. HANCOCK LAW GROUP
72 North 300 East,
Suite A (123-13)
Roosevelt, Utah 84066
(435) 722-9099

WILLIAM S. CONSOVOY
Counsel of Record
CAROLINE A. COOK
CONSOVOY MCCARTHY
PARK PLLC
3033 Wilson Boulevard,
Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

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