No. 21-1340

In the Supreme Court of the United States

LYNN D. BECKER,
Petitioner,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION; UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; UTE ENERGY HOLDINGS, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The Respondent Ute Indian Tribe of the Uintah and Ouray Reservation is a sovereign Indian tribe. The Tribe has no parent corporation or other parent entity, and no publicly held corporations own any interest in the Tribe.

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INTRODUCTION

There is no compelling reason to grant review in this case. The cases below involve competing claims to state and tribal jurisdiction over the dispute between the Ute Indian Tribe and Petitioner Lynn Becker (Becker), a non-Indian, who engaged in a consensual relationship with the Tribe inside the boundaries of the Tribe's reservation. The Indian Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, grants the federal government authority over Indian affairs to the exclusion of the states, meaning that the regulation of trade and intercourse between Indian tribes and non-Indians is exclusively the province of federal law. And in cases involving the boundaries between "state [jurisdiction] and tribal self-government," this Court has repeatedly cautioned that generalizations can be "treacherous." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

Mr. Becker's petition effectively asks this Court to overturn long-settled law—precedent upon precedent—on matters of both tribal court exhaustion and state adjudicatory jurisdiction in lawsuits involving Indian tribes and Indian trust property. In doing so, Becker posits an illusory construct of asserted conflicts in the decisions of lower federal courts and state courts that simply do not exist. The cases Becker cites for a split in lower court decisions are all readily distinguishable, either factually or legally. And without more, the cited cases do not establish a split in legal authority. In fact, in this particular field of law,

involving the boundaries between state and tribal jurisdiction, factual and legal differences are to be expected, indeed, factual and legal differences are the *norm*.

This Court has cautioned that cases involving state/tribal jurisdictional conflicts cannot be decided simplistically based on "mechanical or absolute conceptions of state or tribal sovereignty." *Bracker*, *supra*, 448 U.S. at 144-45 (1980). Instead, courts must conduct "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, *in the specific context*, the exercise of state authority would violate federal law." *Id.* at 145. (emphasis added) This particularized inquiry requires a court to examine "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id*. at 144-45; *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (judicial review must include a "careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions" relevant to each specific case).

Mr. Becker's petition for certiorari addresses none of these factors; instead, Becker relies almost entirely on generalizations and mechanistic analyses. Notably, the State of Utah, through the Honorable Judge Barry

Lawrence—a party to both lower court cases—has elected not to seek certiorari review. For this reason alone, the Court's review is not warranted.

Certiorari is also unwarranted for another reason. Contrary to Becker's assertion, this case offers no opportunity for the Court to address the "exceptionally important" and "recurring" issues that Becker claims he has identified for the Court to address. Pet. 29-34. Two separate evidentiary hearings were conducted in the two cases below, and yet there is not a *scintilla* of evidence in the court record to substantiate the "problems" that Becker says he has identified for Supreme Court review. Thus, for this reason as well, the petition for review should be denied.

STATEMENT OF THE CASE

The Ute Tribe is a federally recognized Indian tribe that resides on the Uintah and Ouray Reservation in Utah. The Tribe has nearly three thousand enrolled members and over half its members live on its reservation. The Tribe operates its own tribal government and oversees approximately 1.3 million acres of trust lands, some of which contain significant oil and gas deposits. Revenue from the development of these oil/gas resources is the primary source of money used to fund the Tribe's government and its health and social welfare programs for its members.[1]

At the outset, it is necessary to correct a material misrepresentation in Becker's petition. At no time did

[1] I. Cuch Declaration, ¶ 2, Plaintiffs' Appendix to Motions for Summary Judgment, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Dec. 7, 2017) Dkt. 55-1 at 8-9 and 11.

the Utah Tribe agree to resolve disputes with Becker before *any* state court, much less state courts in Utah, as the petition implies. Pet. 3. To the contrary, the Tribe agreed only to submit disputes to a court of "competent jurisdiction." Resp't App. 81a. And a "competent court" means simply a court that possesses subject matter jurisdiction. *Restatement (Second) of Judgments*, 2 Intro. Note (Am. Law Inst. 1982). Significantly, in much earlier protracted and costly litigation between the Ute Tribe and the State of Utah (together with three of the state's counties and municipalities), the Tenth Circuit ruled, en banc in 1985, that federal law prohibits the State of Utah from exercising regulatory and adjudicatory jurisdiction over the Ute Tribe and its members for conduct occurring inside the boundaries of the Uintah and Ouray Reservation.[2] In light of this prior litigation history and controlling federal precedent, it is inconceivable that the Ute Tribe would have understood the words "court of competent jurisdiction" to mean state courts in Utah as the Becker petition implies.

A. Federal and Utah State Court Proceedings

Mr. Becker is a non-Indian who worked from March 2004 through October 2007 as a contract employee in

[2] *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072, 1157 (D. Utah 1981) (*Ute I*); *aff'd in part, rev'd in part, Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc) (*Ute III*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*); and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*).

one of the Tribe's governmental departments, the Tribe's Energy and Mineral Department.[3] The Tribe alleges in its complaints that Becker was one of several unscrupulous non-Indians who insinuated themselves into the Tribe's government in the early 2000s and who, through a pattern of fraud, subterfuge and bullying, attempted to secure for themselves an interest in the Tribe's oil and gas mineral estate.[4]

The Tribal parties allege, *inter alia*, that the Becker Independent Contractor Agreement (Agreement) is an *illegal* contract, void *ab initio*, for lack of necessary federal approval required by both federal and tribal laws to prohibit the alienation of tribal trust assets without federal approval.[5] These laws include the Tribe's own internal laws and multiple federal statutes that require the approval of the Secretary of Interior for agreements such as the Becker Agreement.[6]

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[3] *Id.*, Cuch Declaration, ¶ 7, Dkt. 55-1 at 12.

[4] First Amended Complaint, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Dec. 7, 2017) Dkt. 4.

[5] Plaintiffs' Expedited Motion for Summary Judgment and for Interim and Permanent Injunctions on Grounds of Illegality Under Federal and Tribal Law, Infringement on Tribal Sovereignty, and Federal Preemption, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Dec. 7, 2017) Dkt. 53.

[6] *Id.*; *see e.g.*, the Non-Intercourse Act, 25 U.S.C. § 177, which prohibits any "grant … or other conveyance of [Indian] lands, or of any title or claim thereto" unless authorized by Congress; 25 U.S.C. § 81(b), which states that "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary"; the Indian Reorganization Act, 25 U.S.C. § 464, which prohibits the "sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian Tribe," unless authorized by Congress; and the Indian Mineral

Importantly, Mr. Becker *admits* that his Agreement was never approved by the U.S. Secretary of the Interior or the Bureau of Indian Affairs. Resp't App. 104a-107a. Consequently, as a matter of law and undisputed fact, Becker's Agreement with the Ute Tribe is a legal nullity.[7]

Development Act (IMDA), 25 U.S.C. § 2102(a), which requires the Secretary of the Interior to approve any "service" or "managerial" agreement related to the "exploration for, or extraction, processing, or other development of" Indian oil and gas mineral resources.

[7] *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 667-75 (1974) (*Oneida I*), and *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*) (holding the Oneida Nation's 1795 conveyance of 100,000 acres to the State of New York was a legal nullity because the conveyance was never approved by the federal government); *Smith v. McCullough*, 270 U.S. 456, 463, 465 (1926) (without federal approval, no portion of the unapproved contract is enforceable); *Ewert v. Bluejacket*, 259 U.S. 129, 137 (1922) (illegal alienation of Indian property confers no enforceable rights); *Wells Fargo Bank v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 698-700 (7th Cir. 2011) (trust indenture and waiver of sovereign immunity contained therein were void *ab initio* for lack of federal approval); *Catskill Dev., L.L.C. v. Park Place Entm't, Corp.*, 547 F.3d 115, 127-30 (2d Cir. 2008) (contracts with Mohawk Indian Tribe were void *ab initio* for lack of federal approval); *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.2d 737, 742-43 (8th Cir. 1993) (holding that federal restraints on the alienation of Indian property apply not only to real property but also "to interests in [Indian] land, like fossils" (or minerals) "that become personal property when severed from the land."); *Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459-60 (9th Cir. 1986) (and cases cited therein) (agreement not approved under the Indian Mineral Development Act is not enforceable); *Pueblo of Santa Ana v. Mt. States Tel. and Telegraph Co.*, 734 F.2d 1402, 1406 (10th Cir. 1984), *rev'd on other grounds*, 472 U.S. 237 (1985) (nullifying a 1928 rights-of-way because it was void *ab initio*).

The Tribal parties further allege that federal law and Utah state law *both* prohibit the Utah state court from exercising subject matter jurisdiction over the *Becker* state suit—not simply because the suit involves claims against the Tribe that arose within the Tribe's reservation boundaries, but also because the suit seeks to adjudicate Becker's claims to an ownership interest in the Tribe's restricted oil/gas mineral interests, property that indisputably is held in trust for the Tribe by the United States.[8] Significantly, under Public Law 280, 28 U.S.C. § 1360(b) and 25 U.S.C. 1322(b), Congress has expressly prohibited state courts in all fifty states from adjudicating "in probate proceedings or otherwise" the ownership or right to possess "any real or personal property" or "any interest therein" belonging "to any Indian or any Indian tribe." *Bryan v. Itasca Cty.*, 426 U.S. 373, 388-89 (1976).

B. The Lower Federal Court Records and Four Tenth Circuit Rulings

In 2016, the Tribe filed a federal court suit seeking, *inter alia*, to enjoin Becker's state court suit against the tribal parties, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, U.S. District Court for the District of Utah, case number 2:16-cv-00579 (June 13, 2016) (the "*Lawrence* case"). Thereafter, Becker filed a separate federal suit seeking to enjoin the tribal parties' suit against him in the Ute Indian Tribal Court, *Becker v. Ute Indian Tribe of the Uintah and*

[8] Plaintiffs' Expedited Motion for Summary Judgment and for Interim and Permanent Injunctions on Grounds of Federal Preemption, Infringement on Tribal Sovereignty, and Lack of Subject Matter Jurisdiction, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Dec. 7, 2017) Dkt. 52.

Ouray Reservation, U.S. District Court for the District of Utah, case number 2:16-cv-00579 (Sept. 14, 2016) (the "*Becker* case").

Since 2016, the two cases have been appealed to the Tenth Circuit two times each, with two different panels of circuit court judges (a total of five different circuit judges altogether) ruling largely in the Tribe's favor on the same legal issues (at different stages of litigation) in all four appeals. Becker's petition refers to those four decisions as *Becker I* through *Becker IV*. The Tribal parties refer to the cases as *Lawrence I* and *II*, and *Becker I*, *II* and *III*. The four most recent Tenth Circuit decisions are:

> *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539 (10th Cir. 2017) (*Lawrence I*)
>
> *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 868 F.3d 1199 (10th Cir. 2017) (*Becker II*)
>
> *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 11 F.4th 1140 (10th Cir. 2021) (*Becker III*)
>
> *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 22 F.4th 892 (10th Cir. 2022) (*Lawrence II*)

The district court conducted two separate evidentiary hearings, both ordered by the Tenth Circuit: a hearing on February 28, 2018, at which time the Tribe presented two expert witnesses and Mr. Becker called

no witnesses;[9] then nearly two years later, a two-day hearing on January 6-7, 2020.[10] The Tribe's documentary and testimonial evidence is included in the court records and is summarized in the Tribe's briefs to the Tenth Circuit.[11]

Becker's petition urges this Court to grant review in order to address "exceptionally important" and "recurring" issues related to tribal court exhaustion, sovereign immunity waivers, and "tribal commerce"—issues that Becker contends "threaten [ ] to disrupt fruitful commerce between non-Indians and tribes." Pet. 29-34. Significantly, however, there is not a *scintilla* of evidence in the court records to substantiate any of Becker's allegations to this Court. In fact, the only evidence of record on this point directly controverts Becker's assertions. Pilar Thomas, Esq., former Deputy Solicitor for Indian Affairs, U.S. Department of Interior, and former Deputy Director, Office of Indian Energy Policy and Programs, U.S. Department of Energy, testified as an expert witness for the Tribe. And in response to questions from Becker's counsel, Attorney Thomas testified:

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[9] Minute Entry, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Feb. 28, 2018) Dkt. 106.

[10] Minute Entries, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Jan. 6-7, 2020) Dkt. 174, 175.

[11] Tribe's Opening Brief at 51-56, *Ute Indian Tribe v. Lawrence*, No. 18-4013 (10th Cir. June 11, 2018), Dkt. 01011005459; Tribe's Opening Brief at 45-50, *Ute Indian Tribe v. Becker*, Nos. 18-4030 and 18-4072, (10th Cir. July 16, 2018) Dkt. 010110023721; Tribe's Reply Brief at 15-30, *Ute Indian Tribe v. Becker*, Nos. 18-4030 and 18-4072, (10th Cir. Aug. 29, 2018) Dkt. 010110044952.

> People do business with [Indian] tribes all the time. Tribes enter into contracts with people all the time. It is incumbent, in my practice and in my expert opinion, that when you do business with a tribe that you are aware of both the tribe's law and federal law.[12]

Neither Becker nor the Honorable Judge Barry Lawrence sought en banc review of the Tenth Circuit's 2021 and 2022 rulings in *Lawrence* and *Becker*. Instead, Becker, but not State Judge Lawrence, directly petitioned for certiorari.

C. The Suit Still Pending Before the Ute Indian Tribal Court

The Ute tribal parties sued Becker in the Ute Indian Tribal Court in August 2016, alleging claims for declaratory relief, breach of fiduciary duty, fraud/ constructive fraud/theft/conversion of tribal assets, unjust enrichment, and equitable disgorgement and restitution. Resp't App. 1a-25a. A chronology of the Tribal Court proceedings is detailed in the Tribe's opening brief in *Becker*, appeal nos. 18-4030 and 18-4072.[13] For nearly all the sixty-six months between August 2016 and January 2022, the Tribal Court suit was sidelined by the injunction order imposed by the federal district court in *Becker* in direct contravention of this Court's controlling precedent in *Nat'l Farmers*,

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[12] Tribe's Reply Brief, *Ute Indian Tribe v. Lawrence*, No. 18-4013 (10th Cir. July 30, 2018), Dkt. 010110030205, and Aplt. App., XI at 197-199, 2505:10–2507:7, (10th Cir. June 11, 2018) Dkt. 010110054444.

[13] Tribe's Opening Brief at 16-20, *Ute Indian Tribe v. Becker*, Nos. 18-4030 and 18-4072, (10th Cir. July 16, 2018) Dkt. 010110023721.

471 U.S. at 856-57, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-17 (1987). The federal court injunction was not dissolved until the Tenth Circuit mandate in *Becker* issued on January 20, 2022.[14]

Nonetheless, for a period of nearly fourteen months in 2017-2018, the Tribal Court suit was allowed to proceed by order of the Tenth Circuit. In those months, the Tribal Court (*i*) denied Becker's motion to dismiss for lack of tribal court jurisdiction, Resp't App. 26a-34a; (*ii*) *sua sponte* bifurcated the declaratory judgment claims from the tort and equitable claims, Resp't App. 39a-40a; (*iii*) ruled on both parties' pretrial motions, Resp't App. 35a-38a and (*iii*) conducted a hearing on the tribal parties' motion for partial summary judgment on the Tribe's claims for declaratory relief. On February 28, 2018, the Tribal Court granted partial summary judgment in the Tribe's favor. Resp't App. 41a-61a. The Tribal Court ruled, *inter alia*, that the waiver of sovereign immunity under the Becker Agreement was invalid under tribal law. Resp't App. 46a-51a. The court also ruled that the Becker Agreement itself is "void ab initio and without effect" for lack of federal approval as required by both Ute Indian tribal law and federal law. Resp't App. 51a-60a.

The Tribal Court's interlocutory ruling of February 2018 was the last action the Tribal Court was permitted to take before the federal district court in Utah again enjoined the Tribal Court proceedings under its order of April 30, 2018. Pet. App. 75a-82a. As a result, at this time there still has been no exhaustion

[14] Mandate, *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, No. 2:16-cv-00958 (D. Utah Jan. 20, 2022) Dkt. 293.

of tribal court remedies as required by this Court's controlling precedent in *Nat'l Farmers* and *Iowa Mutual*.

REASONS TO DENY CERTIORARI

The petition should be denied for at least three reasons: First, the Tenth Circuit's ruling on tribal court exhaustion was correct and conflicts with no decision of this or any other court. Second, the court's holding that the Utah state court lacks subject matter jurisdiction is also correct, and likewise presents no disputed question of law. Third, Becker seeks a remedy aimed at a problem for which there is not even a scintilla of evidence contained in the court record.

I. There Are No Irreconcilable Conflicts For This Court To Address; No Grounds Exist For Review Under Supreme Court Rule 10

A. There is No Circuit Court or State Court Split

There is no split of authority in the circuit or state courts on the issues presented. Becker's entire contention to this effect is based on assertions that are contrary to both the tribal court *and* the Tenth Circuit's application of law to the complex and unique facts of these cases.

Becker entered into a consensual agreement with the Tribe to be a tribal employee. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members,

through commercial dealing, contracts, leases or other arrangements.")

After working for one year as a tribal employee, Becker claims that his consensual relationship with the Tribe was re-defined in an "Independent Contractor Agreement" (the alleged agreement). The Tribe disagrees. The Tribe claims the alleged agreement was void *ab initio*. Resp't App. 14a. There was a consensual relationship between Becker and the Tribe, but that relationship was not defined by the unlawful and void (and, the Tribe alleges, fraudulent) alleged agreement.

In the underlying Tribal Court case, the Trial Court became the first forum to adjudicate the legality of the Becker Agreement, ruling that the alleged contract was void *ab initio*. Resp't App. 60a. That decision is based upon the application of the Tribe's laws and federal laws to the specific facts, including unrebutted experts, that were presented to the Tribal Court. Resp't App. 51a-60a. Under applicable federal and tribal law, a contract that results in the alienation or encumbrance of assets owned by the United States in trust for a tribe is void *ab initio* unless the contract is first approved by the United States Department of Interior. And as Becker concedes, the Department of Interior never approved his alleged agreement with the Tribe. Therefore, the Tribal Court's decision turned on the factually complex and factually unique issue of whether the alleged agreement encumbered or alienated Indian trust assets. After full briefing and an oral hearing, the Tribal Court determined that the contract did encumber or alienate federal trust property. Hence, the contract was declared void ab initio.

Without exhausting Tribal Court remedies, Becker maintains that federal courts should reject the Tribal Court decision. However, when the case reached the Tenth Circuit, that court applied the law that every circuit applies (that unapproved encumbrances of Indian trust property are void *ab initio*) to the specific facts here, and it concluded that the Tribal Court was likely correct—in fact it noted that Becker did not even present an argument to the contrary. Pet. App. 73. The Tenth Circuit therefore required exhaustion of tribal court remedies, so that a final and full record and decision on the case can be issued by the Tribal Court. *Iowa Mut.*, *supra*, 480 U.S. at 18 (discussing that one of the core purposes of tribal court exhaustion is the creation of a factual record that will be used in any post-exhaustion review); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994); *FMC v. Shoshone–Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990).

Becker's argument that this Court should grant certiorari is based upon his attempt to skip over the threshold issue—whether the alleged agreement is void *ab initio*. Becker's first "Question Presented" is based on the faulty factual premise that the Tribe "expressly consented by contract to federal or state court jurisdiction and waived . . . tribal exhaustion." Pet. at (i). Becker's petition asserts that if the alleged agreement were valid, two circuit courts would rule that Becker is not required to exhaust tribal court remedies. The Tribe disagrees with Becker's assertion that there is any split. Instead, even on the hypothetical issue that Becker asks this Court to

review, the answer turns on specific facts. But this Court does not grant certiorari to review the application of law to hypothetical facts.

Because the Tenth Circuit concluded that the agreement upon which Becker relies is likely void *ab initio*, every circuit court that has addressed the issue would require tribal court exhaustion here. Every circuit court requires tribal court exhaustion notwithstanding a contractual provision to the contrary when the validity of the contract itself is in question. Thus, this case is not a vehicle to resolve the phantom circuit split Becker has conjured.

Indeed, Becker admits that even if he could establish a valid contract, the First Second, and Tenth Circuits would still require exhaustion. Becker neglects to mention that other circuit courts besides those he mentions have addressed this very issue and agree with the First, Second, and Tenth Circuits. In *Bank One, N.A. v. Shumake,* 281 F.3d 507, 514 (5th Cir. 2002), *cert. denied,* 537 U.S. 818 (2002), the Fifth Circuit affirmed the dismissal of a bank's complaint seeking to compel arbitration pursuant to a contractual arbitration clause (a type of forum selection clause[15]) and allowed a previously filed tribal court action to proceed. The Ninth Circuit reached a similar conclusion in *Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221, 1227-29 (9th Cir. 1989), where it

[15] *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 630–31 (1985) (treating an arbitration clause in an international agreement as it would other "freely negotiated contractual choice-of-forum provisions"); *Sherwood v. Marquette Transp. Co.,* 587 F.3d 841, 844 (7th Cir. 2009) ("An arbitration agreement is a specialized forum-selection clause.").

rejected the argument that the FAA's implicit policy of favoring arbitration "should overcome the policy of comity in favor of the tribal court," particularly where "the validity of the arbitration clauses in the contracts are themselves in dispute." *Id.* at 1228 n. 16.

Becker contends the Seventh and Eighth Circuits take the opposite view and would not require exhaustion if the contract was valid. Pet. at 2. However, both the Seventh and Eighth Circuits recognize that exhaustion *is* required when, as here, the validity of the purported waiver is in question.

In *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), the Eighth Circuit ruled that tribal court exhaustion is required when the parties dispute the validity of the agreement purporting to waive tribal exhaustion. There, as here, the party opposing tribal court exhaustion argued that *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995) established that tribal court exhaustion is not required when a contract involving a tribal party contains a forum selection clause. *Bruce H. Lien Co.*, 93 F.3d at 1421. However, the Eighth Circuit distinguished *Carlow* on the basis of a challenge to the validity of the contract containing the waiver:

> The distinction between this case and *Carlow* is that in the present situation the Tribes are challenging the very validity of the agreement containing language giving the Tribal Court limited jurisdiction. As previously indicated, we

> believe this entire litigation requires a logical focus which mandates the agreement's validity be addressed before all else.

Id.

The Eighth Circuit encountered similar circumstances and reached the same conclusion in *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003). In that case, the plaintiff sought to compel an Indian band to arbitrate pursuant to a contract the Band asserted was "void in its entirety for lack of valid federal approval" required under the Indian Gaming Regulatory Act (IGRA).[16] *Id.* at 846. Noting that "[e]xhaustion is mandatory [ ] when a case fits within the policy" and finding "[t]he facts in *Bruce H. Lien Co.*" to be "very close to this case," the court reversed the district court's order compelling the Band to arbitration and held tribal court exhaustion was required. *Id.* at 850-51. As in *Bruce H. Lien Co.* and *Gaming World*, here too the Tribe has challenged the validity of the underlying Agreement purporting to waive exhaustion. Under the facts at bar, the Eighth Circuit would rule no differently than did the Tenth.

Similarly, and under facts much more favorable to former tribal employees than the current case, when a tribe disputed the threshold issue of whether an

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[16] 25 U.S.C. § 2701 *et seq.*; 25 C.F.R. § 502.15 (requiring the National Indian Gaming Commission to approve any agreement that "provides for the management of all or part of a gaming operation.").

alleged ERISA contract was valid,[17] the Federal District Court for the District of Minnesota required exhaustion of tribal court remedies. Then, when the case came back to the federal courts after exhaustion of tribal court remedies the Eighth Circuit held "the initial, and dispositive, issue addressed was whether a valid and enforceable benefits arrangement existed." The Eighth Circuit ruled that the tribal court's holding that the alleged ERISA contract was invalid under tribal law was dispositive and unreviewable in post-exhaustion review. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 757 (8th Cir. 2004).

So too does the Seventh Circuit require a *valid* agreement to foreclose tribal court exhaustion. Becker mischaracterizes the facts of *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), *as amended* (Dec. 14, 2015) in likening them to the facts at bar. A "central issue" in *Stifel* was whether the contracts containing waivers of sovereign immunity and forum selection clauses "constitute [unapproved] management contracts under the IGRA" and therefore were void. *Id.* at 197. Because the validity of the contracts turned solely upon interpretation of the IGRA, the court was able to determine as a matter of law that two of the agreements were "not void as unapproved management contracts" and thus contained valid waivers of sovereign immunity and forum selection clauses. *Id.* at

[17] The alleged contract in *Prescott* was an ERISA contract. Therefore, if the contract had been valid, the ERISA provides for complete preemption and exclusive federal jurisdiction. Even in that much more difficult fact scenario, tribal court exhaustion was required.

205. Only then was the court able to excuse the exhaustion of tribal court remedies. *Id.* at 214.

Similarly, the Seventh Circuit's decision to not require tribal court exhaustion in *Altheimer & Gray v. Sioux Manufacturing Corp.,* 983 F.2d 803 (7th Cir. 1993) turned on whether a contract containing waiver of sovereign immunity, choice of law, and forum selection clauses was void under 25 U.S.C. § 81[18] for failure to obtain the Secretary of the Interior's approval of the contract. *Id.* at 808. The court ruled that the contract at issue there did not relate to Indian lands, and therefore was not subject to 25 U.S.C. § 81 such that the Secretary's approval was required. *Id.* at 812. As with the *Stifel* decision, the court in *Altheimer* was able to determine the contract's validity as a matter of law based upon interpretation of a federal statute and thus upheld the contract's immunity waiver, choice of law, and forum selection clauses.

Here, by contrast, the Tenth Circuit has repeatedly determined that the Agreement on which Becker relies is likely void. *Becker II*, *supra*, 868 F.3d at 1204 ("If there is law exempting the Contract from the requirement of federal approval, Mr. Becker has not provided it to this court."); *id.* at 1204-5 (contract lacking "statutorily mandated federal approval" is "void *ab initio*") (Hartz, J.) (citing *Oneida II*, 470 U.S. at 245 (conveyance without statutorily mandated consent "was void *ab initio*"). Even Judge Briscoe – upon whose

[18] "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary." 25 U.S.C. § 81(b).

dissent in *Lawrence II* Becker places so much weight– agrees with this principle of law:

> [T]he Tribe has raised serious questions regarding the validity of the contract as a whole, as well as the validity of the purported waiver of sovereign immunity in particular. Out of respect for tribal self-government and self-determination, we conclude that the questions the Tribe has raised regarding the validity of the Agreement, as well as the threshold question of whether the Tribal Court has jurisdiction over the parties' dispute, must be resolved in the first instance by the Tribal Court itself . . . Of course, Becker asserts, in reliance on the Agreement itself, that the Tribe expressly waived Tribal Court jurisdiction. But that waiver provision is only applicable if the Agreement itself is determined to be valid, and, as we have noted, the Tribe has asserted nonfrivolous challenges to the validity of the Agreement.

Becker III, *supra*, 11 F.4th at 1150 (Briscoe, J.).

Becker asserts that the First, Second, Fifth, Ninth, and Tenth Circuits may have decided *Stifel* and *Altheimer* differently. If this were a petition seeking a writ of certiorari from one of those decisions, Becker's assertion might merit consideration. But unlike the Agreement at issue here, the Seventh Circuit in *Stifel* and *Altheimer* was able to determine as a matter of law that the contracts waiving tribal court exhaustion in those cases were valid. Crucially, both opinions considered the contracts' validity to be a threshold issue with respect to whether tribal exhaustion was

required – indicating that tribal court exhaustion *would* have been required had the contracts not been deemed valid. *Stifel*, 807 F.3d at 197 ("The central issue [ ] is whether the Bond Documents constitute management contracts under the IGRA . . . . If they are management contracts, then . . . they are void."); *Altheimer*, 983 F.2d at 808 ("[T]he principal dispute between the parties concerns the application of 25 U.S.C. § 81 [to determine contract's validity] . . . . It is there that we will begin our analysis.").

Indeed, Becker's contention that the Seventh Circuit would reach the same result "even in the face of a challenge to the validity of a contract" (Pet. 23) is flatly contradicted by that court's opinion in *Wells Fargo*, *supra*, 658 F.3d at 700. In that case, the Seventh Circuit ruled that a tribal entity's contractual waiver of sovereign immunity was unenforceable because the contract was void *ab initio* for lack of federal approval and, thus, was "not subject to reformation by excision of offending provisions" – even though the contract contained a severability clause. *Id.*

Because Becker's alleged agreement is similarly invalid, neither the Seventh nor Eighth Circuit would excuse tribal court exhaustion here. Indeed, the Eighth Circuit has explicitly and repeatedly held that tribal court exhaustion is required when the validity of the purported waiver of exhaustion is at issue. The Eighth Circuit draws the exact distinction the Ute Tribe draws here, and demonstrates why the phantom conflict split Becker has tried to conjure is not actually presented. *Bruce H. Lien Co.*, 93 F.3d at 1421; *Gaming World,* 317 F.3d at 850-51. Because there is no circuit or lower

court split for this Court to resolve, the petition should be denied.

B. No Act of Congress Permits a Waiver of Tribal Sovereign Immunity to Bootstrap the Ute Tribe into a Utah State Court that Lacks Subject Matter Jurisdiction

In challenging the Tenth Circuit's ruling in *Lawrence II*, Becker does not contend the Tenth Circuit erred in its interpretation or application of federal statutes or controlling precedents. Instead, Mr. Becker cites a scattering of cases for the proposition that a split in authority exists among lower federal courts and state courts on the question of state adjudicatory jurisdiction. Pet. 25-29. Becker's premise, however, hinges upon an improper conflation of two separate legal doctrines and inquiries, questions that this Court has described as "wholly distinct"—that is, the question of subject matter jurisdiction on the one hand and sovereign immunity on the other hand. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-87 n.4 (1991).[19] In fact, in the Tribe's initial appeal to the

[19] *See also United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 923-924 (9th Cir. 2009) (discussing the relationship between sovereign immunity and subject matter jurisdiction and commenting on the court's "imprecision in our language" in mistakenly treating "jurisdiction and sovereign immunity as though they were the same inquiry," noting that "sovereign immunity and subject matter jurisdiction present distinct issues."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) ("To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction."); *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1574-75 (Fed. Cir. 1995) ("The inquiry … is

Tenth Circuit in *Lawrence* in 2017, a different panel of Tenth Circuit judges rejected Becker's misguided argument on this point, stating that "sovereign immunity and a court's lack of subject-matter jurisdiction are different animals." *Lawrence I*, *supra*, 875 F.3d at 545. The court explained that tribal sovereign immunity "is a defense" that "can be waived." *Id.* at 546 (citing this Court's decision in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)). And while the immunity defense can be waived, the 2017 *Lawrence I* ruling emphasized that Becker and the Ute Tribe could not "confer [subject-matter jurisdiction] on the state by consent." *Lawrence*, *supra*, at 546 (citing this Court's decision in *Kennerly v. District Court*, 400 U.S. 423, 426-29 (1971) (holding that the Blackfeet Tribe's consent to state jurisdiction through passage of a tribal resolution was a nullity because it circumvented the "special election" requirement of 25 U.S.C. § 1326)).

In its 2017 *Lawrence I* decision, the Tenth Circuit also explained that a state court may lack subject matter jurisdiction even in circumstances in which "tribal sovereign immunity is not at issue (because the defense has been waived or the Indian party—say an individual member of a tribe—is not entitled to claim tribal immunity)." *Lawrence*, *supra*, 875 F.3d at 546. The *Lawrence I* decision explained that "[t]he sovereign immunity inquiry is solely concerned with whether the tribe itself is being sued and whether the tribe or Congress has explicitly waived immunity." *Id.* at 546 (quotation omitted). In contrast—and in language

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not whether there is one, jurisdiction, or the other, a waiver of immunity, but whether there is both….").

harkening back to this Court's reasoning in *Bracker*, i.e., that the assessment of state jurisdiction requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," 448 U.S. at 144-45—*Lawrence I* emphasized that the sovereign immunity inquiry is "unrelated to factors such as tribal, federal, or state interests" which the court said *are* "relevant to the state jurisdiction question." *Lawrence*, *supra*, 875 F.3d at 546 (quoting *Cohen's Handbook of Federal Indian Law* (Cohen) § 7.05[1][b], at 640 n.27 (Nell Jessup Newton ed. 2012)).

Bearing these important distinctions in mind, it is clear that the Tenth Circuit's rulings on state jurisdiction—first in 2017 and again in 2022—are correct and provide no basis for review.

There are two "independent but related" federal law barriers to the exercise of state jurisdiction over Indians for legal claims arising within Indian country. State jurisdiction may be preempted by federal law, or alternatively, the exercise of state jurisdiction may impermissibly infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982) (citing *Bracker*, *supra*) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). And while the preemption and infringement barriers are related, the barriers are separate and independent of one another. This means that either barrier, standing alone, can support a ruling that state jurisdiction is lacking over "activity undertaken on the reservation or by tribal members." *Bracker*, 448 U.S. at 143.

Congress has enacted statutes which define Indian country and prohibit the extension of state law and authority inside of Indian country. 18 U.S.C. §§ 1151, 1152. In light of these statutes, and Congress' plenary authority, this Court has made clear that federal law *prohibits* state courts from exercising adjudicatory jurisdiction over tribal Indians for activity undertaken inside their reservations unless the "*Congress has expressly so provided*." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (emphasis added) (upholding an injunction to enjoin the application of California law inside California Indian reservations); *see also Williams v. Lee*, 358 U.S. at 220.

Thus, state adjudicatory jurisdiction is preempted by federal law because Congress alone can prescribe the *exclusive* means by which states may exercise civil and criminal adjudicatory jurisdiction over Indians within Indian country. *Kennerly*, *supra*, 400 U.S. at 426-29) (invalidating the Blackfeet Tribe's consent to state jurisdiction through passage of a tribal resolution); *see also Fisher v. Dist. Court*, 424 U.S. 382, 386 (1976) (same).

The foregoing is a summary of applicable federal law generally. However, the analysis is buttressed by taking into account the federal statutes and treaties that are *specific* to this case, i.e., the federal statutes and treaties *specific* to the Ute Tribe and the State of Utah.

In return for the Ute Tribe's cession of vast tracts of valuable land to the federal government, the United States executed treaties with the Ute Indians that guarantee the Tribe a tribal homeland. And that

guarantee is not simply for a homeland, but a homeland of a specific character: a homeland established by federal law and set apart and protected from outside infringement "except … [as] authorized by the United States."[20] (underscore added) In the century and a half since Congress ratified the Ute Treaties of 1863 and 1868, the United States has never authorized the State of Utah to exercise jurisdiction over the Ute Tribe for actions the Tribe has undertaken inside of its reservation. To the contrary, in 1894, when the state of Utah applied for admission to the Union, the Utah Enabling Act, passed by Congress, expressly required the state of Utah to "forever disclaim all right and title to … all lands … owned or held by … Indian tribes." Act of July 16, 1894, Chapter 138 (28 Stat. 107).[21] The disclaimer of state jurisdiction is repeated verbatim in the Utah Constitution, art. III, §2. The foregoing language constitutes the State of Utah's disclaimer of both proprietary and governmental authority over the Ute Indian Tribe. *See McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 173-74, 179-80 (1973) (by virtue of the disclaimer in the Arizona Enabling Act, which is identical to the Utah Enabling Act, the Arizona tax code could not be extended extra-territorially inside the Navajo Reservation to apply to Navajo Indians); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709,

[20] *See* Ute Treaty of 1863 (13 Stat., 673); Ute Treaty of 1868 (15 Stat., 619); Act of April 29, 1874, Chapter 136 (18 Stat., 36), Plaintiffs' Appendix to Motions for Summary Judgment, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Dec. 7, 2017) Dkt. 55-1 at 20, 26 and 38.

[21] *See* Utah Enabling Act, 28 Stat. 107, Plaintiffs' Appendix to Motions for Summary Judgment, *Ute Indian Tribe v. Lawrence*, No. 2:16-cv-00579 (D. Utah Dec. 7, 2017) Dkt. 55-1 at 43.

710, 716 (10th Cir. 1989) (interpreting the disclaimer in the Oklahoma Enabling Act which is identical to the Utah Enabling Act).

For its part, the Ute Tribe has never consented to state civil or criminal jurisdiction over its reservation under any law—state or federal—including Public Law 280, codified, as pertinent here, at 25 U.S.C. §§ 1321-1326. Consequently, it is beyond cavil that the Tenth Circuit was correct in its ruling that the Utah state court lacks adjudicatory jurisdiction over the Becker dispute. No question of law merits this Court's attention.

As noted *supra*, all the cases Becker cites for an "irreconcilable conflict" present no conflict whatsoever. *C&L Enter's, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) did not arise within Indian country and did not involve real property or other tribal assets held in trust for the Tribe by the federal government. Indeed, the *C&L* Court emphasized these facts by noting that the property in question "is not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe." *Id.* at 415. Here, in contrast, it is undisputed that Becker was employed by the Tribe *inside* the Uintah and Ouray Reservation, and it was his job to manage the Tribe's *on-reservation* oil/gas minerals—tribal assets that *are* held in trust by the federal government for the Tribe. Similarly, *Ogala Sioux Tribe v. C&W Enterprises, Inc.*, 842 F.3d 224 (8th Cir. 2008) presents no conflict whatsoever. *Ogala* involved neither a state court adjudication of a dispute arising in Indian country nor a dispute involving restricted Indian trust property; *Ogala* involved simply

the enforcement of a state court judgment entered upon an arbitration award that was issued in an arbitration proceeding to which the Indian tribe had *consented* and participated in voluntarily off the Tribe's reservation. In a similar vein, *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 333 P.3d 380 (Wash. 2014), is a plain vanilla breach of contract case, thus the Washington state court was not required to adjudicate claims to restricted tribal assets held in trust for the tribe by the federal government. Moreover, the tribe in *Outsource* had *both* waived sovereign immunity *and* consented to suit in the Washington state court, which certainly is not the case here. Finally, in contrast to the Ute Tribe in this case, the Tribe in *Outsource* never challenged the legality of either the contract in question or its immunity waiver.

Circuit Judge Briscoe's dissenting opinion in *Lawrence II* also provides no ground for review. Admittedly, it is difficult to reconcile Judge Briscoe's authoring opinion in *Becker III* (in which she concedes the Tribe has "raised serious questions regarding the validity of the [Becker] contract," *Becker III*, *supra*, 11 F.4th at 1150), and her dissenting opinion in *Lawrence II* (in which she speculates that the Tribe must have "intended for any dispute to be heard in the Utah state courts," *Lawrence II*, *supra*, 22 F.4th at 915). Perhaps the two opinions are simply a judicial splitting of the baby. But the Tribe cannot let pass Judge Briscoe's comment in her dissent that Public Law 280, 25 U.S.C. § 1322, "does not address 'state jurisdiction over [Indian] tribes.'" *Id.* at 916. In *Byran v. Itasca Cty.*, *supra*, this Court described Public Law 280 as constituting a "conferral" of subject matter jurisdiction

upon states, and it noted that "there is notably absent" from the statutory text of PL 280 "any conferral of state jurisdiction over the tribes themselves." *Bryan v. Itasca Cty.*, *supra*, 426 U.S. at 388-89. It is true that the words "Indian tribe, band or community" are not used in the subsections that authorize states to assume jurisdiction over individual Indians, 25 U.S.C. §§ 1321(a) and 1322(a). However, the words "Indian tribe, band or community" are used in the subsection (b) of §§ 1321 and 1322, the subsections that expressly prohibit states from adjudicating "in probate proceedings or otherwise" the ownership or right to possess "any real or personal property" or "any interest therein" belonging "to any Indian *or any Indian tribe*." *Id*. (emphasis added) Because the Becker dispute involves precisely this—Becker's claim to ownership or a right to possess an interest in the Ute Tribe's mineral estate—25 U.S.C. § 1322(b) still prohibits Utah state courts from exercising jurisdiction over the Becker state court suit. At most, then, Judge Briscoe's comments in her *Lawrence II* dissent constitutes little more than immaterial dictum.

II. The Tenth Circuit Decisions Are Correct

A. There is No Circuit Split

Becker's contention that the Tenth Circuit erred by requiring tribal court exhaustion is wrong for several reasons. Foremost among them: the Agreement upon which his argument entirely relies is void *ab initio* under federal law. He asserts "this case is an excellent vehicle" because [t]he waivers and consents here are much clearer than in other similar cases." Pet. 32. But the supposed clarity of these waivers is of no

consequence when federal law renders the entire Agreement a legal nullity.

Becker distorts the record by stating the Tenth Circuit "refused to enforce" these provisions "out of respect for tribal self-government and self-determination." Pet. 21. In fact, the Tenth Circuit refused to enforce them out of respect for controlling federal law. *Becker III*, 11 F.4th at 1150 ("Becker asserts, in reliance on the Agreement itself, that the Tribe expressly waived Tribal Court jurisdiction. But that waiver provision is only applicable if the Agreement itself is determined to be valid, and, as we have noted, the Tribe has asserted nonfrivolous challenges to the validity of the Agreement.").

Becker makes only passing reference to the Tribe's declaratory judgment action filed against Becker in Tribal Court.[22] Pet. 13-14 (citing Pet. App. 64-65). He fails to mention – and improperly excludes from his Appendix – the Tribal Court's Opinion and Order dated February 28, 2018 wherein the court granted the Tribe's motion for partial summary judgment and, following a thorough analysis, ruled the Agreement was void *ab initio* under federal law. Resp't App 51a-60a. Indeed, the Tribal Court's lengthy discussion of the Agreement's invalidity under the Indian Non-Intercourse Act of 1790, the Indian Mineral Development Act, and centuries of jurisprudence in the realm of federal Indian law belies Becker's claim that "Tribal courts have no special expertise in interpreting [the] contract." Pet. 34.

[22] Styled *Ute Indian Tribe v. Becker*, CV-16-253.

By itself, Becker's omission from his petition of this preclusive Order is sufficient grounds for the Court to deny the petition. Supreme Court Rule 14(1)(h) requires a petition for a writ of certiorari to include in its appendix:

> (i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed; [and]
>
> (ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases.

And Supreme Court Rule 14(4) provides:

> The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

The Court would be justified in inferring Becker's omission of the Tribal Court's Order to be intentional and denying his petition on this basis alone.

But the existence of the Tribal Court's Order is also fatal to Becker's petition on the merits. Significantly, the Order is the first and only court ruling as to the Agreement's validity and carries preclusive effect. "Issue preclusion generally applies when the prior determination is based on a motion for summary

judgment." 18 James W. Moore, Moore's Federal Practice § 132.03[2][j], at 132-89 (3d ed. 2010). As the Fifth Circuit observed:

> It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero . . . .
> Indeed, a more positive adjudication is hard to imagine.

Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 421 F.2d 1313, 1319 (5th Cir. 1970). *See also* Charles Alan Wright, et al., 18A Federal Practice & Procedure Juris. § 4444 (2d ed. 2002); *In re Griego*, 64 F.3d 580, 584 (10th Cir. 1995) (giving preclusive effect to a district court's summary judgment order); *Semsroth v. City of Wichita*, No. 06-2376-KHV, 2007 WL 2091167, at *7 (D. Kan. July 20, 2007) ("summary judgment ruling constitutes a final adjudication on the merits for purposes of issue preclusion."); *Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc.*, 945 F. Supp. 1421, 1436 (D. Colo. 1996) (giving preclusive effect to the Eastern District of Tennessee's grant of partial summary judgment); *Scripps Clinic and Research Found. v. Baxter Travenol*, 729 F. Supp. 1473, 1475 (D. Del. 1990) ("Collateral estoppel may be asserted even when the prior determination of invalidity is made on a motion for summary judgment rather than after a full-fledged trial.").

Virtually every argument in Becker's petition depends upon the false notion that the Agreement is valid, and its "waivers and consents" should therefore be enforced. *See, e.g.,* Pet. 32. But since the Agreement

has been ruled null and void, Becker's repeated assertions the Tribe waived the exhaustion requirement through the Agreement are groundless.

Becker's backup argument that the forum-selection clause is severable and can be enforced even in the face of the Agreement's invalidity is unavailing. Under federal law the Agreement is void *ab initio*, meaning it was "void from the beginning" and "never had any legal existence at all." *Plummer v. Am. Inst. of Certified Pub. Accts.*, 97 F.3d 220, 225 (7th Cir. 1996) (citations omitted). Similarly, the Seventh Circuit held a tribal entity's contractual waiver of sovereign immunity unenforceable because the contract was void *ab initio* for lack of required federal approval and therefore "not subject to reformation by excision of offending provisions" despite the presence of a severability clause. *Wells Fargo Bank,* 658 F.3d at 700. *See also Becker II*, 868 F.3d at 1204–05 (distinguishing between contract procured by fraud and a contract void *ab initio* due to lack of a statutorily mandated federal approval and holding forum selection clauses unenforceable in the latter).

As noted by the Tribal Court in its Order, when a contract with an Indian tribe requires federal approval, *no portion* of an unapproved contract is enforceable. *See supra*, footnote 7 and cases cited therein.

Every argument Becker makes to avoid tribal court exhaustion depends upon a valid Agreement. Throughout, Becker's petition sidesteps the question of the Agreement's compliance with federal law and simply assumes its validity. Because it is void *ab initio* – and has been adjudicated so by a court of

competent jurisdiction – Becker's position collapses with it.

B. The Utah Courts Lack Subject Matter Jurisdiction

Irrespective of Congressional action and the Congress' exclusive constitutional authority over the question, Becker relies solely on this Court's decision in *Kiowa*, *supra*, 523 U.S. at 760, for the proposition that Indian tribes are subject to state adjudicatory jurisdiction in all cases in which a "tribe has waived its immunity." Pet. 35. Once again, however, Becker is wrong (no matter how hard he bangs the drum). It is axiomatic that cases are not authority for propositions not considered. *E.g., United States v. Tucker Truck Lines,* 344 U.S. 33, 38 (1952) (a case is not precedent for questions that were not "raised in briefs or argument nor discussed in the opinion of the Court."). *Kiowa* is strictly a sovereign immunity case; ss such, *Kiowa* did not involve, and did not address, and did not adjudicate any question of fact or law pertaining to state court subject matter jurisdiction over Indian tribes apart from the Kiowa Tribe's right to assert sovereign immunity under the specific facts of that case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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