No. 17-855

In The
Supreme Court of the United States

VANCE NORTON, GARY JENSEN, KEITH CAMPBELL, ANTHONEY BYRON, BEVAN WATKINS, and TROY SLAUGH,

Petitioners,

v.

THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian Tribe; the BUSINESS COMMITTEE FOR THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, in its official capacity; the UTE TRIBAL COURT OF THE UINTAH AND OURAY RESERVATION; and the HONORABLE THELMA STIFFARM, in her official capacity as Chief Judge of the Ute Tribal Court,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In light of the clear precedent of *Nevada v. Hicks*, 533 U.S. 353 (2001), which holds that state law enforcement officers are not subject to suit in a tribal court for claims arising out of the performance of their duties on tribal lands, did the Tenth Circuit Court of Appeals err in requiring Petitioners to exhaust their remedies in the Ute Tribal Court in order to determine whether that Court has jurisdiction to hear a trespass claim arising out of Petitioners' performance of their official duties that the Ute Indian Tribe brought against them in the Ute Tribal Court?

PARTIES TO THE PROCEEDINGS

The Petitioners in this case are Vance Norton, in his capacity as a former police officer for Vernal City, Utah; Gary Jensen, in his capacity as the former Chief of Police for Vernal City, Utah; Keith Campbell, in his capacity as a former Deputy Sheriff for Uintah County, Utah; Anthoney Byron, in his capacity as a former Deputy Sheriff for Uintah County, Utah; Bevan Watkins, in his capacity as a Deputy Sheriff for Uintah County, Utah; and Troy Slaugh, in his capacity as a Deputy Sheriff for Uintah County, Utah. Other Defendants-Appellees in the case below included Craig Young, in his capacity as a Highway Patrol trooper for the State of Utah; Dave Swenson, in his capacity as a Highway Patrol trooper for the State of Utah; Jeff Chuff, in his capacity as a Highway Patrol trooper for the State of Utah; Rex Olsen, in his capacity as a Highway Patrol trooper for the State of Utah; and Sean Davis, in his capacity as an employee of the Utah Department of Natural Resources, Division of Wildlife Resources, for the State of Utah.

The Respondents are the Ute Indian Tribe of the Uintah and Ouray Indian Reservation (the "Ute Tribe"); the Business Committee for the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, in its official capacity; the Ute Tribal Court of the Uintah and Ouray Reservation (the "Ute Tribal Court"); and the Honorable Thelma Stiffarm, in her official capacity as Chief Judge of the Ute Tribal Court.

PARTIES TO THE PROCEEDINGS – Continued

Other Appellants-Defendants in the case below included Debra Jones and Arden Post, individually and as the natural parents of Todd R. Murray; and Debra Jones, as personal representative of the Estate of Todd R. Murray, but the decision below upheld the District Court's injunction against Murray's parents and his Estate from pursuing their claims in Ute Tribal Court. The Honorable William Reynolds, in his capacity as Acting Chief Judge of the Ute Tribal Court, was also an Appellant-Defendant in the case below, but a Notice of Substitution replacing him with the Honorable Thelma Stiffarm was filed in the courts below on December 5, 2017.

CORPORATE DISCLOSURE STATEMENT

In accordance with Sup. Ct. R. 29.6, none of the Petitioners is a corporate entity or publicly held company requiring any further disclosures.

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PETITION FOR WRIT OF CERTIORARI

Vance Norton, Gary Jensen, Keith Campbell, Anthoney Byron, Bevan Watkins and Troy Slaugh (collectively "Petitioners") respectfully petition this Court for a Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 862 F.3d 1236 (10th Cir. 2016). (App. 1.) Petitioners' Motion for Preliminary Injunction was granted in the District Court for the District of Utah by an Order dated October 5, 2015, which is not reported in the Federal Supplement, but is available at 2015 WL 13590157 (D. Utah, Oct. 5, 2015). (App. 29.) These two opinions, as well as the record and opinions in the related cases of *Jones et al. v. Norton et al.*, 3 F. Supp. 3d 1170 (D. Utah 2014), and *Jones et al. v. Norton et al.*, 809 F.3d 564 (10th Cir. 2015), will be the source of the facts set out below in the Statement of the Case.

JURISDICTION

The Court of Appeals filed its opinion on July 11, 2017. (App. 1.) Judgment was entered on July 11, 2016. (App. 40.) A timely petition for rehearing *en banc* was denied on September 18, 2017. (App. 39.) This Court has jurisdiction to review the Court of Appeals'

decision by issuing a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves an April 1, 2007, high-speed pursuit by a Utah Highway Patrol trooper and other law enforcement officers (including Petitioners) of a vehicle with Nevada license plates onto the Uintah and Ouray Reservation in Northeastern Utah, which is a patchwork quilt of Indian country and non-Indian country lands. There were two males in the fleeing vehicle. But no one knew their identities until after this incident was over and it was discovered by law enforcement officers that the driver was a non-Indian and that the passenger was Todd R. Murray, a member of the Ute Tribe. The non-Indian driver had committed several off-Reservation felonies, including fleeing from an officer, for which he was later charged by the State of Utah. Once it was learned that Murray was a member of the Ute Tribe and that the incident had occurred on tribal land, the investigation was immediately turned over to the FBI and Bureau of Indian Affairs. No tribal property was damaged in this incident, but almost eight years later the Ute Tribe sued Petitioners in the Ute Tribal Court on a trespass claim arising out of this pursuit.

The pursuit was initiated by a Utah Highway Patrol trooper, and started off-Reservation on Highway 40. The pursuit lasted about 30 minutes and was at

speeds of up to 125 miles per hour through several small towns. The pursuit was on State and/or County roads, repeatedly went onto and off the Ute Reservation, but ended on-Reservation when the vehicle left the roadway and crashed in a remote area of the surrounding desert. The non-Indian driver was apprehended at the crash scene. But Murray fled on foot into the desert armed with a pistol.

Petitioners and other law enforcement officers arrived on scene and searched for Murray for reasons of officer safety and because they did not know whether Murray had been injured. Shortly thereafter, one of the officers encountered the armed Murray, who may have been circling back to the scene of the crash to shoot the pursuing Highway Patrol trooper. (Murray apparently did not know that other officers had arrived to assist the Highway Patrol trooper.) Following an exchange of gunfire with the officer that he encountered, Murray shot and killed himself. Murray's suicide was witnessed by several officers.

The State Medical Examiner ruled Murray's death a "suicide." According to the autopsy report, Murray was intoxicated at the time of his death and had recently used methamphetamine, which the Medical Examiner concluded potentially interfered with his judgment. It was not until after Murray committed suicide that investigating officers found Murray's wallet containing his *Ute Tribal Membership Card*, at which point the matter was immediately turned over to the FBI and Bureau of Indian Affairs.

On March 30, 2009, Murray's parents and his estate sued Petitioners in Utah State Court, from which it was removed without objection to the United States District Court for the District of Utah. In that lawsuit, Murray's parents and estate asserted federal civil rights claims and state common-law claims including wrongful death, assault, and battery, based on allegations that the officers had shot Murray.

On March 7, 2014, after years of contentious litigation, the United States District Court granted summary judgment in favor of all of the defendants, including Petitioners, and dismissed the federal civil rights claims with prejudice. The District Court declined to exercise supplemental jurisdiction over the state common-law claims and dismissed them without prejudice. In doing so, the District Court expressly found that Murray had committed suicide. The District Court's opinion is reported at *Jones et al. v. Norton et al.*, 3 F. Supp. 3d 1170 (D. Utah 2014). On December 29, 2015, the Tenth Circuit Court of Appeals affirmed the District Court's decision. *Jones et al. v. Norton et al.*, 809 F.3d 564 (10th Cir. 2015).

Claiming that they were "dissatisfied" with the decision of the District Court, and insisting that the Ute Tribal Court "was the only forum with jurisdiction to adjudicate the tort claims related to the death of 21-year-old Ute tribal member Todd Murray," on March 5, 2015, Murray's parents and his estate brought another wrongful death suit against Petitioners in the Ute Tribal Court. The Ute Tribe joined in that action by asserting a trespass claim against Petitioners based

upon their pursuit of Murray on tribal lands even though they did not know that Murray was a member of the Ute Tribe. The Ute Tribe also asked the Ute Tribal Court to issue a permanent injunction prohibiting State and local officers from entering the Reservation.

Upon the filing of that complaint in the Ute Tribal Court, Petitioners brought suit in the United States District Court for the District of Utah seeking a preliminary injunction enjoining the prosecution of the Tribal Court case. The defendants, including Respondents herein, moved to dismiss the Petitioners' action, but the District Court denied the Motion to Dismiss and entered the preliminary injunction sought by Petitioners. The District Court did so on the basis of the *Hicks* decision. The Tenth Circuit Court of Appeals upheld the decision of the District Court as to all claims except the Ute Tribe's trespass claim. With respect to that claim, the Appeals Court rejected *Hicks* as controlling precedent and held that the Petitioners had to exhaust tribal court remedies, and remanded for further proceedings in Tribal Court to determine whether the Tribal Court had jurisdiction to hear the trespass claim.

SUMMARY OF THE ARGUMENT

This Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), held that state and local law enforcement officers are not subject to suit in tribal courts for claims

arising out of the performance of their duties on tribal lands, that they are answerable for such claims only in state or United States federal courts, and that they are not required to exhaust remedies in tribal court when sued therein. The Court of Appeals decision below is in direct conflict with that controlling precedent. The effect of that ruling is to impede law enforcement by state officers, including Petitioners, throughout all of the states that comprise the Tenth Circuit, which is a matter of significant public importance. The Tenth Circuit's decision in this case, holding that state law enforcement officers may be subject to tribal court jurisdiction and must allow the tribal court to determine that issue, will not only deter legitimate law enforcement activity near Indian reservations, but it will also add to and further complicate the already complex jurisdictional interplay between state and tribal authorities.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Clearly Conflicts with United States Supreme Court Precedent

In *Nevada v. Hicks*, 533 U.S. 353 (2001), which involved trespass and other common-law tort claims filed by a tribal member in tribal court, this Court held that: "[T]here is no need to exhaust the jurisdictional dispute in tribal court [because] . . . State officials operating on a reservation . . . are properly held accountable for misconduct and civil rights violations in either

state or federal court, but not in tribal court." *Id.* at 375. The Circuit Court's decision in this case directly conflicts with *Hicks* on the issue of exhaustion.

In the original suit arising out of the facts of this case, the District Court for the District of Utah found that Petitioners' pursuit of Murray "was reasonable under the circumstances" because the "officers did not know, could not have known, and did not have a duty at that point to ascertain whether Mr. Murray was an enrolled member of the tribe." *Jones*, 3 F. Supp. 3d at 1195. The District Court further concluded that the officers' "attempt to apprehend Mr. Murray while protecting themselves – and the means they used to do so – were expected police behavior in light of the circumstances." *Id.* The Tenth Circuit Court of Appeals affirmed the District Court. *Jones*, 809 F.3d 564 (10th Cir. 2016). Furthermore, in *Ute Indian Tribe v. State of Utah*, 790 F.3d 1000, 1006-1007 (10th Cir. 2015), another Tenth Circuit panel cited with approval these same Petitioners having stopped alleged criminal activity even when it occurred within Indian country, inquiring into the Indian status of the suspects and, if they were found to be a tribal member, turning the matter over to federal authorities. The Circuit's decision in this case is in direct conflict with that recent prior decision, adding further to the confusion over law enforcement authority and permissible actions within Indian country.

II. The Tenth Circuit's Decision Disregards and Limits the *Hicks* Precedent

In *Hicks*, this Court held that there was a *per se* rule against subjecting state and local law enforcement officers to suit in a tribal court for causes of action related to the performance of their official duties. Yet, despite the clarity of that holding, the Tenth Circuit Court of Appeals in this case reasoned that *Hicks* did not apply because "there is no claim that Murray was suspected of committing an off-reservation crime." *Norton v. Ute Indian Tribe,* 862 F.3d 1236, 1248 (10th Cir. 2017). But the holding in *Hicks* was not so narrow, which this Court made clear: "We do not say state officers cannot be regulated [i.e., subject to tribal court jurisdiction]; we say they cannot be regulated in the performance of their law enforcement duties," *Hick*s, 533 U.S. at 373, which the Court clarified by stating "even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state law-rights)." *Id.* Furthermore and directly important to this case, this Court expressly noted in *Hicks* that "[t]he last question before us is whether petitioners were required to exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court." *Id.* at 369. This Court clearly and unequivocally answered that question by holding: "Since it is clear . . . that tribal courts lack jurisdiction over state officials

for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases 'would serve no purpose other than delay,' and is therefore unnecessary." *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)).

Hence, the Tenth Circuit's decision in this case is based upon a fundamental misreading and narrowing of *Hicks.* In *Hicks*, for example, this Court emphasized that, because the government can only act through its officers and agents, "if a tribe can 'affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws,' 'the operations of the [state] government may at any time be arrested at the will of the [tribe].'" *Id.* at 365 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)). The *Hicks* decision noted that "permitting damages suits against governmental officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). However, with its decision in this case, the Tenth Circuit has given fresh life to this Court's fears about the chilling effect of subjecting state and local law enforcement officers to suit in a tribal court for damages claims arising out of their performance of their official duties.

The Tenth Circuit's opinion determined that it is "plausible that the Tribal Court possesses jurisdiction over the trespass claim," *Norton*, 862 F.3d at 1245, despite *Hicks*'s clear holding that no such jurisdiction

exists when the claim arises out of law enforcement activities of state or local officers. The Tenth Circuit likewise did so with full knowledge of the concurring opinions in *Hicks*, such as that of Justice Souter who agreed with the Court's opinion that tribal courts have no jurisdiction to hear such claims (533 U.S. at 375) and Justice O'Connor who recognized that *Hicks* held "that a tribe has no power to regulate the activities of state officials enforcing state law on land owned and controlled by the tribe" (*id.* at 386), but complained that the majority in *Hicks* had created "a broad *per se* rule prohibiting tribal [court] jurisdiction over nonmembers on tribal land whenever the nonmembers are state officials." *Id.* at 396. And, indeed, that broad *per se* rule was the holding of *Hicks*, which the Tenth Circuit ignored in this case.

The Tenth Circuit's decision in this case is also based upon non-*Hicks* Tenth Circuit cases that are inapposite because they do not involve state law enforcement officers. In fact, this Court made this very point in distinguishing the *Hicks* decision from its other decisions on tribal jurisdiction. *See id.* at 372.

III. The Tenth Circuit's Decision Would Severely Compromise Law Enforcement Near Indian Country as Expressly Cautioned Against in the *Hicks* Decision Itself

If the decision of the Court of Appeals stands, law enforcement officers run the risk of being sued in tribal court whenever they stop a suspect anywhere near

Indian country, should that suspect be a member of a federally recognized tribe and the offense was committed within Indian country. Under these circumstances, the natural reaction of officers will be to ignore criminal activity near Indian country. This creates a void in law enforcement activity because tribal courts have no jurisdiction over offenses committed by non-Indians even when a tribal member is the victim of that crime, which was a problem that this Court specifically noted in *Hicks*.

As noted above, this Court cautioned in *Hicks* that the ability of tribes to exact penalties based on state-directed activities, *Hicks*, 533 U.S. at 365 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)), and permitting damage suits against state officials may entail substantial social costs including law enforcement officers being inhibited in the discharge of their duties by fear of such liability, *id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). This was an important and overriding reason for the Court's *per se* ruling in *Hicks* that officers were not subject to suit in tribal court for torts or other violations involving the discharge of their duties.

The Tenth Circuit's decision in this case, holding that state law enforcement officers may be subject to tribal court jurisdiction and must allow the tribal court to determine that issue, will not only deter legitimate law enforcement activity near Indian reservations, but it will also add to and further complicate the already complex jurisdictional interplay between state and tribal authorities. Under the existing jurisdictional

framework, states have no criminal jurisdiction over on-reservation crimes committed by tribal members, *see Solem v. Bartlett,* 465 U.S. 463, 465 n.2 (1984), tribal members are subject to state jurisdiction for their off-reservation crimes, *Hicks*, 533 U.S. at 362, tribes have no criminal jurisdiction over on-reservation crimes involving non-Indians, *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), and non-Indians are subject to state jurisdiction for their on-reservation crimes not involving Indians, *see United States v. McBratney*, 104 U.S. 621, 624 (1881). This jurisdictional jigsaw puzzle is not only confusing but it is further complicated by the fact that: (1) an officer cannot determine a suspect's Indian status by his or her appearance; (2) neither is it easy for an officer to determine whether the offense was committed within Indian country since public rights-of-way often repeatedly go onto and off reservation land, and in many instances one side of a highway will be Indian country and the other will not; and (3) in most instances the officer's decision to engage a crime in progress or investigate related suspicious activity will have to be made on a moment's notice without an opportunity to determine the suspect's status as a possible tribal member or whether the criminal conduct or suspicious activity is taking place on-reservation or off-reservation.

In a prior effort to address the confusing jurisdictional situation involving law enforcement encounters within Indian country, another Tenth Circuit panel described a valid procedure whereby officers could investigate and stop criminal activity within Indian country

while determining tribal membership after the fact. *See Ute Tribe v. State of Utah*, 790 F.3d at 1006-1007. Indeed, the Tenth Circuit approvingly cited the exact facts of the Petitioners' actions in this case as an example of this lawful process. *Id.* (citing *Jones*, 3 F. Supp. 3d at 1170-1192). The Circuit Court in *State of Utah* explained that officers need not engage in racial profiling to determine if a suspect is a tribal member committing an offense, rather "officers could just as easily (and lawfully) inquire into a [person's] tribal membership *after* [he or] she is stopped for a suspected offense." 709 F.3d at 1006-1007 (emphasis in original). The Petitioners herein stopped the criminal activity within Indian country, inquired into the Indian status of both suspects and upon discovery that Murray was a tribal member, turned the matter of his suicide over to federal authorities.

The Tenth Circuit's newest decision in this case clearly conflicts with their reasoning and guidance set forth in *State of Utah*. The Tenth Circuit now shifts the policy consideration with its finding that officers should continue to perform their duties (i.e., stop crimes in progress and protect the public even if it is within Indian country and may involve a tribal member), but they do so at their own peril through potential liability exposure in a tribal court.

The Tenth Circuit's decision in this case has a real and immediate impact upon law enforcement. That decision seriously burdens law enforcement interests by imposing upon officers operating near a reservation the difficult choice between enforcing state law on

state rights-of-way that cross reservation boundaries and risk being haled into tribal court if it is later discovered that a suspected offender is a tribal member and the offense happened to be committed on tribal land or, suspending enforcement of state law on state rights-of-way near reservation boundaries in order to avoid that risk. A highway patrol trooper or deputy sheriff is not likely to risk exposing himself or herself to a damage suit in tribal court, especially with no guarantees of constitutional due process other than those provided under 25 U.S.C. § 1302 and no ability to predetermine whether a suspect is a tribal member or if the crime occurred within Indian country or on non-tribal lands, and it is unreasonable to expect them to do otherwise. Indeed, the Tenth Circuit has now created the very void in law enforcement that the *Hicks* decision both predicted and attempted to remedy, and that is a matter of serious public concern.

CONCLUSION

This Court's decision in *Hicks* directly forecloses the result ordered in the decision of the Tenth Circuit Court of Appeals in this case. The Tenth Circuit had a duty to recognize and apply the *Hicks* decision, but did not do so. The Tenth Circuit's denial of Petitioners' petition for rehearing *en banc* likewise means that the Tenth Circuit's decision in this case will not be reviewed and, unless a Petition for Writ of Certiorari is granted, will remain the law in that Circuit. Pursuant to 28 U.S.C. § 1254(1) and Sup. Ct. R. 10, this Court has

the authority to issue a writ of certiorari insofar as the Tenth Circuit's decision in this case is in direct conflict with this Court's decision in *Hicks*. Accordingly, Petitioners respectfully submit that the Court should grant the Petition for a Writ of Certiorari for a full review of the decision of the Circuit Court.

Respectfully submitted,

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