No. 17-855

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Vance Norton, Gary Jensen, Keith Campbell, Anthoney Byron, Bevan Watkins, and Troy Slaugh (collectively, "Petitioners") hereby submit this Reply Memorandum in further support of their Petition for Writ of Certiorari.

INTRODUCTION

For the reasons set forth below, Respondents' *Brief in Opposition* provides no reason that this Court should decline to issue a writ of certiorari to review and correct the Tenth Circuit Court of Appeals' failure to apply the clear mandate of this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001). That case held that tribal courts have no jurisdiction over claims brought against state and local law enforcement officers arising out of the performance of their official duties and, therefore, federal courts are not required to allow a tribal court to make an initial determination of its jurisdiction over such claims. Respondents cite no decision of this Court that narrowed that holding with respect to state and local law enforcement officers.

ARGUMENT

I. The Factual Record Was Developed in the District Court

Respondents devote at least 60% of their *Brief in Opposition* in an attempt to convince this Court that the absence of a factual record precludes the issuance

of a Writ of Certiorari. It is noteworthy, however, that Respondents make only one reference to *Jones, et al. v. Norton, et al.*, 3 F. Supp. 3d 1170 (D. Utah 2014), which was the District Court's decision in the original lawsuit brought by Todd Murray's parents and his estate. And that reference is to assert that the Ute Tribe is not bound by the *Jones* decision, *Brief in Opposition*, p. 8, fn. 4, precisely because the decision's extensive findings of fact undermine the alleged basis of the Tribe's trespass claim.

In *Jones*, for example, the District Court found that Todd R. Murray had in fact committed suicide: "The evidence clearly shows that Murray shot himself." *Id.* at 1190. And that finding was also affirmed on appeal by the Tenth Circuit which explicitly found no genuine dispute as to that fact. *Jones, et al. v. Norton, et al.,* 809 F.3d 564, 575 (10th Cir. 2015).

Similarly, the District Court found that there had been no spoliation, 3 F. Supp. 3d at 1203, and the Court of Appeals affirmed that finding. 809 F.3d at 578-579.[1] Furthermore, the District Court found that Petitioners' pursuit of Todd Murray "was reasonable under the circumstances . . . [because the] officers did not know, could not have known, and did not have a duty at that

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[1] In their *Brief in Opposition,* Respondents not only ignore the District Court's spoliation findings, but they even assert that it is relevant to the Ute Tribe's trespass claim. But that is obviously not so because the FBI's failure to test or preserve the gun that Todd Murray used to commit suicide and/or to do other forensic tests does not have any relevance to the alleged trespass by Petitioners.

point to ascertain whether Mr. Murray was an enrolled member of the tribe." 3 F. Supp. 3d at 1194. Thus, the District Court concluded that the officers' "attempt to apprehend Mr. Murray while protecting themselves – and the means they used to do so – were expected police behavior in light of the circumstances." *Id.* at 1194-1196. Not only did the Tenth Circuit affirm the District Court's finding, but in a subsequent decision involving the Ute Tribe, the Tenth Circuit acknowledged the approved practice of State and local officers stopping alleged criminal activity even when it occurs within Indian country, and then inquiring into the Indian status of the suspect. *See Ute Indian Tribe v. State of Utah*, 790 F.3d 1000, 1006-1007 (10th Cir. 2015).

Instead of referring to the District Court's extensive factual findings in the *Jones* case, Respondents refer to the allegations contained in the Tribal Court complaint, which are totally contradicted by the District Court's findings. Respondents allege, for example, that Uriah Kurip, the driver of the vehicle in which Todd Murray was a passenger, was also an Indian, which is false. 3 F. Supp. 3d at 1212 ("Mr. Kurip . . . was *not* a 'tribal male'") (emphasis in original). Respondents allege, too, that Todd Murray was not under the influence of drugs or alcohol, but the District Court found otherwise. *Id.* at 1184. Respondents deny that Todd Murray's suicide was witnessed; yet another untrue statement. 809 F.3d at 569-570.

Respondents even try to escape the reach of *Nevada v. Hicks* by claiming that the mandate of that decision does not apply to the instant case because the

Ute Tribe has sued Petitioners in their individual capacities rather than in their official capacities. This position is unsupportable because, as *Hicks* itself noted, the alleged distinction between official and individual capacity suits is "irrelevant." It is irrelevant because the government can only act through its officers and agents, "and if a tribe can 'affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws,' 'the operations of the [state] government may at any time be arrested at the will of the [tribe].'" *Hicks*, 533 U.S. at 365 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)).

Respondents insist that the pursuit of the Kurip vehicle was confined solely to tribal lands. This is not only not true, but it is also contrary to the facts found by the District Court. According to the District Court, the pursuit began on Highway 40 near Vernal, Utah, passed through several communities at speeds of 125 miles an hour, and went "in and out of the Reservation's boundaries." 3 F. Supp. 3d at 1178.

II. Review of Tribal Court Jurisdiction Is a Federal Question

For over forty years, this Court has held that the scope of tribal courts' jurisdiction is a federal question. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Yet, Respondents argue that this Court lacks jurisdiction over this question and that the Tenth

Circuit was incorrect in holding that it had jurisdiction.

Elsewhere in their *Opposition Brief*, Respondents cite this Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), which specifically noted that "whether a tribal court has adjudicative authority over nonmembers is a federal question." *Id.* at 324 (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 9, and *National Farmers Union Ins. Co.*, 471 U.S. at 845).

III. There Are No Undecided Factual Issues Relevant to Appellants' Right to an Injunction Against the Tribal Court Proceedings

Respondents' opposition to the issuance of a Writ of Certiorari is, in substantial part, a combination of misstating facts that have been determined in prior proceedings together with outright fabrications of claims that there are unresolved issues of fact. Moreover, Respondents resort to inflammatory mischaracterizations of the nature of the state and local law enforcement officers' activities, referring to the search for Mr. Murray after he fled the scene of the traffic stop as "hunting Indians"[2] and throwing in references to

[2] The driver of the car pursued and apprehended by Petitioners was not an Indian and none of Petitioners knew that Mr. Murray was an Indian until after he had committed suicide when approached by the officers. To characterize Petitioners' conduct in the course of their legitimate law enforcement activities as "hunting Indians" approaches defamation and serves no legitimate

claims of spoliation of evidence,[3] which even Respondents acknowledge did not involve Petitioners.

Petitioners have set forth above the relevant findings of fact supporting Petitioners' position with citations to the District Court's findings in *Jones*, 3 F. Supp. 3d at 1170. Thus, contrary to Respondents' obvious attempt to obscure the facts in this case, Petitioners were all state and local law enforcement officers involved in carrying out their legitimate law enforcement activities when they entered the Ute Reservation, and they properly entered the Reservation during a pursuit of a vehicle that began outside the Reservation. Those are the only facts that are relevant for the proper application of *Hicks*' core holding. The mandate of that decision is that *only* federal and state courts, not tribal courts, have jurisdiction to hear claims and controversies concerning the activities of state and local officers in the course of their law enforcement activities.

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purpose, but rather seeks to impugn the motives and activities of Petitioners, which is not supported by anything in the record.

[3] Respondents' *Brief* acknowledges that the finding of spoliation of evidence is related to the responsibility of federal officers. All Petitioners, and the other law enforcement officers who responded to the incident are state and local law enforcement officers. The reference to the claim of spoliation is nothing more than a disingenuous attempt to tar the legitimate law enforcement activities of Petitioners by an undeserved association with alleged wrongful conduct by others *distinct* from the actions of Petitioners.

IV. The Issue of Whether Officers Are Subject to the Jurisdiction of a Tribal Court Has Broad Importance

Respondents assert that this case is of little significance and, therefore, cannot have any influence with respect to state law enforcement on or near a reservation. But the fact that the Ute Tribe brought its trespass claim is proof to the contrary. The pursuit of Todd Murray took place in a remote desert area and did not result in any damage to the Ute Tribe. Respondents incorrectly contend that by this action the Ute Tribe is protecting its sovereignty. The investigation of Todd Murray's suicide was turned over to the FBI, which had the exclusive jurisdiction over the case. 809 F.3d at 581. Neither the Ute Tribe, including tribal police officers, nor the Ute Tribal Court had any jurisdiction over this matter. *See* 18 U.S.C. § 1151; *Oliphant*, 435 U.S. at 191. Consequently, this case is not about preserving the Ute Tribe's sovereignty. It is about the intimidation of state and municipal law enforcement officers.

As this Court cautioned in *Hicks*, the ability of tribes to exact penalties based on state-directed activities, 533 U.S. at 365 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)), and permitting damage suits against state officials may entail substantial social costs including law enforcement officers being inhibited in the discharge of their duties by fear of such liability, *id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). And the deterrence of law enforcement near the Ute Reservation is exactly the purpose of the

Ute Tribe's trespass claim, which Respondents concede when they complain that "local Utah state and county officers focus their patrols more heavily near the Tribe's borders, looking for tribal members to stop on various pretextual grounds." *Opposition Brief*, p. 23. Moreover, as this Court made clear in *Hicks*, "even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) [but not a tribal court] to vindicate constitutional or other federal- and state law-rights." 533 U.S. at 373.

V. The Tenth Circuit Misapplied This Court's Decision in *Nevada v. Hicks*

While it is expected that Respondents view the Tenth Circuit's decision as a proper application of the decision in *Nevada v. Hicks*, Respondents do not actually address Petitioners' position about the holding in that case, but rather resort to claiming that Petitioners' argument is a "misquotation" of the opinion. The Petition in fact quotes both the majority opinion, as well as the statements of concurring and dissenting justices reiterating the holding of the majority.

Respondents' argument is, in reality, an attempt to divert the Court's attention from the clear mandate of *Hicks*, by reference to subsequent cases that did not involve law enforcement activities of state and local law enforcement officers. That tactic was successful in

the Tenth Circuit, which relied largely on other Tenth Circuit decisions not involving state and local law enforcement activities. Respondents claim that the decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316 (2008), narrowed the holding of *Hicks*. However, *Plains Commerce* involved the question of whether a tribal court had jurisdiction to hear lending discrimination claims against a non-Indian bank, *not* a case involving a claim of jurisdiction over state and local law enforcement officers. Furthermore, this Court found no tribal court jurisdiction. *See* 544 U.S. at 320. More importantly, in *Plains Commerce* the Court analyzed the scope of exceptions to the general rule that tribal courts lack jurisdiction over non-Indians, even on tribal lands, established in *Montana v. United States*, 552 U.S. 1087 (2008), and the *Hicks* decision was not analyzed, let alone narrowed.[4]

Finally, Respondents' diversionary tactic includes the assertion that Petitioners' reliance on the broad holding of *Hicks* is misplaced because the officers who initiated the chase did not suspect Mr. Murray of any crime, nor could Petitioners claim that his running away from the traffic stop constituted a crime. However, this is irrelevant to whether Petitioners were

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[4] In *Plains Commerce*, *Hicks* was cited seven times in the majority opinion, and three times in the dissent. Each of those citations involved general jurisdictional principles and considerations, and *never* specifically or even tangentially addressed the central holding of *Hicks* that tribal courts have no jurisdiction over claims against state and local law enforcement officers arising out of their law enforcement activities.

involved in law enforcement activities. Petitioners' actions on the Ute Reservation were precipitated by the driver of the vehicle refusing to stop. All of Petitioners' activities flowing from that criminal act, including Petitioners' search for Mr. Murray to ensure their own safety in the course of the ongoing investigation after he had fled the scene, are part of the same legitimate law enforcement activities, regardless of whether Mr. Murray had committed or was suspected of committing any independent crime.

CONCLUSION

Despite Respondents' attempts to divert the Court's attention from the effect and applicability of the *Hicks* decision in the instant case, *Hicks* clearly holds that tribal courts have no jurisdiction, plausible or otherwise, over claims brought against state and local law enforcement officers arising out of their law enforcement activities, and that federal courts are not required to defer to a tribal court's determination as to whether such jurisdiction exists. In holding otherwise, the Tenth Circuit Court of Appeals failed to follow the clear precedent of this Court. Thus, this Court should

grant the Petition for a Writ of Certiorari to correct the error of the court below.

Respectfully submitted,

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