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

SUPPLEMENTAL BRIEF FOR PETITIONERS

JOHN D. HANCOCK
JOHN D. HANCOCK LAW GROUP
72 North 300 E.
Suite A (123-13)
Roosevelt, UT 84066
(435) 265-3272

WILLIAM S. CONSOVOY
Counsel of Record
JEFFREY M. HARRIS
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

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285605

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.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States recognizes that "state supreme courts have taken somewhat different approaches" on the first question presented, there is "some disagreement" over the second question, and the decision below is wrong because the rationales underlying the tribal-exhaustion doctrine "would appear ordinarily to depend on whether tribal-court proceedings are, in fact, pending." Brief of United States ("U.S. Br.") 8, 12, 18. Yet it recommends that the Court deny certiorari. The arguments the United States makes for opposing review are misplaced.

I. This Court has jurisdiction under § 1257.

As Petitioners explained, there are no jurisdictional obstacles to this Court's review of the questions presented. Reply Br. 10-11. The United States (at 11) agrees with Petitioners that "only review by this Court at this stage is likely to fully vindicate what [Petitioners] assert to be a 'right to proceed in state court without having to exhaust in tribal court.'" As the United States notes, in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), this Court held that it had jurisdiction under § 1257 to consider a question of venue even though there was not yet a final judgment in state court. Like the exhaustion issue here, the venue question in *Langdeau* was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558.

Langdeau also relied upon the "policy underlying the requirement of finality in 28 U.S.C. § 1257," which would be advanced by "determin[ing] now in which state court

appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.* So too here. Absent this Court's intervention on the exhaustion issue, Petitioners could face years of delay, complexity, and uncertainty before they are able to litigate their state-law claims on the merits in state court (if they are ever able to return to state court, *see infra*). This is precisely the type of case in which "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478 (1975).

The United States recognizes these governing principles yet argues (at 10) that it is "not entirely clear" whether this Court has appellate jurisdiction. That argument relies exclusively on prudential and pragmatic concerns that lack merit and do not undermine the Court's jurisdiction.[1]

First, the United States suggests (at 9-10) that the exhaustion issue is insufficiently final because the Utah Supreme Court instructed the trial court to determine if there is a non-frivolous basis for bringing certain claims in tribal court. Pet. App. 71a-73a. But that instruction applies only to Petitioners' official-capacity claims—and not to the personal-capacity claims. *Id.*

1. Notably, the United States does not endorse Respondents' misguided suggestion that the decision below rested solely on state law. Reply Br. 6-8.

In particular, the trial court was instructed "to carefully follow [Justice Himonas's] additional directions on remand," *id.* at 35a n.12, and those directions were to determine whether it might be futile for Petitioners to exhaust a "subset" of their claims in tribal court, namely "their official-capacity claims," *id.* at 71a. But the decision was unequivocal that other "portions of plaintiffs' lawsuit" will "proceed in tribal court." *Id.* at 73a.[2] The Utah Supreme Court also noted that the official-capacity claims (even if not subject to tribal-court exhaustion) would likely be stayed "pending the resolution of those portions of the plaintiffs' lawsuit that can proceed in tribal court." *Id.* In short, due to the Utah Supreme Court's misapplication of federal law, Petitioners have no choice but to proceed to tribal court before they can obtain a ruling from a state court on the merits of their claims. The Utah Supreme Court's decision "is plainly final *on the federal issue* and is not subject to further review in the state courts." *Cox*, 420 U.S. at 485 (emphasis added).

The United States also suggests (at 10-11) that the Court's immediate intervention is unnecessary because, perhaps years from now, Petitioners could obtain review of the exhaustion issue after the completion of litigation in tribal court and another round of proceedings in state or federal court. But as the United States concedes (at 11), the same was true of the venue question in *Langdeau*—yet that did not deprive this Court of appellate jurisdiction under Section 1257. 371 U.S. at 558.

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2. The United States' suggestion, in passing, that the trial court may conclude that the personal-capacity claims also are not subject to exhaustion is therefore misplaced. U.S. Br. 21-22. The Utah Supreme Court foreclosed that possibility.

Furthermore, Petitioners may *permanently* lose the ability to return to state court if they must first proceed in tribal court. As Justice Lee noted, state courts "lack … any direct review authority over tribal court decisions." Pet. App. 81a n.13; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction … proper deference to the tribal court system precludes relitigation of issues raised by [the plaintiff's] claim and resolved in the Tribal Courts."). If Petitioners bring their claims in tribal court and lose, it is far from certain that they could then "return to state court," U.S. Br. 11. Immediate intervention is thus the only way to ensure that Petitioners do not irrevocably lose their chosen forum. The Utah Supreme Court's ruling on tribal exhaustion is as final as it will ever be.

II. The lower courts are divided over whether and how the tribal-exhaustion doctrine applies in state court.

As Petitioners explained, state and federal courts are divided over whether and to what extent the tribal-exhaustion doctrine applies in state court. *See* Pet. 15-23. The United States acknowledges that courts have taken "somewhat different approaches" but asserts that any divergent holdings turned on "case-specific circumstances" rather than a "crystallized disagreement." U.S. Br. 8, 14-20.

Although the United States would like to chalk up any division to factual differences, this split of authority is widely acknowledged and well documented. In *Meyer & Assocs., Inc. v. Coushatta Tribe of La.*, 992 So.2d 446, 461-62 (La. 2008), the Louisiana Supreme Court declined to adopt an exhaustion requirement, and the dissenting

justices criticized that holding for failing to follow the Connecticut Supreme Court's reasoning in *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998). In turn, the Connecticut Supreme Court noted in *Drumm* that it was declining to follow cases from Washington and Minnesota holding that "the exhaustion doctrine is not applicable to state courts." *Id.* at 61 n.11 (citing *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290-91 (Minn. 1996); *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372, 373-75 (Wash. Ct. App. 1996)). And Justice Lee highlighted this division of authority in his dissenting opinion below. *See* Pet. App. 77a n.4 (Lee, J., dissenting). In sum, the lower courts that have actually *decided* these issues have readily acknowledged the existence of a split.

The United States (at 14-15) seeks to distinguish the Minnesota Supreme Court's decision in *Gavle* on the ground that the court "considered multiple factors" in declining to require exhaustion of tribal court remedies. But there is no doubt that this case would have come out differently had it arisen in Minnesota. Like this case, *Gavle* involved ordinary state-law claims filed in state court challenging at least some misconduct that took place off-reservation. 555 N.W. 2d at 287-88. And, like Respondents here, the defendants in *Gavle* relied on *National Farmers* and *Iowa Mutual* to argue that all of the claims needed to be litigated in tribal court. But the Minnesota Supreme Court squarely rejected that argument, emphasizing that "Minnesota state courts have a strong interest in determining for our citizens the nature of legal claims that they may assert against tribal business entities and the defenses that may be raised in response." *Id.* at 292. As long as the claims did not seek to "change the tribal laws, to reduce the community's ability to govern itself, or to remove the tribal court's jurisdiction"

over "on-reservation activities," they could be heard in state court. *Id. Gavle* thus makes clear that there is no federal-law impediment to a non-tribal business bringing state-law claims in state court alleging interference with its off-reservation business activities.

Similarly, in *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372, 373-75 (Wash. Ct. App. 1996), the Washington Court of Appeals refused to require exhaustion of state-law contract claims involving off-reservation activity. Here too, the crux of Petitioners' state-law claims is that Respondents sought to extort money and interfere with Petitioners' off-reservation business activities. Just as *Maxa* emphasized the powerful state interest in "interpreting and enforcing contracts made with its citizens," 924 P.2d at 375, there was no obstacle to the Utah courts applying state tort law to protect its citizens from extortionate and unfair business practices. *See also 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."); *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.").

Moreover, in *Meyer*, the Louisiana Supreme Court refused to require tribal court exhaustion of claims arising out of a contract between a tribe and an engineering firm. As in this case, the state had "a major interest" in the proper adjudication of cases involving its citizens. 992 So. 2d 451-52. As noted above, because "state courts, unlike federal courts, do not have the power to review a tribal court's exercise of jurisdiction over non-members," requiring tribal-court exhaustion could have the effect

of permanently stripping the state courts of their ability to adjudicate state-law claims. *Id.* at 452. The United States (at 18) nevertheless claims that *Meyer* turned on "case-specific factors." But the *Meyer* dissent disagreed, arguing that the majority erred as a matter of federal law because *Iowa Mutual* and *National Farmers* "required" exhaustion. 992 So. 2d at 457-59 (Kimball, J., dissenting). The dissent would have followed the "well-reasoned and extensive" decision of the Connecticut Supreme Court in *Drumm*, which "decided that the Exhaustion Doctrine applies to state courts." *Id.* at 461.

As to the second question presented—whether the exhaustion doctrine can apply in the absence of a pending case in tribal court—the United States acknowledges (at 18-19) "some disagreement" among the lower federal and state courts. The United States quibbles over the extent of the split. But it does not—and cannot—dispute that there is a square conflict of authority, with Utah and several federal courts on one side and Connecticut and New York (at a minimum) on the other. *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) (noting 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).

Last, the United States (at 18) suggests that even if there is a division of authority, the Court's intervention is not needed because these issues have arisen only a "handful" of times in recent years. But the injury to state sovereignty "cannot be overstated" whenever federal law is construed as restricting the jurisdiction of state courts to hear state-law claims. Utah Br. 12. Had tribal exhaustion been imposed by a federal statute, this Court would have required a clear statement of congressional

intent to displace state authority. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Yet the Utah Supreme Court imposed such a rule as a matter of federal law based on an interpretation of this Court's decisions. If the Court intended for the tribal-exhaustion doctrine to apply in circumstances beyond those addressed in *National Farmers* and *Iowa Mutual*, it would have said so clearly. And if that is not what this Court intended, it should eliminate any confusion on this point and reverse the decision below. Either way, a division of authority over when state courts may be stripped of the power to hear state-law claims is plainly important enough to warrant this Court's review.

III. There are no "vehicle" issues.

The United States (at 20-22) incorrectly suggests that this petition is an inappropriate "vehicle" for addressing the nature and scope of the tribal-exhaustion doctrine. To begin, none of these "vehicle" issues even pertains to the first question. The United States acknowledges that there is no obstacle to reviewing "whether the tribal-exhaustion doctrine 'applies to state courts' as a categorical matter." U.S. Br. 20 (quoting Pet. i).

The concerns the United States raises about the second question are misplaced. Notably, the United States apparently agrees with Petitioners that the applicability of the tribal-exhaustion doctrine should "depend on whether tribal-court proceedings are, in fact, pending." U.S. Br. 12. There is, in fact, no pending tribal-court proceeding here. Pet. 76a. Thus, the *salient* facts are undisputed and there are no obstacles to resolution of this question either.

The United States suggests that the second question does not "independently warrant" review because it is only "relevant" if the Court were to rule against Petitioners on the first question. U.S. Br. 18. The United States opposes review of the first question, however, because it disagrees with Petitioner on the extent of the conflict, *see supra* 6-7, and on the merits, U.S. Br. 12—not because of any vehicle issue. The United States may oppose review of the second question, then, but that position has nothing to do with obstacles that might prevent this Court from reaching the issue.

The United States' remaining objections to granting review confirm that these are not genuine vehicle issues—at least as that concern is customarily invoked at the certiorari stage. The United States worries that "lack of clarity in the decision below could inhibit the Court's ability to fully undertake" review of this question because the Utah Supreme Court *might* have required exhaustion of certain "questions" (not "claims"), which *might* be appropriate under "principles of primary jurisdiction or certification of state-law issues to a state court." U.S. Br. 20-21. But even assuming this chain of speculation could come to pass, it has nothing to do with the actual question presented: whether tribal exhaustion applies absent an ongoing tribal proceeding. Again, all agree that there is no ongoing tribal-court proceeding.

Even the United States seems skeptical about the plausibility of its "primary jurisdiction" theory. Indeed, the government says only that it is "aware of no basis in federal law for disapproving that procedure." *Id.* at 21. That is no ringing endorsement. Regardless, an alternative ground for affirmance that no party has raised, that depends on an interpretation of the decision below

that the United States is unsure is correct, and that would expand the doctrine in ways the United States will not forthrightly support, may be many things. But a vehicle issue is not one of them.[3]

Finally, the United States chides the parties for not citing *Williams v. Lee*, 358 U.S. 217 (1959), U.S. Br. 14, 18, because restrictions it imposes on "state-court jurisdiction over suits against Indians for on-reservation conduct" may "have to be considered" at some point, *id.* at 22. The United States acknowledges, however, that the *Williams* question is "distinct" from these tribal-exhaustion questions. *Id.* at 14. The *Williams* line of cases addresses the circumstances under which there is "tribal jurisdiction over the conduct of nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). That issue is "distinct" because if such jurisdiction exists, the remedy is not tribal-court exhaustion. The state-court lawsuit would instead be "barred" under principles of "tribal sovereignty," U.S. Br. 13, 15, and therefore must be dismissed for lack of jurisdiction, *Santa Clara Pueblo v. Martinez*, U.S. 49, 60 n.9 (1978).[4]

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3. The same goes for the suggestion that Petitioners might need to exhaust their claims in a tribal administrative proceeding. U.S. Br. 22. There is no pending administrative proceeding, Reply Br. 9, no decision of this Court requires exhaustion under those conditions, the United States does not actually argue that tribal exhaustion should be extended to that circumstance, and even if it did, that would be another alternative basis for affirmance—not a "vehicle" issue.

4. But even if the *Williams* issue were intertwined with tribal exhaustion, that would not create a vehicle issue. Tribal sovereignty doctrines almost never apply to "nonmember conduct on non-Indian land." U.S. Br. 21. It is also incorrect that "at this stage of the litigation it is disputed where the events underlying

This case confronts an antecedent question: will the *Williams* issue (assuming it is raised at all) be decided in state or tribal court? Pet. App. 58a-59a. Some courts—including the Utah Supreme Court—hold that the tribal-exhaustion doctrine requires a tribal court to decide that issue in the first instance and oust the plaintiff from his chosen forum. Other courts—because the case is in state court or because there is no ongoing tribal-court proceeding—hold that exhaustion is not required and proceed to decide the *Williams* question and any other legal or factual dispute in the case. *See supra* 4-8. That is the very issue for which review is sought here.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JOHN D. HANCOCK
JOHN D. HANCOCK LAW GROUP
72 North 300 E.
Suite A (123-13)
Roosevelt, UT 84066
(435) 265-3272

WILLIAM S. CONSOVOY
Counsel of Record
JEFFREY M. HARRIS
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

Date: December 18, 2018

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petitioners' claims took place." *Id*. Because this case is at the Rule 12 stage, Petitioners' claim that this dispute occurred on non-Indian land must be taken as true. App. 9a, 16a n.6.