No. 17-1301

In the Supreme Court of the United States

RYAN HARVEY, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Utah's state courts were required to decline to resolve petitioners' claims, which include challenges to tribal jurisdiction, until the parties exhausted their remedies in tribal court.

2. Whether exhaustion of remedies in tribal court was required even though no party had yet invoked the tribal court's jurisdiction by filing suit there.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Indian tribes are subject to Congress's "plenary control," but "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). That historic authority extends to matters of "internal self-government," for which tribes retain "the right to prescribe laws applicable to tribe members and to enforce those laws." *Wheeler*, 435 U.S. at 322. Tribes also "retain considerable control over nonmember conduct on tribal land." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997).

Tribal control over nonmembers on non-Indian land is relatively limited, by contrast, and tribes generally "lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate*, 438 U.S. at 446. This Court has recognized "two exceptions" to that rule, however. *Ibid.* (discussing *Montana* v. *United States*, 450 U.S. 544 (1981)). As relevant here, 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." *Montana*, 450 U.S. at 565.

b. In *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), this Court addressed the effect of tribal sovereign interests on adjudication by federal courts of tribal-court jurisdiction. In that case, a member of the Crow Tribe obtained a default judgment in tribal court against nonmembers (collectively, "National Farmers") based on claims arising from an injury that had occurred on non-Indian land within the Crow Reservation. *Id.* at 847-848. Rather than appeal that judgment in tribal court, National Farmers filed a federal-court suit against the tribe, its courts, and its officials seeking an injunction against further tribal-court proceedings. *Id.* at 848.

Whether such an injunction was proper, this Court explained, turned on "whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court." 471 U.S. at 852. And in the Court's view, "examination" of that question "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856. Pointing to Congress's policy of "supporting tribal self-government and

self-determination," as well as the need for "orderly administration of justice in the federal court[s]," the Court held that the district court should have "stay[ed] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Id.* at 856-857 (footnote omitted). "Exhaustion of tribal court remedies," the Court explained, "will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857.

In *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), after a tribal court had assumed jurisdiction over claims arising from an on-reservation automobile accident, an insurance company that was a party to the tribal-court proceeding brought a diversity action in federal court seeking a declaratory judgment that it had no duty to defend and indemnify the insured. *Id.* at 11-13. This Court affirmed dismissal of the action, explaining that "the exhaustion rule announced in *National Farmers*" applies "[r]egardless of the basis for jurisdiction" in federal court. *Id.* at 16. The Court held that affording "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Ibid.* "Until appellate review" in tribal court "is complete," the Court concluded, the "Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Id.* at 17.

2. The Ute Indian Tribe of the Uintah and Ouray Reservation is a federally recognized tribe with a reservation in northeastern Utah. See *Hagen* v. *Utah*, 510 U.S.

399, 402-408 (1994). This Court held in *Hagen* that the Ute Reservation had been diminished. *Id.* at 421.

Petitioner Ryan Harvey owns and operates two companies (Rocks Off and Wild Cat Rentals, also petitioners here) that lease equipment and provide dirt, sand, and gravel to oil-and-gas production companies. Pet. App. 4a. Petitioners allege that their facilities are located on non-Indian fee lands outside the diminished Ute Reservation and that they do not operate within the diminished Reservation. Pls.' Am. State Compl. (Am. Compl.) ¶¶ 26-35 (dated Aug. 29, 2013). Petitioners acknowledge, however, that some of their customers may transport their products and equipment onto the Reservation. *Id.* ¶¶ 31, 35.

Petitioners believe that they do not require tribal authorization to conduct business with customers who operate within the Reservation. Am. Compl. ¶ 36. But they allege that, beginning in September 2012, a commissioner of the Ute Tribal Employment Rights Office (UTERO), Dino Cesspooch, threatened to "shut down" their business unless they obtained certain tribal authorizations, *id.* ¶ 37, which Harvey then obtained "under duress," *id.* ¶ 47. See *id.* ¶¶ 48-57.

In March 2013, petitioners further allege, Harvey received a letter from UTERO's Director, Sheila Wopsock, informing him that the Tribe's Energy and Minerals Department had "revoked" Rocks Off's access permit and that Rocks Off was therefore no longer in compliance with UTERO's requirements for "lawful entrance upon the Reservation." Pet. App. 5a; see *id.* at 5a-6a. Shortly thereafter, UTERO sent a letter to "all Oil & Gas Companies" informing them that Rocks Off was "no longer authorized to perform work on" the Reservation. *Id.* at 6a. The letter also stated that "[a]ny

use" of Rocks Off "by an employer doing work on the Reservation after receipt of this Notice may result in the assessment of penalties and/or sanctions against such employer to the fullest extent of the law." *Ibid.* Petitioners allege that, as a result of UTERO's letter, their customers have declined to "do business with [petitioners] or work with anyone that does business with [petitioners]," and that their business has been "substantially and irreparably harmed" as a result. Am. Compl. ¶¶ 74, 75.

3. In April 2013, petitioners filed suit in Utah state district court against, among others, the Tribe and several tribal officials (including Cesspooch and Wopsock) in their official and individual capacities. Pet. 8; Pet. App. 7a. Petitioners' amended complaint raised two federal claims, contending that the Tribe and tribal officials exceeded their jurisdiction, and five state-law claims. Pet. App. 7a. Petitioners sought "declaratory judgments that the tribe and its officials exceeded their jurisdiction, injunctions against all of the defendants, and damages." *Ibid.*

After the Tribe's attempt to remove the case to federal district court was rejected on the ground that it had waived its right to remove, see *Harvey* v. *Ute Indian Tribe*, 797 F.3d 800, 803 (10th Cir. 2015), the state district court dismissed claims against the Tribe based on its sovereign immunity, Pet. App. 97a-106a, and against the other defendants on the ground that the Tribe was a necessary and indispensable party, *id.* at 107a-117a. The court also held that the Tribe's sovereign immunity precluded petitioners' claims against the tribal officials, *id.* at 128a-131a, and that certain other claims failed to state a ground on which relief could be granted, *id.* at 117a-126a.

4. The Utah Supreme Court affirmed in part and reversed in part. Pet. App. 1a-93a. The decision was unanimous in several respects. First, it affirmed dismissal of all claims against the Tribe based on its sovereign immunity. *Id.* at 10a-15a. Second, characterizing petitioners' claims for injunctive relief against the tribal officials as official-capacity claims, the court held that any claim that those officials exceeded their authority under *tribal law* was barred by the Tribe's sovereign immunity, but that claims that the officials exceeded limitations on their authority under *federal law* could be asserted under the framework of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 21a. Third, the court held that the state district court had erred in dismissing the case for failure to join an indispensable party (the Tribe). *Id.* at 22a-25a. Fourth, the court dismissed certain state-law claims against certain defendants. *Id.* at 38a-52a.

As a result of those rulings, and as relevant here, the following claims were left for resolution: (1) claims for declaratory and injunctive relief against the tribal officials in their official capacities, asserting that they had exceeded federal-law limitations on their authority; and (2) various state-law claims for damages against the tribal officials in their personal capacities and against other defendants. The Utah Supreme Court divided on the proper disposition of those claims.

Justice Durham, writing for the court, concluded that, although no suit was then pending in tribal court, petitioners should have been required to exhaust tribal remedies. Pet. App. 26a-35a. Noting that a tribe has a sovereign right to exclude non-Indians from its land, Justice Durham described the "central question" in the case as "whether the tribal officials were regulating who may come onto tribal land." *Id.* at 29a-30a. A tribal

court should have the "first opportunity" to answer that question, she concluded, including by deciding whether the Tribe had authority under tribal law to require petitioners to obtain a permit and whether its officials lawfully revoked the permit. *Id.* at 30a. Justice Durham accordingly remanded the case to the state district court, instructing it either to dismiss the case in favor of tribal-court proceedings or "to stay the state court proceedings to await the outcome in the tribal court." *Id.* at 34a; see *id.* at 34a-35a.

Justice Himonas concurred and issued a separate opinion to explain his view that tribal-court exhaustion under *National Farmers* and *LaPlante* properly applies in state-court proceedings. Pet. App. 53a-73a. That doctrine is a judicially recognized component of federal Indian law, he explained, binding on the States under the Supremacy Clause. *Id.* at 60a-67a. Justice Himonas emphasized that federal and state courts are thus required to defer to tribal courts whenever a "tribal court has a colorable claim of jurisdiction" based on one of the two *Montana* "exceptions." *Id.* at 58a-59a.

Associate Chief Justice Lee concurred in part and dissented in part, finding no need for petitioners to exhaust tribal remedies in this case. Pet. App. 74a-93a. In Justice Lee's view, the tribal-exhaustion doctrine is not a "binding federal rule" that applies in state-court proceedings, particularly where no pending tribal proceeding exists. *Id.* at 76a. Justice Lee would instead "adopt a rule of exhaustion as a matter of comity under Utah common law," *id.* at 84a, but he would require Utah's courts to "stay [their] exercise of jurisdiction only *after* one of the parties has invoked the jurisdiction of the tribal courts," *id.* at 76a.

DISCUSSION

Petitioners contend that the Utah Supreme Court erred in ordering the state district court to dismiss or stay further adjudication of petitioners' claims until the Tribe's courts have weighed in on the dispute. Petitioners argue that disagreement exists regarding whether federal tribal-exhaustion principles apply in state court. Although state supreme courts have taken somewhat different approaches in cases involving claims that implicate tribal jurisdiction, those decisions have largely rested on multiple case-specific factors, and no clear-cut conflict exists. Several features of this case, including its interlocutory posture, would also make it an inappropriate vehicle for considering the circumstances in which state courts should defer in favor of tribal-court proceedings. Further review is unwarranted at this time.

A. A Substantial Question Exists Regarding Whether The Utah Supreme Court Has Issued A "Final Judgment" Over Which This Court Has Jurisdiction

This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). That provision "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997).

The Utah Supreme Court's decision in this case is interlocutory in that it did not finally determine or terminate the litigation. After affirming dismissal of some of petitioners' claims and reinstating others, the court remanded "for the district court to determine whether the case should be dismissed or stayed under the tribal exhaustion doctrine." Pet. App. 52a; see *id.* at 35a. If the district court elects to stay the case until any proceedings have concluded in the tribal courts, adjudication of

petitioners' claims could later resume in state court. But in addition, Justice Himonas—whose decision Justice Durham "charge[d] the district court to carefully follow," *id.* at 35a n.12—indicated that petitioners would not be required to file their claims in tribal court unless there was a "nonfrivolous basis" for believing that tribal courts would have jurisdiction over petitioners' claims. *Id.* at 71a. Justice Himonas noted that the "plain language" of a provision of tribal law seems to preclude tribal courts from "from exercising jurisdiction over" certain of petitioners' claims. *Ibid.* (citing Ute Law & Order Code § 1-2-3(5) (2013)); see *id.* at 71a-73a. Justice Himonas thus indicated that further proceedings in the district court would likely be needed to determine whether requiring petitioners to resort to tribal court was appropriate. See *id.* at 73a ("[T]he tribal exhaustion doctrine cannot require a plaintiff to file a truly frivolous claim in tribal court.").

While not disputing the case's interlocutory "posture," Reply Br. 10, petitioners nevertheless argue that the ruling below may be treated as final under two of the exceptions to the final-judgment rule recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). First, petitioners argue that, "although the case has been remanded, 'the federal issue will not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance and they are wholly unrelated to the federal question.'" Reply Br. 10 (quoting 420 U.S. at 478) (brackets and ellipsis omitted). Second, petitioners argue that, "even if the remand did bear on the federal issue, 'later review cannot be had, whatever the ultimate outcome of the case.'" *Ibid.* (quoting 420 U.S. at 481) (ellipsis omitted).

Although the issue is not entirely clear, good reason exists to doubt whether *Cox Broadcasting* authorizes review here. The first exception petitioners invoke does not apply because further substantive proceedings in state court will likely affect, and may in fact moot, the federal issue. The district court may decide, in line with Justice Himonas's instructions to consider the issue, that resort to tribal courts is not required because tribal courts would plainly lack jurisdiction over petitioners' claims (or some of them). Or petitioners might *prevail* in tribal court. Or they might prevail in state court after tribal-court proceedings have been instituted and exhausted, if the state court concludes that the tribal courts exceeded the federal-law limitations on their jurisdiction and then rules for petitioners on the merits. This case is thus unlike decisions in which further state-court proceedings were anticipated to "have little substance," *Cox Broadcasting*, 420 U.S. at 478, most of which involved a final *merits* determination by the State's highest court, accompanied by a remand to address ancillary issues such as damages or attorney's fees. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 126 (1945).

As to the other *Cox Broadcasting* exception, petitioners argue (Reply Br. 10) that, absent review by this Court, their opportunity to challenge the Utah Supreme Court's exhaustion decision "will be lost forever." Whether that is true will depend, however, on the course of future proceedings, including whether the state district court concludes on remand that invocation and exhaustion of tribal-court remedies would be futile. Or if state-court

proceedings are stayed pending any proceedings instituted in tribal court, and the tribal courts rule in a manner adverse to petitioners on a factual or legal question bearing on federal-law limitations on tribal-court jurisdiction, then petitioners may challenge that ruling upon return to state court; rejection of that federal-law challenge would presumably be reviewable by the Utah Supreme Court—and then, if necessary, by this Court. Justice Durham's opinion also suggested that "if Harvey does not agree with the tribe's determination of its jurisdiction, he will be able to seek review of the tribal court's order in federal court," Pet. App. 34a, after which petitioners could presumably seek this Court's review.

Petitioners are correct (Reply Br. 10) that only review by this Court at this stage is likely to fully vindicate what they assert to be a "right to proceed in state court without having to exhaust in tribal court." Petitioners rely (*id.* at 11) on *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), but that decision involved review of a *federal* court's exhaustion ruling. In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963), the Court took jurisdiction, under Section 1257, over the defendants' challenge to a state-court decision regarding venue, where the defendants alleged that a federal statute "prohibit[ed] further proceedings against the defendants in the state court in which the suit is now pending." See *Cox Broadcasting*, 420 U.S. at 481-487 (discussing *Mercantile National Bank* and similar cases). But given the respect due tribal courts under *National Farmers* and *LaPlante*, there is considerable doubt that "refusal immediately to review the state-court decision" in this case would "seriously erode federal policy," which is necessary to fall within the exception. *Id.* at 482-483.

B. The Utah Supreme Court's Decision Does Not Present Any Conflict Warranting This Court's Review

1. In *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), this Court held that federal courts must abstain from resolving certain questions concerning federal-law limitations on the jurisdiction of a tribal court before which a suit is pending, because those questions should first be resolved in the tribal-court proceeding. In *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), the Court held that a federal court, under its diversity jurisdiction, should not resolve a dispute on the merits under state law when a suit is already pending in tribal court arising out of the same occurrence. *Id.* at 12-14, 16. That rule, the Court explained, applies as a matter of "federal policy" when necessary to prevent "direct competition with the tribal courts" by "any nontribal court"—which would appear to include a state court—on matters of tribal "authority over reservation affairs." *Id.* at 16; see *id.* at 15 ("federal law" prohibits "state-court jurisdiction" that "would interfere with tribal sovereignty and self-government").

For similar reasons, however, the justification for abstaining in favor of tribal-court proceedings under the specific rationales of *National Farmers* and *LaPlante* would appear ordinarily to depend on whether tribal-court proceeding are, in fact, pending. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 448 (1997) ("[*National Farmers*] describe[s] an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction."). If no tribal-court proceeding is pending, adjudication of the parties' claims by a non-tribal court would not create any "direct competition" with tribal courts. *LaPlante*, 480 U.S. at 16. Instead, where a non-

Indian attempts to sue a tribe or tribal member in state court concerning on-reservation conduct (whether or not there is a pending tribal-court proceeding), any bar to the state court's adjudication of the case would normally be based, not on *National Farmers* or *LaPlante*, but on *Williams* v. *Lee*, 358 U.S. 217 (1959), which held that suits against tribal members in state court involving on-reservation conduct are generally barred, *id.* at 223.

In arguing that the rationale for exhaustion "does not require a case to be pending in the tribal court," Pet. App. 28a, Justice Durham opined that to permit *any* state-court adjudication of "a tribe's right to exclude individuals from their land" would necessarily infringe on tribal sovereignty, *ibid.* But this Court has concluded that state courts may resolve disputes involving tribes and tribal members concerning access to a reservation, where the cause of action arose outside of Indian country. See *Nevada* v. *Hicks*, 533 U.S. 353, 362 (2001). And the Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984). There is accordingly no categorical prohibition against state-court adjudication of suits that implicate tribal interests. Nor is a state court forbidden, if necessary to resolve state-law claims over which the court otherwise has jurisdiction, from interpreting tribal law—any more than it would be forbidden from interpreting federal law or the law of another State.

This case, however, includes claims for injunctive relief against tribal officials in their official capacity for allegedly exceeding federal-law limitations on their au-

thority in taking regulatory action concerning permitting of access to the Reservation. Such a suit raises particular concerns under the distinct barrier to state-court adjudication under *Williams* v. *Lee*. Resolution of those federal claims would, in turn, inform resolution of the state-law damages claims against those officials. See Pet. App. 34a-35a & n.11. Yet the parties' petition-stage briefs do not even cite *Williams* v. *Lee*.

2. Petitioners assert (Pet. 2) that "widespread confusion" and persistent "disagreement" exists among state courts regarding the applicability in state court of the tribal-court exhaustion doctrine. Notably, however, petitioners cite only four state supreme court decisions in the 30 years following *LaPlante*. That is unsurprising, as suits involving tribal litigants are often filed in, or removed to, federal court. Cf. *Harvey* v. *Ute Indian Tribe*, 797 F.3d 800, 803 (10th Cir. 2015) (respondents' removal rejected because they "waived their right to removal and their right to consent to removal"). The four cited state supreme court decisions, moreover, were decided largely on case-specific circumstances. In the absence of crystallized disagreement in the state courts, review in this case is not warranted. That is especially so because Associate Chief Justice Lee's dissent would have applied an exhaustion principle as a matter of comity under state law, albeit only where one of the parties had instituted a proceeding in tribal court, see Pet. App. 76a, 84a—the very situation in which this Court required exhaustion in *National Farmers* and *LaPlante*.

a. The earliest case on which petitioners rely, *Gavle* v. *Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), cert. denied, 524 U.S. 911 (1998), involved state-law tort claims by a non-Indian employee against a tribal corporation

based on actions occurring both within and outside Indian country. The Minnesota Supreme Court focused primarily on whether a state court should exercise jurisdiction over those claims under the *Williams* v. *Lee* test of whether state-court adjudication would unduly infringe upon tribal sovereignty. *Id.* at 291-292. To answer that question, the court considered multiple factors, including the lack of any "federal prohibition on state court consideration of civil claims arising out of the acts of Indian business entities occurring outside of Indian country," *id.* at 290, and the need to avoid "highly inappropriate" claim-splitting, in which allegations of tortious conduct *within* Indian country would be tried in tribal court, but allegations of tortious conduct *outside* Indian country would be tried in state court, *ibid.* As part of its infringement inquiry, the court briefly discussed the exhaustion principles at issue in *National Farmers* and *LaPlante*. *Id.* at 291. Ultimately, although it found "the question [to be] a close one," the court concluded that the State's courts should exercise jurisdiction, but only to decide "whether [the tribal defendant] may assert the defense of sovereign immunity." *Id.* at 292. The court then held that all the plaintiff's claims were barred by sovereign immunity. *Id.* at 292-296.

In *State* v. *Zaman*, 946 P.2d 459 (Ariz. 1997) (en banc), cert. denied, 522 U.S. 1148 (1998), Arizona brought suit in state court on behalf of an Indian mother (a member of the Navajo Nation) and her child to obtain custody and child support from the non-Indian father. *Id.* at 460. The Arizona Supreme Court rejected the father's challenge to state-court jurisdiction, concluding that it would not "unduly infringe on Indian self-governance" under *Williams* v. *Lee*, and that "[t]he infringement test

protects Indians" and "is not an offensive tool to be used against them." *Id.* at 461. The court questioned whether a tribal court, under *Montana* v. *United States*, 450 U.S. 544 (1981), and other relevant precedents, would have jurisdiction over the action. 946 P.2d at 463-464. The court concluded that it did not need to decide that issue, however, because "it would be unwise to hold that the state court should refrain from exercising certain state court jurisdiction in favor of uncertain tribal court jurisdiction" under the circumstances—namely, that the Indian mother "has a right to bring th[e] action in state court," and there "is no countervailing tribal interest in helping [the non-Indian father] escape his legal obligations." *Id.* at 464.

In *Drumm* v. *Brown*, 716 A.2d 50 (Conn. 1998), the plaintiffs were an employee of a tribal casino and two state police officers working there. The plaintiffs asserted various tort claims in state court against officers of the tribe and its gaming enterprise arising from the defendants' accusations of misconduct against the plaintiffs. *Id.* at 52-53. After the state trial court dismissed the complaint for failure to exhaust tribal remedies, the police officers filed suit in tribal court, and all the plaintiffs appealed the dismissal. *Id.* at 54. The Connecticut Supreme Court first held that it would treat the tribal-exhaustion doctrine as "binding" on Connecticut courts, *id.* at 61, because *National Farmers* and *LaPlante* appear to have been based on "substantive" federal policy, *id.* at 63. But even if the exhaustion doctrine "constitute[s] only a federal court procedural rule," the court explained, it would nevertheless "adopt the doctrine" for Connecticut courts in order to avoid harming "the federal policy of supporting tribal self-government and

self-determination." *Ibid.* But the court went on to interpret *National Farmers* and *LaPlante* as requiring exhaustion only when a proceeding was pending in tribal court, although such proceeding need not be the first-filed action. *Id.* at 64-66. The court consequently held that the plaintiffs' state-court action should be stayed on the claims of the two police-officer plaintiffs, who had also filed suit in tribal court, but could proceed on the claims of the employee-plaintiff, who had not done so. *Id.* at 66-67.

Finally, *Meyer & Associates, Inc.* v. *Coushatta Tribe of Louisiana*, 992 So. 2d 446 (La. 2008), cert. denied, 556 U.S. 1166 (2009), involved a breach-of-contract action filed in state court by a construction firm against the Coushatta Tribe. *Id.* at 448-449. The Louisiana Supreme Court observed that this Court "has never held that the exhaustion of tribal remedies doctrine applies to the states." *Id.* at 450. But even assuming that it does, the Louisiana Supreme Court continued, it would apply only where the state and tribal courts "share jurisdiction." *Ibid.* Therefore, to know whether exhaustion was appropriate, the state court would first have to decide "whether the Tribe had validly waived its sovereign immunity," and the state court should "declin[e] to defer to the Tribal Court on that issue." *Ibid.* The court then concluded that the Tribe had indeed waived its sovereign immunity. *Id.* at 450-451. In light of what it believed to be the "discretionary" nature of the tribal-court exhaustion doctrine, the parties' contractual choice-of-law provision subjecting the dispute to Louisiana law, and Louisiana's "major interest in contractual disputes involving its corporations and municipalities," the court concluded that the state trial court had not

"abused its discretion" in declining to stay the case in favor of exhaustion in tribal court. *Id.* at 451-452.

As the foregoing shows, this handful of state supreme court decisions defies easy characterization. Each relied on multiple considerations—often drawing simultaneously on related Indian-law doctrines, such as the *Williams* v. *Lee* infringement test (which no party has discussed in its briefing here)—in deciding whether to stay state-court proceedings in favor of proceedings in tribal court. Nor did those courts give categorical yes-or-no answers to that question. Petitioners thus oversimplify when they assert (Pet. 18-19) that *Gavle* took an approach "opposite" to that of *Drumm* and describe *Zaman* and *Meyer & Associates* as holding that the exhaustion doctrine categorically does not "apply" in state courts. The differing outcomes in those cases are more properly attributed to the courts' consideration of case-specific factors.

b. Petitioners briefly assert (Pet. 21-22; Reply Br. 8-9) that the decision below warrants review because of a conflict regarding whether the tribal-exhaustion doctrine applies in the absence of parallel tribal-court proceedings. Because that question is relevant in this case only if the doctrine applies in state court as an initial matter, it would not independently warrant this Court's review.

In any event, there is some disagreement (although less than petitioners claim) about the relevance of pending tribal-court proceedings. As petitioners note, several federal courts of appeals have concluded that the absence of simultaneous tribal-court proceedings is not dispositive in cases brought in federal court. Pet. 21 (citing *Ninigret Dev. Corp.* v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000);

United States v. *Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996); *Crawford* v. *Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991), cert. denied, 502 U.S. 1096 (1992)). In this case brought in state court, the Utah Supreme Court likewise concluded that the tribal-exhaustion doctrine "does not require a case to be pending in the tribal court," Pet. App. 28a, while Associate Chief Justice Lee argued in dissent that "the *LaPlante* line of cases" does not apply "in the absence of a pending case filed in tribal courts," *id.* at 84a-85a. By contrast, the Connecticut Supreme Court held in *Drumm* "that exhaustion is not required in the absence of a pending action in the tribal court," 716 A.2d at 64, and it appears to be the only state court of last resort to so hold.

Petitioners also rely (Pet. 22) on the Seventh Circuit's decision in *Altheimer & Gray* v. *Sioux Manufacturing Corp.*, 983 F.2d 803 (1993), but that case did not resolve the issue. The Seventh Circuit noted that *National Farmers* and *LaPlante* had "dealt only with the situation where a tribal court's jurisdiction over a dispute has been challenged by a later-filed action in federal court." *Id.* at 814. But it also observed that those cases had articulated "broader" principles, which several federal appellate courts had applied "to cases in which there existed no first-filed tribal court action." *Ibid.* The Seventh Circuit saw no need to weigh in on that issue, however, because "even [those] Circuits" had not applied the tribal exhaustion doctrine automatically, but instead had "f[ou]nd it necessary to examine the factual circumstances of each case." *Ibid.* After looking at several case-specific factors—most importantly the tribal defendant's "explicit[] agree[ment] to submit to the venue and jurisdiction of federal and state courts located in Illinois"—the Seventh Circuit determined that

abstention would not be appropriate. *Id.* at 815; see *id.* at 814-815. The court's decision therefore did not turn on the absence of pending tribal-court proceedings.

C. This Case Would Be A Poor Vehicle For Considering The Questions Presented

Even if this Court has jurisdiction to review the Utah Supreme Court's decision, see pp. 8-11, *supra*, that decision is unclear in several key respects. Insofar as this Court might seek to determine whether and in what manner invocation of tribal-court proceedings would be appropriate under the circumstances of this case—rather than decide whether the tribal-exhaustion doctrine "applies to state courts" as a categorical matter, Pet. i—the lack of clarity in the decision below could inhibit the Court's ability to fully undertake that task.

First, although petitioners seek to prevent the Ute tribal courts from resolving their state-law "claims," *e.g.*, Pet. 2, 27, it is unclear whether the Utah Supreme Court intended to adopt a categorical rule mandating tribal-court resolution of *claims*—as distinguished from specific *questions* relevant to those claims—in a case such as this. Justice Durham's opinion for the court focused primarily on certain legal questions that the tribal court should address, including "[w]hether the tribe may demand that Harvey obtain a permit," Pet. App. 30a, and "[w]hether the tribal officials unlawfully revoked Harvey's permit," *ibid.*; see *id.* at 35a n.11 (whether Tribe's actions "exceeded the tribe's authority"). Those "question[s] of tribal law," in Justice Durham's view, require tribal resolution because they speak directly to the Tribe's "jurisdiction[]" and "self-governance." *Id.* at 30a. Elsewhere, however, Justice Durham stated more broadly that "Harvey must exhaust his remedies in tribal court, even if the tribal

court must end up applying some state law," *id.* at 33a, a statement that suggests exhaustion of claims, as to which nontribal law (*i.e.*, state law) would be relevant.

Petitioners' arguments, which are grounded in concerns about state sovereignty and due process, see Pet. 25-33, are premised on reading the decision below broadly, as requiring claims to be filed in tribal court. See Pet. i. But neither petitioners nor respondents have argued that a state court may not, while retaining jurisdiction over claims over which it would otherwise have jurisdiction under *Williams* v. *Lee*, provide for a tribal court to decide specific questions within its expertise—in a manner analogous to principles of primary jurisdiction or certification of state-law issues to a state court. And we are aware of no basis in federal law for disapproving that procedure.

Moreover, there appear to be issues in this case that could affect the propriety of requiring exhaustion in tribal court of some or all of petitioners' claims. If the tribal court lacks jurisdiction to adjudicate one or more of petitioners' claims, filing such claims in the tribal court would be futile and presumably not required. See *National Farmers*, 471 U.S. at 856 n.21 (exhaustion not required where it "would be futile"). Justice Himonas thus instructed the district court to consider on remand whether, under tribal law, the tribal courts could hear petitioners' claims seeking relief against the tribal officials in their official capacities. See pp. 9-10, *supra*. Also unclear is whether tribal courts may adjudicate petitioners' state-law claims for damages. Tribal courts have limited jurisdiction over nonmember conduct on non-Indian land, see *Strate*, 520 U.S. at 454, and at this stage of the litigation it is disputed where the events underlying petitioners' claims took place. Compare Pet.

6 ("[Petitioners] never engaged in business on reservation land."), with Br. in Opp. 19 ("[T]his case involves an exercise of the Tribe's authority to exclude nonmembers from the Reservation."). And depending on resolution of that question, the general limitation under *Williams* v. *Lee* on state-court jurisdiction over suits against Indians for on-reservation conduct would also have to be considered. Nor is it clear whether petitioners' claims could appropriately be split between state and tribal courts based on where conduct relevant to different claims occurred. Cf. *Gavle*, 555 N.W.2d at 290-291 (finding claim-splitting there "highly inappropriate").

A state court in a case such as this may also need to consider whether invocation of tribal *administrative* proceedings would be appropriate in the first instance. See, *e.g.*, *Burlington N. R.R.* v. *Crow Tribal Council*, 940 F.2d 1239, 1244-1247 (9th Cir. 1991) (requiring plaintiff to exhaust both administrative and judicial tribal remedies before federal litigation could proceed). Respondents have argued (at 22) that petitioners failed to avail themselves of the administrative procedures the Tribe affords for challenging the revocation of tribal authorizations. As the case comes to this Court, however, it is not clear what the procedures are for challenging the revocation of an access permit (see p. 4, *supra*), whether petitioners were advised of them, or whether they still remain available to petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2018