No. 04-74

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,
v.
NICHOLAS CUMMINGS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because it presents no issue worthy of this Court's attention. The South Dakota Supreme Court held that a local law enforcement official in fresh pursuit lacked authority to arrest a tribal member on a reservation for a misdemeanor committed off the reservation. That decision made no new law. To the contrary, the South Dakota Supreme Court merely reaffirmed its 1991 decision in *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), reaching the same result in nearly identical circumstances. The State filed a petition for a writ of certiorari in *Spotted Horse*, and this Court denied review, *see South Dakota v. Spotted Horse*, 500 U.S. 928 (1991), just as the Court did in the other tribal fresh

pursuit case that it has considered. *See United States v. Patch*, 114 F.3d 131 (9th Cir.), *cert. denied*, 522 U.S. 983 (1997).

The State seeks to manufacture a different result here by recasting the decision below as "contraven[ing] this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001)." Pet. at i (Question Presented). But the South Dakota Supreme Court discussed *Hicks* at great length in its opinion and carefully noted the critical factual distinctions between *Hicks* and the case at hand. The State alleges no split of authority on the applicability of *Hicks* to the fresh pursuit alleged here; indeed, the decision below is the first published decision to address *Hicks* in this context. Review should be denied for that reason alone.

No extraordinary factors justify review despite the absence of a split on the *Hicks* issue presented by the State. As the dearth of published fresh pursuit opinions suggests, the issue arises infrequently, and it will arise even less frequently in light of the vast and growing body of tribal-state law enforcement agreements that expressly permit state officials to enter reservations in fresh pursuit. Intergovernmental agreements such as these have rendered largely academic the issue of a state officer's authority to make fresh pursuit arrests in a neighboring State, and they are increasingly doing the same for a state officer's authority to make fresh pursuit arrests within a reservation. Nor can the State claim that the decision below will cause some new irreparable harm – as noted, the decision below reaffirmed what has been settled law in South Dakota for nearly 15 years, and even with respect to this particular case the State may yet achieve the outcome it seeks – a conviction at trial – without intervention by this Court. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Respondent Nicholas Cummings is a member of the Oglala Sioux Tribe who resides on the Tribe's Pine Ridge Reservation. The reservation is located entirely within Shannon and Jackson Counties in South Dakota. Fall River County is one of the counties that borders the reservation.

The facts as found by the magistrate court (and left undisturbed by the South Dakota Supreme Court) are as follows. *See generally* Pet. App. 16a-19a (setting forth Magistrate's Findings of Fact). On March 4, 2003, at approximately 6:30 p.m., Deputy Steven McMillin of the Fall River County Sheriff's office was traveling west on a rural, isolated portion of U.S. Highway 18 in Fall River County near the border of the Pine Ridge Reservation when he observed Mr. Cummings traveling east toward the reservation. Deputy McMillin indicated that Mr. Cummings was traveling at 71 miles per hour in a 65 mile per hour zone.

The deputy turned his vehicle around and began following Mr. Cummings. While still in Fall River County, the deputy observed the vehicle cross the yellow line on the hilly and winding road by a "small margin of less than one foot." Pet. App. 17a, ¶ 10. The deputy activated his lights and siren. Mr. Cummings did not pull over and instead continued east on Highway 18. Less than two miles after Deputy McMillin activated his siren, Mr. Cummings crossed out of Fall River County and onto the Pine Ridge Reservation in Shannon County. Deputy McMillin followed Mr. Cummings onto the reservation. He did not seek or have permission from the dispatch for the Oglala Sioux Tribe

Department of Public Safety or any other Oglala official to enter the reservation.

Shortly after entering the reservation, Mr. Cummings stopped his car alongside the highway. Deputy McMillin ordered Mr. Cummings out of the car at gun point and forced him to kneel on the ground. Mr. Cummings complied and was initially placed in handcuffs, although the handcuffs were later removed. Deputy McMillin testified that he then asked Mr. Cummings to step inside the patrol car.

After Mr. Cummings had entered the car, but before any *Miranda* warnings were given, Deputy McMillin conducted a field interview with Mr. Cummings, which was captured on audiotape. In that interview, Mr. Cummings admitted that he had consumed four beers, Pet. App. 39a, and he refused any field sobriety tests. Mr. Cummings steadfastly denied, however, that he had seen the lights on Deputy McMillin's police car before entering the reservation.

Tribal officers then arrived on the scene, and they placed Mr. Cummings under arrest.

B. The Magistrate Court Proceedings

Mr. Cummings was charged in state court with speeding under S.D. Codified Laws 32-25-7 and eluding a police officer under S.D. Codified Laws 32-33-18, both misdemeanors under South Dakota law. Mr. Cummings was not charged under state law for any alcohol-related offense.

Prior to trial, Mr. Cummings moved to suppress the information gathered in the field interview. Following a hearing at which Deputy McMillin was the principal witness, the magistrate court granted the motion to suppress.

The court recognized that its decision was controlled by *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), a "case

with facts substantially similar to the case currently before this Court." Pet. App. 21a, ¶ 7. The court noted that, in *Spotted Horse*, the South Dakota Supreme Court had held that "an arrest or search effectuated by [a] non-tribal law enforcement officer within the exterior boundaries of an Indian reservation was illegal," and that the "remedy for such a search and seizure was the suppression of evidence obtained by the illegal arrest and detention of the Defendant." *Id.* (citing *Spotted Horse*, 462 N.W.2d at 469). Accordingly, the magistrate court excluded all evidence gathered by Deputy McMillin after he entered the Pine Ridge Indian Reservation. *See id.* at 22a, ¶ 9.

C. The South Dakota Supreme Court's Decision

The South Dakota Supreme Court granted the State's request for a discretionary, interlocutory appeal to consider whether *Spotted Horse* remained good law, and the court unanimously affirmed the magistrate court's decision.

At the outset, the state Supreme Court noted that nothing in *Spotted Horse* affected the authority of the State to *try* an Indian who had been arrested illegally; indeed, in *Spotted Horse* itself, the South Dakota Supreme Court had relied on the so-called "*Ker-Frisbie* doctrine" and had affirmed the defendant's conviction. 462 N.W.2d at 467-68.[1]

The court then turned to the suppression issue that was the principal subject of the State's appeal. The court noted that the decision in *Spotted Horse* was based primarily on the State's lack of jurisdiction over Indian reservations, and in particular on South Dakota's failure to take advantage of the

[1] Under the doctrine articulated in *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), an illegal arrest does not generally affect the jurisdiction of a court to try the defendant.

route established by Congress – through "Public Law 280" – for asserting jurisdiction over such reservations.[2] As the court explained below, "[u]nder Public Law 280, . . . states which had constitutions or statutes disclaiming jurisdiction over Indian Country were given statutory power to assume and exercise civil and criminal jurisdiction over reservations." Pet. App. 4a; *see also Spotted Horse*, 462 N.W.2d at 467. South Dakota was such a "'disclaimer state.'" Pet. App. 4a (citing S.D. Const. art. XXII); *see also Spotted Horse*, 462 N.W.2d at 467. South Dakota, however, refused to assume the full jurisdiction that Congress offered and instead sought to assume only "partial jurisdiction" over certain state highways. Both the U.S. Court of Appeals for the Eighth Circuit and the South Dakota Supreme Court held that the effort to assert partial jurisdiction was invalid. Pet. App. 4a-5a (citing *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990), and *Spotted Horse*, 462 N.W.2d at 467). South Dakota thus lacked jurisdiction over the Indian reservations within its borders, and, "[s]ince the State had no jurisdiction on the reservation, . . . [South Dakota's] fresh

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[2] Public Law 280 – as the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 18 U.S.C. § 1162 is commonly called – gave five States (a sixth was added in 1958) civil and criminal jurisdiction over Indian country and allowed other States to assume jurisdiction over Indian country if they so chose. *See generally Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 143 (1984). Several States successfully assumed jurisdiction over all or part of Indian country. *See, e.g.*, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). In 1968, Congress amended Public Law 280 to require tribal consent prior to any further assumptions of jurisdiction. *See Three Affiliated Tribes*, 467 U.S. at 143.

pursuit statute 'could not reach onto the reservation' and the arrest of Spotted Horse was illegal." Pet. App. 5a.

The South Dakota Supreme Court then considered whether this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), required a different result. After a careful and thorough discussion of *Hicks*, *see* Pet. App. 6a-11a, the court concluded that it did not.

The court noted that *Hicks* involved a fundamentally different issue. In *Hicks*, the Tribe had attempted to assert civil jurisdiction over a § 1983 action brought by a tribal member seeking to hold a non-Indian state officer liable for executing a search warrant issued by state court and consented to by the Tribe. Here, in contrast, it was the State that was seeking to "extend its jurisdiction into the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction." Pet. App. 7a. In other words, *Hicks* involved tribal sovereignty invoked as "a sword against state officers," whereas here tribal sovereignty was invoked "as a shield to protect the Tribe's sovereignty from incursions by the State." *Id.*

The state Supreme Court noted that the opinions in *Hicks* reinforced the narrow scope of this Court's decision. Thus, the opinion for the Court noted that its holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law," 533 U.S. at 358 n.2, a point echoed by the concurrences of Justice Souter (joined by Justices Kennedy and Thomas), *see id.* at 376 (Souter, J., concurring), and Justice Ginsburg, *see id.* at 386 (Ginsburg, J. concurring). The South Dakota majority also noted that Justice Souter, although expressly joining the Court's opinion, noted that he would have reached the Court's opinion "by a different route," one that did not involve

consideration of the criminal jurisdictional issues. 533 U.S. at 375 (Souter, J., concurring).

The South Dakota Supreme Court also placed substantial emphasis on the State's failure to assert jurisdiction under Public Law 280. The state court noted that "our State never effectively asserted jurisdiction over the reservations in South Dakota." Pet. App. 9a. The court found it "difficult to maintain the proposition that the State, after having failed to effectively assert jurisdiction when given the opportunity by Congress, now suddenly gains that jurisdiction through no action of the State or the Tribe." *Id.*

Finally, even setting aside that *Hicks* was principally a decision about the jurisdiction of tribal courts, the South Dakota Supreme Court noted that *Hicks* was still not controlling, because the state officers in *Hicks* had obtained consent from the tribal court before entering the reservation, and the officers acted pursuant to a warrant issued by the state court. *Hicks* thus did not resolve whether the same result was required for a state officer who, in fresh pursuit of a misdemeanant, enters a reservation "without tribal permission or a warrant." Pet. App. 10a.

Justice Zinter concurred. Although disagreeing with any suggestion in the majority's opinion that Justice Scalia's opinion in *Hicks* did not speak for a majority of the Justices, he "join[ed] the Court because of the fundamental distinction between *Hicks*'s core issue of *tribal* jurisdiction over *non*-members and *Spotted Horse's* core issue of state criminal jurisdiction over *tribal* members." Pet. App. 14a (Zinter, J., concurring) (emphasis in original).

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's attention. The State's principal contention is that the decision below "contravened this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001)." Pet. at i. The State, however, does not even allege a split on the applicability of *Hicks* to fresh pursuit cases; nor could the State do so. The decision of the South Dakota Supreme Court is the first to address the implications of *Hicks* in this context.

Nor is this a situation in which the state court ignored relevant law from this Court. To the contrary, the South Dakota Supreme Court devoted the majority of its opinion to a careful analysis of *Hicks* to determine whether *Hicks* required an overruling of the South Dakota Supreme Court's 1990 decision in *Spotted Horse*. Both the majority and the concurrence identified specific reasons for believing that *Hicks* did not control, and all five Justices agreed that *Hicks* was distinguishable. *See* Pet. App. 6a-11a; *id.* at 14a (Zinter, J., concurring). The State's contention that the South Dakota Supreme Court defied *Hicks* is simply an overblown plea for error correction. As this Court is well aware, such pleas are not typically a basis for granting review.

2. Review of the State's plea for error correction is particularly unwarranted here. Congress provided a mechanism for the State to assert the sort of jurisdiction that the State seeks here when it enacted Public Law 280. No one contests that if the State had validly assumed jurisdiction over Indian country under Public Law 280, the State would have authority to make a fresh pursuit arrest such as that at issue here. South Dakota steadfastly refused, however, to accept jurisdiction on the terms Congress offered. The State's plea now for assistance from this Court is thus mistimed and misplaced.

Moreover, Congress, which has ultimate authority to define the scope of criminal jurisdiction in Indian country, has not seen fit to disturb the result in *Spotted Horse* over the past 14 years. As Public Law 280 and numerous reservation-specific statutes demonstrate,[3] Congress has not hesitated to define jurisdictional boundaries in Indian country when it thought such definition appropriate. Congress's inaction in the face of *Spotted Horse* thus speaks volumes.

Review is also inappropriate because the issue of fresh pursuit onto Indian reservations is becoming ever less important due to the presence of agreements between States and Tribes to address precisely this issue. Over the past decade, scores of Tribes have reached agreement with state and local authorities to address fresh pursuit issues.[4] *See*

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[3] *See, e.g.*, 25 U.S.C. § 713f(c)(6) (granting state criminal jurisdiction over Confederated Tribes of the Grand Ronde Community of Oregon); 25 U.S.C. § 766(b) (granting the State criminal jurisdiction over Paiute Indians of Utah); 25 U.S.C. § 232 (granting the State criminal jurisdiction over all reservations in New York); Act of October 5, 1949, ch. 604, 63 Stat. 705 (granting jurisdiction over the Agua Caliente Reservation to California); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (granting criminal jurisdiction over Sac & Fox Reservation to Iowa); 18 U.S.C. § 3243 (granting criminal jurisdiction over all reservations to Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (granting criminal jurisdiction over Devil's Lake Reservation to North Dakota); 25 U.S.C. § 736(f) (granting Texas full criminal jurisdiction within the boundaries of the federal reservations reestablished by the Act); 25 U.S.C. § 566e (specifying that Oregon has jurisdiction over the restored Klamath Indian Tribe).

[4] *See, e.g.*, Agreement By and Between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Regarding Fresh Pursuit and Extradition, art. I (Oct. 7, 1981); Cross-Deputization Agreement By and Between the Bureau of

generally Hicks, 533 U.S. at 393 (noting the "host of cooperative agreements between tribes and state authorities . . . to provide law enforcement") (O'Connor, J., concurring); Douglas R. Nash & Christopher P. Graham, *'The Importance of Being Honest': Exploring the Need for Tribal Court Approval for Search Warrants Executed In Indian Country After* State v. Mathews*,* 38 Idaho L. Rev. 581, 593 (2002) (observing that "tribes and states have . . . negotiated numerous cooperative agreements in critical areas of law enforcement"); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage,* 112 Harv. L. Rev. 922, 927 (1999). The existence of such agreements may well explain the dearth of litigated fresh pursuit cases, *see* Conference of Western Attorneys General, *American Indian Law Deskbook* 105 (2d ed. 1998) (noting that the "issue of fresh pursuit of tribal members onto their reservations has received spare judicial attention"), and it

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Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska, section 1 (June 1, 2001); Memorandum of Understanding Between and Among United States Bureau of Indian Affairs and Three Affiliated Tribes and City of New Town (North Dakota) (June 18, 1998); A Law Enforcement Agreement Between and Among the Cherokee Nation, the United States of America, the State of Oklahoma and its Political Subdivisions, the Various Boards of County Commissioners, and Various Law Enforcement Agencies, section 4 (Oct. 10, 1994); Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County (Michigan), section 3 (Mar. 19, 1997); Law Enforcement Agreement Among the Eastern Shoshone and Northern Arapaho Tribes, the City of Riverton (Wyoming), and the Bureau of Indian Affairs, ¶ 10 (Dec. 18, 2000). *See* www.ncai.org/main/pages/issues/governance/agreements/lea-sd_v_cummings.asp (posting agreements cited here).

highlights the lack of any compelling need for intervention by this Court.

Such agreements are also the most appropriate way to resolve these intergovernmental disputes. Law enforcement agreements reflect the mutual interest that Tribes and States have in ensuring effective law enforcement both inside and outside Indian country, and they do so in a way that respects the sovereign status of each party. As even the state Attorneys General have recognized, "[r]egardless of the precise jurisdictional contours in hot pursuit, extradition, or on-reservation arrest matters, these are areas where mutual assistance agreements between states, tribes, and the United States . . . seem particularly worthwhile, since each government has a common interest in ensuring that their respective criminal justice systems work harmoniously." Conference of Western Attorneys General, *American Indian Law Deskbook* at 105; *see also Spotted Horse*, 462 N.W.2d at 469 (noting the interests of "Indians and non-Indians alike" in reaching agreements to resolve these issues).

Indeed, intergovernmental agreements are precisely the way that States have resolved the jurisdictional issues arising from fresh pursuit arrests across state lines. At common law, an officer from one State lacked authority to enter and make an arrest in another State for a misdemeanor (such as the one at issue here), *see, e.g.*, 2 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 3.5(a), at 22 (2d ed. Supp. 2003) ("At common law, a law enforcement officer did not have authority to arrest in another state, although an exception to this rule existed where the officer was in 'fresh pursuit' of one who had committed a felony") (citation omitted); 5 Am. Jur. 2d, *Arrest* § 72 (1995), and even fresh pursuit arrests for felonies (which were permissible at common law) were a potential source of tension between sovereigns. States thus have

uniformly entered agreements and enacted legislation to allow officers from other States to enter when in fresh pursuit. *See, e.g.*, S.D. Codified Laws 23A-3-9 (granting authority to out-of-state officers to make misdemeanor fresh pursuit arrests in South Dakota); Cal. Penal Code § 852 (adopting Uniform Act on Fresh Pursuit). As noted, Tribes and States are actively working together to reach that same end, and thus intervention by this Court now not only is unnecessary, but would be counterproductive because it would pretermit a process that promises to accommodate all of the law enforcement and sovereignty interests at stake.

3. The State's plea for error correction also should be rejected because the South Dakota Supreme Court correctly concluded that *Hicks* did not control. Indeed, the tribal sovereignty interests implicated here are substantially more important than the sovereignty interests implicated in *Hicks*, in at least three critical respects.

First, as the South Dakota Supreme Court correctly noted, *Hicks* involved the invocation of tribal sovereignty as a sword, whereas here tribal sovereignty is invoked as a shield. The question this Court decided in *Hicks* was whether tribal sovereignty required that a Tribe be empowered to hear a claim against a state officer for civil damages. *See* 533 U.S. at 355. Here, in contrast, the question is whether tribal sovereignty protects a Tribe from unwanted intrusions onto the reservation by state officers. This case thus involves more than a claim for civil damages, and instead involves directly the Tribe's core interests as a sovereign in controlling access to its borders and policing its own territory and members. Such interests go to the heart of tribal sovereignty in a way that providing a forum for civil damages against non-Indians does not.

Second, *Hicks* does not control because *Hicks* involved a search approved by the tribal court and conducted by state officials in concert with tribal officers. *See Hicks*, 533 U.S. at 356 (noting that "a tribal-court warrant" had been "secured" prior to execution of the state-court warrant and that the search was conducted by "three wardens and additional tribal officers"). Here, as noted, the officers neither sought nor received authority to enter the reservation from tribal authorities, and tribal officers arrived on the scene only after the interview that is at issue in this case had occurred. State enforcement action that respects tribal sovereignty by working with tribal officials is manifestly different than state enforcement action that entirely excludes tribal officials. *See, e.g.*, *Hicks*, 533 U.S. at 386 (Souter, J., concurring) (noting that "the uncontested fact that the Tribal Court itself authorized service of the state warrant here bars any serious contention that the execution of that warrant adversely affected the Tribe's political integrity").

Third, in *Hicks* the search was conducted pursuant to a valid warrant, as this Court repeatedly emphasized. Thus, the Court framed its inquiry by asking whether the Tribe "can regulate state wardens *executing a search warrant* for evidence of an off-reservation crime," 533 U.S. at 358 (emphasis added), and the Court justified its result on precedent that "suggest[s] state authority to *issue search warrants* in cases such as the one before us." *Id.* at 363-64 (emphasis added). Here, in contrast, the officer lacked any such valid warrant.

The absence of a warrant is important, particularly where (as here) the underlying crime is a misdemeanor. In the analogous situation of entry into a home for an arrest, for example, the authority of an officer to enter a home pursuant to a warrant is generally unquestioned. For a warrantless

entry, however, even one made in fresh pursuit, the nature of the underlying offense is critical. As a general matter, such a warrantless entry is permissible when in fresh pursuit of a fleeing felon, *see United States v. Santana*, 427 U.S. 38, 42-43 (1976), but *not* when in pursuit of a fleeing misdemeanant, *see Welsh v. Wisconsin*, 466 U.S. 740, 752-53 (1984). The Court explained in *Welsh* "that an important factor to be considered" in balancing the various interests at stake is "the gravity of the underlying offenses for which the arrest is being made." 466 U.S. at 753. A rule (like the common law rule) that prohibits entry onto reservations for misdemeanors such as the offenses at issue here is responsive to the need to weigh the gravity of the underlying offense and reach the required "accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Hicks*, 533 U.S. at 361-62 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980)). *Hicks*, which involved only a search pursuant to a warrant, does not require a different result.

In short, the South Dakota Supreme Court's extensively analyzed the opinions in *Hicks* and determined correctly that *Hicks* did not control. At the very least, in the absence of any split of authority on the applicability of *Hicks* to fresh pursuit cases, the evident distinctions between *Hicks* and the decision below demonstrate that review at this time, as the lower courts are just beginning to wrestle with the full implications of *Hicks*, is not warranted.

4. The smattering of authority cited by the State in a cursory footnote to support the proposition that "[s]everal state courts anticipated the *Hicks* ruling," Pet. at 14 n.2, does not materially aid the State's cause.

Most of the cases cited in the State's footnote pre-date *Hicks* and are, in any event, entirely irrelevant to the issues presented here. *State v. Mathews*, 986 P.2d 323, 337 (Idaho 1999), for example, did not involve fresh pursuit at all, but instead (like the underlying search in *Hicks*) involved a search pursuant to a warrant issued by a state court. *Fournier v. Roed*, 161 N.W.2d 458, 461 (N.D. 1968), a 1968 decision, rejected a habeas challenge contending that an illegal arrest of an Indian by a state officer on a reservation deprived the State of authority to try the Indian. But the South Dakota Supreme Court made clear both in *Spotted Horse* and in the decision below that an unlawful arrest has no effect on the lawfulness of any subsequent trial or conviction, and thus the decision below is entirely consistent with *Fournier*. And although the decision in *State v. Lupe*, 889 P.2d 4 (Ariz. Ct. App. 1994), addresses fresh pursuit issues, it is only a decision of an intermediate appellate court; the Arizona Supreme Court has not decided the issue. *Cf.* S. Ct. Rule 10(b) (focusing on, *inter alia*, decisions of a "state court of last resort").[5]

City of Cut Bank v. Bird, 38 P.3d 804 (Mont. 2001), is the only fresh pursuit case from a state court of last resort cited by the State. But the State does not contend that any tension between *Bird* and the decision below justifies a grant of certiorari. Nor could it. *Bird* relied principally (38 P.3d at

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[5] In *State v. Hook*, 476 N.W.2d 565 (N.D. 1991), the North Dakota Supreme Court held that state officers had jurisdiction to enter the Devils Lake Sioux Indian Reservation, but only because Congress had expressly given the State criminal jurisdiction over that reservation in a 1946 statute. *See id.* at 568-69 (quoting 60 Stat. 229 (1946)); *see also supra* note 3. No such congressional authorization is at issue here, and thus the State correctly does not suggest that *Hook* is relevant.

806-07) on the Ninth Circuit's decision in *United States v. Patch*, 114 F.3d 131 (9th Cir. 1997) – a case not even cited by the State – and *Patch* in turn resolved the issue with a single sentence and a citation to the decision of the state intermediate appellate court in *Lupe*, *see* 114 F.3d at 134. The reasoning in those cases is thus cursory at best.[6] Even absent *Hicks*, therefore, any tension with those cases would not justify this Court's attention. Indeed, this Court denied review in *Patch* despite the tension between *Patch* and *Spotted Horse*, *see* 522 U.S. 983 (1997), and the decision below merely reaffirms *Spotted Horse*. With *Hicks* as an intervening development, the case for review is even weaker, because the relevant question in the lower courts is how *Hicks* applies to fresh pursuit cases, and again this case is the first to address that issue.[7] Any tension between the decision below and pre-*Hicks* cases thus provides no basis for review.

5. The posture of this case – involving an interlocutory pre-trial appeal of a suppression motion – makes this a particularly inappropriate case for review. As the South Dakota Supreme Court made clear, nothing in its decision affects the State's jurisdiction to try Mr. Cummings. Nor is that an empty promise – Spotted Horse, for example, was convicted on charges based on evidence obtained prior to the

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[6] The *Bird* Court's reliance on *Patch* was in any event misplaced. All of the events in *Patch* occurred on the reservation, and the state officer there had authority to patrol the reservation highway where the infraction took place. Whether a law enforcement officer who is lawfully on a reservation highway has authority to leave to make an arrest elsewhere on the reservation was not at issue in *Bird* and is not at issue here.

[7] Although *Bird* technically post-dated *Hicks*, the court in *Bird* made no mention of *Hicks* in its decision, and thus *Bird* itself contributes nothing to resolving the relevant question.

illegal arrest. Here, the principal evidence the South Dakota Supreme Court suppressed was the statement that Mr. Cummings had consumed four beers. But the State brought no alcohol-related charges, and the alcohol-related evidence is entirely irrelevant to the speeding charge. Although the State contends that the evidence is relevant to the eluding charge, *see* Pet. at 4, even there its importance likely pales in comparison with the testimony of Deputy McMillin. The evidence suppressed is thus unlikely to prejudice the State's prosecution of Mr. Cummings. The largely academic nature of the resulting controversy thus weighs heavily against review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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