No. 07-103

In The

Supreme Court of the United States

RICKIE L. REBER, TEX WILLIAM ATKINS, STEVEN PAUL THUNEHORST, and C.R.,

Petitioners,

v.

THE STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. All issues set forth in the Petition were properly raised and preserved in the courts below.

As has already been pointed out, all of the issues raised in the Petition were properly, carefully, and timely raised in the courts below. Pet. 8-10; Pet. App. 31-37, 38-39; Resp. App. 1-10. Petitioners likewise briefed these matters exhaustively before the Utah Court of Appeals. Appellants' Briefs, Jan. 5, 2005.

In an apparent effort to foreclose review by this Court, the State refused to respond to some of the issues raised before the Utah Court of Appeals. Petitioners duly pointed out this omission to that court. Appellants' Reply Brief, July 29, 2005, pp. 25-27. The court ultimately ruled in the Petitioners' favor, albeit on grounds not fully briefed by either party. Pet. 11, Pet. App. 17. Petitioners thus cross-petitioned to the Utah Supreme Court as to the effect of the Ute Partition Act on the Uintah Band. Cross-Petitions, May 30, 2006.

"[A] prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984), *accord Dipoma v. McPhie*, 29 P.3d 1225, 1230 (Utah 2001). Inasmuch as the present Petitioners prevailed before the Utah Court of Appeals, it was unnecessary, and indeed, would have been inappropriate to cross-petition on any issue

other than the new one raised by the Utah Court of Appeals in its ruling. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). It is equally clear that a prevailing party must cross-appeal to contest an otherwise favorable ruling. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85, n.9 (1980).

Petitioners fully briefed all five issues before the Utah Supreme Court. As the prevailing party in the lower appellate court, the present Petitioners could and did assert before the Utah Supreme Court all issues raised before the Utah Court of Appeals. Opening Brief, Oct. 13, 2006, pp. 17-25. Again, the State of Utah refused to respond to any issue other than that upon which it had prevailed in the Utah Court of Appeals. For all intents and purposes, it left it up to the amicus curiae to even respond to the Petitioners' Cross-Petition.

The State of Utah would now urge that this Court may only review those issues which the immediately preceding court chose to explicitly mention. Resp. 8-15. That is clearly not the law. This Court has long held that a petitioner must only show that the issue was fairly *presented* to the court below. *Webb v. Webb*, 451 U.S. 493 (1981). Where, as here, the lower court ruling does not address the issues addressed in the petition, the burden is upon the petitioner to show merely that the issue was properly *raised* in the court below. *Street v. New York*, 394 U.S. 576, 582 (1969). Petitioners have clearly met this burden. The issue is sufficiently preserved if the necessary effect

of the lower court's ruling is to deny the petitioner's claim. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

In effect, the State of Utah suggests a rule whereby any adverse party or lower court could foreclose review by simply choosing to ignore issues it does not want addressed. However, this Court has held that lower court rulings cannot prevent this Court from reviewing all federal issues properly raised. *Hathorn v. Lovorn*, 457 U.S. 255, 261-262 (1982); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

The issue of judicial bias was properly raised in the trial court as a denial of due process under the Fourteenth Amendment. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-822 (1986). The Petitioners have consistently maintained that this constituted plain error. *United States v. Cotton*, 535 U.S. 625, 631-632 (2002).

B. The State's interpretation of *Ute V* and *Conway* is irrelevant to the issue of Reasonable Reliance.

As set forth in the Petition, a person cannot be convicted of a crime if they acted in reasonable reliance upon a published court ruling. *United States v. Caceres*, 440 U.S. 741, 753 n.15 (1979). The issue is whether that reliance was *reasonable*, not whether it was correct. Pet. 13. The Respondent and amicus now respond by characterizing the Tenth Circuit's *Conway* holding as merely procedural. Resp. 9. Am.Br. 6, n.3. As correctly stated in Respondent's brief, *Timpanogos*

Tribe v. Conway, 286 F.3d 1195 (10th Cir. 2002), was an interlocutory appeal by the State of Utah against a ruling in favor of some members of the Uintah Band. Resp. 9. In determining that the district court did have jurisdiction, the appellate court necessarily stated the basis for its decision, and it was this basis that the Petitioners relied upon in determining they could continue to hunt on their own tribal land. This is how appellate rulings are supposed to work. To now characterize this ruling as "merely procedural" would be the same as insisting that *Marbury v. Madison*, 1 Cranch 137 (1803), determined nothing more than whether Mr. Marbury was entitled to a writ.

Respondents again concede, as they have before the Utah Court of Appeals and the Utah Supreme Court, that the Petitioners were in fact in Indian country as defined under *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*). Resp. 9-10. No one disputes that Ute Indians can hunt throughout Indian country. Am.Br.App. 78-94. The sole jurisdictional question thus remaining before this Court is whether Uintah Indians can still hunt in that Indian country as well.

C. The Ute Tribe does not contest that the Ute Partition Act terminated over two thirds of the Uintah Band.

Apparently the Ute Tribe does not contest that the majority of the Uintah Band was terminated under the Ute Partition Act ("UPA"), 25 U.S.C. §§677-677aa, but merely whether that termination

effectively expelled the Uintah Band from the Ute Tribe. Am.Br. 9. Since the sole factual issue of consequence is whether a majority was terminated, the Ute Tribe has apparently conceded that fact. *See* Sup.Ct.R. 15.2.

Moreover, this Court has consistently limited termination to federal benefits enumerated in the termination acts, leaving tribal existence unaffected. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968). Applying this rule, the Tenth Circuit held that termination could not be imputed to hunting rights not explicitly mentioned in the UPA. *United States v. Felter*, 752 F.2d 1505, 1511 (10th Cir. 1985). The Ute Tribe has now conceded (and quite forcefully at that), that the UPA makes no mention of the Uintah Band whatsoever. Am.Br. 7-10. The factual basis is thus firmly established for this Court to consider how the majority of Uintah Band members could be stripped of their Uintah tribal existence when their tribe is never even mentioned in the Act.

The amicus implies that because neither Mr. Reber nor Mrs. Thunehorst were listed on any roll prior to 1954, they could not possibly be Utes. Am.Br. 13. The Ute Tribe has pointedly failed to mention that no roll of the entire Ute Tribe existed prior to termination. The only difference between the 456 Uintahs on the termination roll and the 220 excluded from both rolls is the roll itself. In other words, not only were Mr. Reber and Mrs. Thunehorst never members of the Ute Tribe, neither were the 456 Uintahs on the list, or for that matter, the other 34 Indians. Indeed, taking the Ute Tribe's allegation to its logical conclusion, no Ute

Tribe existed at all until the full-blood roll was compiled under the UPA. If the 490 were never Indians in the first place, there certainly would have been no need to terminate them.

Finally, the Ute Tribe somehow implies that there is no "friction" regarding the Uintah Band because an agreement exists between the Ute Tribe and the State. Am.Br. 3. It is hard to see how 50 years of litigation, including a 24-year boundary dispute between the Ute Tribe and the State of Utah, demonstrates such a harmony. Pet. 7, n.2. Quite simply, the Tenth Circuit's observation in *Hackford v. Babbitt*, 14 F.3d 1457, 1463 (10th Cir. 1994), Pet. 6, speaks for itself. Any State/tribal harmony that comes at the expense of a dispossessed tribe is the "harmony" of the cat digesting the canary.

D. Neither *Hackford* nor *Murdock* address the effect of the Ute Partition Act on the Uintah Band.

The amicus cites *Hackford* and *United States v. Von Murdock*, 132 F.3d 534 (10th Cir. 1997), for the proposition that the Uintah Band has no existence independent of the Ute Tribe. Am.Br. 5-7. However, neither *Hackford* nor *Murdock* ever addressed the effect of the UPA on the Uintah Band.

In *Hackford*, the Tenth Circuit reviewed the 1937 Ute constitution and a set of agreements ratified in 1950 (*ref*. 25 U.S.C. §672), and concluded that, *as of 1950*, the three bands constituted a unified tribe. 14

F.3d at 1461. The case makes *no further* findings in regard to the Uintah Band. Indeed, it explicitly *refrains* from addressing Mr. Hackford's separate claims with regard to the Uintah Band at all, finding that all water on the reservation has a priority date of October 3, 1861, regardless of band affiliation. 14 F.3d at 1469.

Having addressed the Uintah Band only through 1950, the court then addressed the relative effects of the 1954 UPA on the "Mixed-bloods" and "Full-bloods," drawing no connection whatsoever between the "Mixed-bloods" and the Uintah Band. 14 F.3d at 1461-1464. Nowhere does the opinion remotely suggest that the Tenth Circuit was even apprized of such a connection. Indeed, the court's extensive treatment of Mr. Hackford's rights as a "Mixed-blood," while never making a finding on his rights as a Uintah, confirms not only that the court was not aware of any such connection, but that Mr. Hackford never presented the court with such a question.

Perry Murdock was born in 1968 to two parents who were included on the termination rolls. His first argument was simply that he is a member of the Ute Tribe, notwithstanding the UPA, and *with no reference to the Uintah Band whatsoever*. The Tenth Circuit rejected this argument out of hand. *Murdock*, 132 F.3d at 540. He then argued that he had rights as a member of the Uintah Band, *without reference to the UPA*. *Id.* The Tenth Circuit accordingly dispensed of his argument, likewise *without reference to the UPA*. 132 P.3d at 541. The court was never asked to

address the effects of the UPA on the Uintah Band, and thus provided no analysis relevant to that question. Like the *Hackford* court, the *Murdock* court simply considered the Ute Tribe as of 1950, four years prior to the UPA, and made no further inquiry. To this day, the Tenth Circuit has yet to be informed that the UPA terminated three quarters of the Uintah Band. This pivotal issue has yet to be addressed by any federal court.

E. No Act or Treaty empowers the Ute Tribe to determine the membership of the Uintah Band.

The Ute Tribe argues on the premise that members of the Uintah Band are merely former Utes, excluded from the Ute Tribe under the authority of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978). This conflicts with three critical principles: First, the Uintah Band possesses as much right under *Santa Clara* to determine who is Uintah as does the Ute Tribe to determine who is Ute. Second, the Ute Tribe can point to nothing in the Ute Constitution of 1937 nor any treaty or act of Congress giving it a separate such power over the Uintah Band. The Ute Tribe has power solely to determine the membership of the Ute Tribe as a whole, *not* of the constituent bands. Indeed, the Ute Tribe never even presumed to exercise such a power until after 1954, *after* the expulsion of the Uintah Band. Prior to that time, each band maintained its own roll.

Finally, the Tenth Circuit has clearly held that any ambiguity in the UPA must be interpreted in favor of those terminated, *not* the Ute Tribe. *Felter*, 752 F.2d at 1511, *applying Bryan v. Itasca County*, 426 U.S. 373 (1976). In short, when the Uintah Band was expelled under the UPA, it took its rights under *Santa Clara* with it. After 1954, the Uintah Band was no longer a party to the Ute Constitution and could no longer be bound by it. The Ute Tribe thus does not, nor can it, explain how a membership ordinance passed in 1992 could have any relevance to the Uintah Band. Am.Br.App. 42.

F. The State's application of *Rogers* is contrary to this Court's holdings regarding terminated tribes.

The Utah Supreme Court's interpretation of *United States v. Rogers*, 45 U.S. (4 How.) 567 (1845), directly contradicts this Court's more recent and applicable holdings in *Santa Clara* and *Menominee*. Moreover, *Rogers* merely held that a white man with no Indian ancestry whatsoever who was adopted into an Indian tribe at a mature age could not now claim Indian status. It indicates how far the law has been misconstrued that the State of Utah now relies on *Rogers* to declare that a man who is Indian by birth, who was eligible at birth for membership in the Ute

Tribe, and who is recognized as Indian by his own tribe[1], is nevertheless not an Indian.

The blood quantum charade becomes apparent when it is recognized that under the UPA, all persons with a blood quantum *up to and including 50%* were nevertheless terminated from federal supervision. 25 U.S.C. §677a(b) and (c). To maintain this charade, the Ute Tribe maintains the highest blood quantum of any tribe in America: *5/8*! Am.Br.App. 33. This means that the terminated Uintah Band possesses a *higher* Indian blood quantum than many entire *tribes subsequently* added to the Secretary of the Interior's list of "recognized" tribes.

[1] The State of Utah's obsession with blood quantum, as well as the Ute Tribe's attempts to invoke its constitution against a rival tribe, both overlook that tribal "regulation is rooted in the unique status of Indians as '*a separate people*' with their *own* political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is *not* to be viewed as legislation of a 'racial group consisting of Indians. . . . '" *United States v. Antelope*, 430 U.S. 641, 646 (1977), *citing Morton v. Mancari*, 417 U.S. 535, 553, n.24 (1974). (Emphasis added). Cohen, Felix S., *Handbook of Federal Indian Law* (1982 ed.), p. 654. This separateness of people and institutions would include separation of tribes from each other, as well as from the State and federal governments.

G. The Petition raises important federal questions of Due Process and Indian tribal identity.

The Utah Supreme Court's holding directly contradicts this Court's holdings as to Due Process of Law under the Fourteenth Amendment, both as to reliance upon published court rulings and as to judicial bias. *Caceres*, *supra*, *Aetna Life Ins. Co.*, *supra*. Its implicit holding regarding the Uintah Band directly opposes (1) this Court's holding regarding the rights of terminated tribes, *Menominee*, *supra*, (2) the canons of construction regarding acts affecting Indian rights, *Bryan*, *supra*, (3) the specific application of those canons to the UPA, as set forth by the Tenth Circuit, *Felter, supra*, and (4) the presumption of majority rule, as is found throughout the entire federal regulatory structure. *See, e.g.*, 25 U.S.C. §§476(a)(1), 476(c), 1300j-4(a)(1), 1300k-6(a)(1), 1321(a), 1322(a), 1326.

The process of separating tribal populations from their legal identities began on the Uintah & Ouray Reservation. The process is now raging through American Indian tribes like a plague. The controversies over the Cherokee Freedmen, now pending before Congress, and the Pachenga Tribe of California, in the face of new casino money, are but two examples. *See* House Bill 2824, June 21, 2007, and Amend. 783 to House Bill 2786, Sept. 6, 2007 (Respectively severing relations with U.S. government and prohibiting distribution of funds until Cherokee Nation of Oklahoma recognizes Cherokee Freedmen under Treaty of 1866). *See also Lamere v. Superior Court*, 131

Cal.App.4th 1059, 31 Cal.Rptr.3d 880 (Cal. App. 4th Dist. 2005), *cert. denied*, 547 U.S. ___ (May 22, 2006).

The potential for exploitation of such a process is profound. The only check that lies within the power of the federal government is to ensure that democratic majorities retain control of tribal identities. While the legislative and administrative structure latently implies a presumption of majority rule, it is high time that the principle be explicitly articulated, before America's entire Indian population is dispossessed by minority cliques seeking nothing but profit.

Absent explicit language to the contrary, how is it possible to terminate the majority of a tribe and not terminate the tribe itself? The answer lies in applying the accepted canons of construction and the basic laws of physics. Three quarters of the membership is three quarters of the membership, whether by choice or by force.

CONCLUSION

The State of Utah has presented no plausible reason why the Petitioners should not have been able to present their reasonable reliance argument to a jury. Likewise, the Ute Tribe has provided no plausible explanation as to how three quarters of a tribe can be terminated without terminating the tribe itself. Since the Utah Supreme Court's ruling stands contrary to this Court's precedents on both these

issues, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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