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 UINTAH
AND OURAY RESERVATION, *et al.*,

Respondents.

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

REPLY BRIEF

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
JEFFREY M. HARRIS
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: June 5, 2018

281252

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

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Petitioners was set forth at page iii of the Petition for Writ of Certiorari and there are no changes to that statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

I. The Acknowledged Split of Authority over the Scope of the Tribal Remedies Exhaustion Doctrine Is Squarely Implicated Here..... 3

A. The Lower Courts Are Divided over Whether the Tribal Remedies Exhaustion Doctrine Applies in State Court..... 3

B. The Utah Supreme Court Decided the Question Presented as a Matter of Federal Law..... 6

II. This Court Should Also Grant Certiorari on the Question Whether the Tribal Remedies Exhaustion Doctrine Applies in the Absence of a Pending Tribal Proceeding..... 8

III. The Posture of This Case Provides No Basis to Postpone This Court's Review 10

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Cases *Page*

Altheimer & Gray v. Sioux Mfg. Corp.,
983 F.2d 803 (7th Cir. 1993) 9

Astorga v. Wing,
118 P.3d 1103 (Ariz. Ct. App. 2005) 4

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975). 10

Drumm v. Brown,
716 A.2d 50 (Conn. 1998) 6, 7, 8

Gavle v. Little Six, Inc.,
555 N.W.2d 284 (Minn. 1996) 3, 4

Iowa Mut. Ins. Co. v. LaPlante,
480 U.S. 9 (1987). 1

Jefferson v. City of Tarrant, Ala.,
522 U.S. 75 (1997). 10

Maxa v. Yakima Petroleum, Inc.,
924 P.2d 372 (Wash. Ct. App. 1996) 4

Meyer & Assocs., Inc. v. Coushatta Tribe of La.,
992 So.2d 446 (La. 2008) 3, 5, 6

Michael Minnis & Assocs., P.C. v. Kaw Nation,
90 P.3d 1009 (Okla. Ct. Civ. App. 2003) 3-4

Cited Authorities

Page

Michigan v. Long,
463 U.S. 1032 (1983) 2, 8

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985) 1

Patsy v. Bd. of Regents of State of Fla.,
457 U.S. 496 (1982) 11

Seneca v. Seneca,
741 N.Y.S.2d 375 (N.Y. App. Div. 2002) 8

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the state and federal courts are divided over two important questions regarding the tribal remedies exhaustion doctrine: whether that doctrine applies in state courts, and whether it applies absent parallel tribal court proceedings.

Respondents instead argue that those entrenched splits are not implicated here because this case involves issues of "tribal governance." But that argument fails at every step. Several of the cases in these splits addressed tribal sovereign immunity—a paradigmatic aspect of tribal self-government. Moreover, this case does not involve some arcane aspect of tribal governance that is uniquely suited to tribal court—it instead involves state statutory and common-law claims for extortion, conspiracy, antitrust violations, and tortious interference. Respondents attempt to distinguish the conflicting cases based on factual or procedural nuances. But there is no doubt that Petitioners' claims would have proceeded without *any* need to exhaust tribal remedies if this case had arisen in one of the many jurisdictions that have held that the tribal remedies exhaustion doctrine does not apply in state court.

Respondents also suggest that the Utah Supreme Court's decision was based on state rather than federal law, but the decision speaks for itself: the court cited more than ten federal cases—including this Court's decisions 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)—but not a single Utah state case in support of its exhaustion

rule. Even if it were unclear whether the decision below rested on federal or state law, this Court presumes "the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

Respondents fare no better in seeking to evade review of the second question presented—whether the tribal remedies exhaustion doctrine applies in the absence of parallel litigation in tribal court. Respondents assert that this split is not implicated here either, because an administrative licensing proceeding before the UTERO Commission constitutes a "parallel" tribal proceeding. But any proceedings before the UTERO Commission concluded in 2013, and Respondents do not even attempt to argue that this administrative body would have jurisdiction to consider Petitioner's Utah state-law claims.

* * *

At bottom, Respondents unsuccessfully seek to inject complexity into what is actually a straightforward case: Petitioners were deprived of a forum for their state-law claims based on the Utah Supreme Court's misapplication of a federal exhaustion doctrine that was never designed to apply in state court. And such a rule is doubly problematic when, as here, a court refuses to adjudicate such claims *despite the absence of any pending tribal proceeding.* Both of the questions presented have been answered differently in several other jurisdictions, and this Court's intervention is needed to restore uniformity to this important area of federal law.

I. The Acknowledged Split of Authority over the Scope of the Tribal Remedies Exhaustion Doctrine Is Squarely Implicated Here.

A. The Lower Courts Are Divided over Whether the Tribal Remedies Exhaustion Doctrine Applies in State Court.

As Petitioners explained (Pet. 15-21), there is a sharp divide over whether and to what extent the tribal remedies exhaustion doctrine applies in state court. Utah and Connecticut have held that the exhaustion doctrine does apply, whereas Minnesota, Louisiana, Arizona, Oklahoma, and Washington have held that it does not. Respondents do not deny that this split exists. BIO 12-17. They instead argue that this case does not implicate the split because, unlike those cases, it involves "issues of tribal governance." *Id.* at 13. That purported distinction fails for several reasons.

At the outset, Respondents do not—and cannot—dispute that the courts deciding the cases on the opposite side of the split carefully analyzed this Court's precedents in *National Farmers* and *Iowa Mutual* and concluded that those holdings do not apply *at all* to claims filed in state court. *See Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290-91 (Minn. 1996) ("[W]e conclude that state courts have jurisdiction of [the plaintiff's] claims, including those arising within Indian country … ."); *Meyer & Assocs., Inc. v. Coushatta Tribe of La.*, 992 So.2d 446, 450 (La. 2008) ("[T]he United States Supreme Court has never held that the exhaustion of tribal remedies doctrine applies to the states."); *Michael Minnis & Assocs., P.C. v. Kaw Nation*, 90 P.3d 1009, 1013-14 (Okla. Ct. Civ. App.

2003) ("[T]he exhaustion doctrine does not apply in state court actions."); *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372, 373-75 (Wash. Ct. App. 1996) (distinguishing *National Farmers* and *Iowa Mutual* because "[s]tate civil adjudicatory authority over litigation involving tribe members … is not specifically preempted by federal law"); *Astorga v. Wing*, 118 P.3d 1103, 1106-07 (Ariz. Ct. App. 2005) ("Despite Petitioners' argument ... the principle of exhaustion recognized by federal courts in this context does not similarly operate in Arizona state courts.").

Respondents' attempt to distinguish those cases on the ground that they did not implicate "tribal governance" fails. Like this case, the Minnesota Supreme Court's decision in *Gavle* involved both "non-Indian individuals and Indian tribal business entities" and "acts occurring both within Indian country and outside." 555 N.W.2d at 290. And the case involved matters that unquestionably implicated tribal sovereignty, including the question whether a certain tribe-owned business entity was protected by tribal sovereign immunity. *Id.* at 288. The Minnesota Supreme Court squarely rejected the notion that state courts were required to "defer to the tribal court on the question of … sovereign immunity." *Id.* at 292; *see also id.* ("Minnesota state courts have a strong interest in determining for [Minnesota] citizens the nature of the legal claims that they may assert against tribal business entities.").[1] Under Respondents' theory, however, exhaustion surely would have been required,

1. The court ultimately held on the merits that the corporation was protected by tribal sovereign immunity, without suggesting that this question first needed to be considered by a tribal court. *See Gavle v. Little Six, Inc.*, 555 N.W.2d. 284, 292-96 (Minn. 1996).

as few matters are more integral to "tribal governance" than the question of which entities are protected by the tribe's sovereign immunity.

Similarly, *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, was a contract dispute that required the court to determine, *inter alia*, whether the tribe had waived its sovereign immunity. 992 So.2d 446, 449 (La. 2008). The tribe argued that the question of sovereign immunity should be determined by a tribal court in the first instance. But the Supreme Court of Louisiana disagreed, holding that "the United States Supreme Court has never held that the exhaustion of tribal remedies doctrine applies to the states." *Id.* at 450. Indeed, the court reached that holding even though the tribe argued—just as Respondents argue here—that adjudication of the claims would be intertwined with questions of tribal law. *See id.* at 450-51 (refusing to require exhaustion in tribal court notwithstanding the tribe's argument that waivers of sovereign immunity were invalid under tribal law).

Respondents further contend that these cases are distinguishable because "state law issues predominated" in those decisions. BIO 14. Once again, that is no distinction at all. Petitioners' complaint includes state-law claims alleging tortious interference with economic relations, extortion, Utah Antitrust Act violations, blacklisting, and civil conspiracy. Pet. App. 7a. Questions of state law will obviously "predominate" in the adjudication of those claims; indeed, it would be untenable to suggest that Petitioners could pursue such paradigmatic state-law claims in state court only after they have first been adjudicated in tribal courts that have no particular experience or expertise handling such matters.

At bottom, Respondents seek to diminish the conflict of authority by focusing on immaterial factual or procedural differences between the decisions on both sides of the split. But such nuances provide no basis for postponing this Court's resolution of a well-documented split of authority that has led to pervasive confusion among state courts. *See, e.g., Meyer & Assocs.*, 992 So.2d at 461 (Kimball, J., dissenting) (lamenting Louisiana's split with Connecticut); *Drumm v. Brown*, 716 A.2d 50, 61 n.11 (Conn. 1998) (acknowledging Connecticut's split with Minnesota and Washington); *see also* Pet. App. 77a n.4 (Lee, A.C.J., dissenting) (acknowledging that Connecticut, Louisiana, and Arizona are part of the split Utah now joins).

B. The Utah Supreme Court Decided the Question Presented as a Matter of Federal Law.

Respondents next assert that the Utah Supreme Court's decision turned solely on "state law principles of comity and prudence" rather than "this Court's exhaustion decisions." BIO 18-21. They also seek to brush aside much of the analysis from the decision below on the ground that it appeared in Justice Himonas's concurrence rather than the majority opinion. Those arguments fail. Foremost, given that "[t]he majority opinion *incorporates Justice Himonas's concurring opinion*," Pet. App. 3a (emphasis added), Respondents cannot wave away the concurrence as an afterthought.

Respondents' suggestion that this is all just a matter of Utah state law fares no better. In support of its holding that Petitioners were required to exhaust tribal-court remedies, the majority opinion cited *eleven* federal cases—including this Court's decisions in *National Farmers* and

Iowa Mutual —but not a single Utah state-court decision. Pet. App. 26a-29a.[2] While discussing those federal cases, the majority repeatedly noted that exhaustion of tribal remedies was "*mandatory* before another court exercises jurisdiction" and a "requirement." Pet. App. 27a (emphasis in original). The court also cited this Court's decision in *Iowa Mutual* as the foundation of what it called the "exhaustion of tribal remedies doctrine." Pet. App. 26a.

Justice Himonas's concurrence, which was "incorporate[d]" into the majority opinion, Pet. App. 3a, eliminates any doubt that the court considered the tribal exhaustion doctrine to be federal law that is binding on state courts. The concurrence viewed the exhaustion doctrine as a "'component of the law embodying the federal policy supporting tribal self-government and self-determination' that is therefore binding on the states under the Supremacy Clause." Pet. App. 60a (quoting *Drumm*, 716 A.2d at 62-63). That opinion also acknowledged a split of authority on this issue but argued that "it would be anomalous to conclude that the tribal exhaustion rule only applies in federal court" in light of the *federal* policies and statutes promoting "tribal self-government and self-determination." Pet. App. 61a-64a.

Even if there were ambiguity about whether the Utah Supreme Court's decision turned on federal or state law—and there is not—that would be insufficient to divest this Court of jurisdiction. "[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal

2. The majority cited two Utah state cases in a footnote while discussing the substantive scope of Petitioners' claims, not the tribal exhaustion doctrine. Pet. App. 34a-35a n.11.

law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground *is not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040-41 (emphasis added). It is certainly far from "clear" that an opinion citing exclusively federal cases in support of its exhaustion holding somehow rested *sub silentio* on Utah state law.

II. This Court Should Also Grant Certiorari on the Question Whether the Tribal Remedies Exhaustion Doctrine Applies in the Absence of a Pending Tribal Proceeding.

Certiorari is also warranted to address whether the tribal remedies exhaustion doctrine applies in the absence of pending litigation in tribal court. *See* Pet. 21-23. This issue, too, has led to an entrenched split of authority among the state and federal courts. *See, e.g.,* Pet. App. 89a-93a (noting Utah's split with Connecticut); *Seneca v. Seneca*, 741 N.Y.S.2d 375, 379 (N.Y. App. Div. 2002) (acknowledging New York's split with federal circuits); *Drumm*, 716 A.2d at 64 nn.16-17 (citing federal courts on both sides of the split).

Respondents assert that no "lower *federal* court" has held that pending tribal litigation is required to trigger the tribal remedies exhaustion doctrine. BIO 21 (emphasis added). But they do not dispute that a number of *state* courts have held precisely that. *See*, *e.g.*, *Drumm*, 716 A.2d at 64 ("[E]xhaustion is not required in the absence of a pending action in the tribal court."); *Seneca*, 741 N.Y.S.2d

at 379 (holding that the tribal remedies exhaustion doctrine "does not apply to this case because there is no action pending in a … tribal court"). In a case Respondents ignore, moreover, the Seventh Circuit also distinguished *National Farmers* and *Iowa Mutual* on the ground that in the matter under review "there [was] no case pending in tribal court." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993).

Respondents further contend that the split is not implicated here because this dispute "arises out of a quasi-judicial tribal regulatory proceeding by the UTERO Commission." BIO 21-22. But Petitioners do not challenge action by the UTERO Commission on tribal-law grounds; they instead bring *Utah state-law claims* for extortion, conspiracy, antitrust violations, tortious interference, and other wrongful acts, and they seek declaratory relief on a matter of *federal law*. Respondents do not—and cannot—argue that the UTERO Commission would have jurisdiction to adjudicate those claims. Moreover, even Respondents acknowledge that the licensing process before the UTERO Commission "culminated in issuance of the 2013 Letter" directing oil and gas companies not to do business with Petitioners. BIO 21. It would be anomalous, to say the least, to hold that Petitioners may not pursue state-law claims in state court based on the existence of a nonjudicial tribal administrative procedure that "culminated" more than five years earlier. The licensing process before the UTERO Commission is not in any way a "parallel" tribal court proceeding for purposes of the split of authority discussed in the Petition.

III. The Posture of This Case Provides No Basis to Postpone This Court's Review.

Finally, Respondents incorrectly assert that this Court should deny certiorari because the decision below is "interlocutory." BIO 26-27. Respondents wisely do not argue that the posture is a jurisdictional barrier to review. First, "the federal issue is conclusive [and] the outcome of further proceedings [on this question] preordained." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479 (1975). In other words, although the case has been remanded, "the federal issue [will] not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance … [and] they are wholly unrelated to the federal question." *Id*. at 478. On remand, the district court will determine whether the case should be held in abeyance or dismissed. Pet. App. 52a. Either way, the exhaustion ruling is as final as it is ever going to be.

Second, even if the remand did bear on the federal issue, "later review ... cannot be had, whatever the ultimate outcome of the case." *Cox Broad. Corp.*, 420 U.S. at 481. Petitioners challenge the Utah Supreme Court's ruling that it must exhaust its claims in tribal court. Absent immediate review by this Court, Petitioners' right to proceed in state court without having to exhaust in tribal court will be lost forever. Unlike the state court in *Jefferson v. City of Tarrant, Alabama*, the Utah Supreme Court "has effectively determined the entire litigation." 522 U.S. 75, 84 (1997). This case is being sent to tribal court absent this Court's intervention.

Instead of framing this posture as a jurisdictional issue, which it clearly is not, Respondents suggest that

"'perhaps'" further briefing may be necessary regarding which specific claims require exhaustion. BIO 27-28 (quoting Pet. App. 73a (Himonas, J., concurring)). But, again, Respondents do not dispute that the Utah Supreme Court has expressed an unequivocal position on the discrete legal questions of whether the tribal remedies exhaustion doctrine applies *at all* in state courts or in the absence of parallel tribal court proceedings.

This Court has previously granted certiorari in cases in which a party seeks review of a decision requiring it to exhaust certain alternative remedies before proceeding in court. *See*, *e.g.*, *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496 (1982) (reviewing a decision requiring certain types of exhaustion before the plaintiff could bring a § 1983 claim). Indeed, the Court granted certiorari in *Patsy* even though the court of appeals had decided certain discrete questions of law and then "remanded the case to the District Court to determine whether exhaustion would be appropriate in [that] case." *Id.* at 499-500. The remand order here is even narrower because the Utah Supreme Court has already conclusively determined that exhaustion is required in this case. Such a remand provides no basis for denying consideration of the questions presented.

CONCLUSION

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
JEFFREY M. HARRIS
CAROLINE A. COOK
CONSOVOY MCCARTHY
PARK PLLC
3033 Wilson Boulevard,
Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

June 5, 2018