15-640

No. 15-___

IN THE

Supreme Court of the United States

WASATCH COUNTY, UTAH,
SCOTT H. SWEAT, & TYLER J. BERG,

Petitioners,

v.

UTE INDIAN TRIBE OF
THE UINTAH AND OURAY RESERVATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hagen v. Utah*, 510 U.S. 399, 409 (1994), this Court granted certiorari "to resolve the direct conflict between" the Tenth Circuit and the Utah Supreme Court over whether Congress has diminished the lands of the Uintah Valley and Uncompaghre Indian Reservation. This Court adopted the state court's holding that the lands have been diminished, such that those lands are not Indian Country.

The Tenth Circuit is not giving up, however. It has held that its prior precedent justifies expressly refusing to follow *Hagen*, except to the limited extent absolutely compelled with respect to the precise facts of this Court's ruling. In this case, the Tenth Circuit went substantially further still and held that its earlier (admittedly erroneous) holding that the reservation has not been diminished binds even petitioner Wasatch County, which was not a party to any of the prior litigation. Despite this Court's determination to resolve the conflict between the federal and state courts in *Hagen*, that conflict continues to persist.

The Question Presented is:

Did the court of appeals err in defying this Court's decision in *Hagen v. Utah* and enjoining a proper state court prosecution of a tribal member on lands that this Court has held have been diminished by Congress?

RULE 29.6 DISCLOSURE STATEMENT

No corporate entity is a petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

STATUTORY PROVISIONS INVOLVED

The Anti-Injunction Act provides in relevant part that "[a] court of the United States may not grant an injunction to stay proceedings in State court except as . . . necessary . . . to . . . effectuate its judgments." 28 U.S.C. § 2283.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A) is published at 790 F.3d 1000. The district court's order (Pet. App. B) is unpublished.

JURISDICTION

The court of appeals issued its judgment on June 15, 2015. On August 25, 2015, Justice Sotomayor granted a timely application to extend the time to file this Petition to and including November 13, 2015. App. No. 15A237. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In state court, petitioner Wasatch County (County) sought to prosecute a member of an Indian tribe for state law offenses she committed on a state road within the original boundaries of an Indian reservation. This Court and the state courts have found that *this precise reservation* has been

diminished, such that the County should have jurisdiction over the road.

The Tenth Circuit nonetheless enjoined the prosecution and found that only the tribe had jurisdiction. It invoked its own prior rulings, which expressly refuse to give full effect to this Court's decision about the reservation and which reject the view of the state courts.

The court of appeals thought that extraordinary result was authorized by an exception to the Anti-Injunction Act that permits enjoining a state court proceeding to enforce a prior federal court judgment. But the County was not a party to that prior case, which in any event did not produce an enforceable judgment at all and which is avowedly directly contrary to an on-point decision of this Court.

I. Background Of The Litigation Over The Boundaries Of The Ute Indian Reservation

A. History Of The Original Reservation Lands

Congress established the Uintah Valley Reservation and adjoining Uncompaghre Reservation (collectively, the Reservation) in Utah in the 1860s and 1880s. Respondent is the Ute Indian Tribe (Tribe), which has roughly 3000 members. They are "the descendants of the Indians who settled on the Uintah Reservation." *Hagen v. Utah*, 510 U.S. 399, 402 (1994).

The Reservation includes more than one million acres that the United States Government holds in trust for the Tribe and over which the Tribe indisputably has sovereignty. In addition, as originally established, the Reservation includes substantial non-trust lands.

In the late 1890s and very early 1900s, Congress transferred title to non-trust lands within the Reservation to non-Indians, in two particularly relevant respects. First, the Acts "allotted" lands to members of the Tribe, but "restored" other plots to the "public domain" for transfer to non-Indian settlers. The parties call the latter plots "unallotted lands."

Congress also "set apart and reserve[d]" substantial Reservation lands for a different "public" use: an addition to the public Uintah National Forest (Forest). Bureau of Indian Affairs, A Forest History of the Uintah and Ouray Indian Reservation 86-87, 89 (1992) (citing 33 Stat. 1070 (1905)). President Roosevelt withdrew roughly one million acres from the Reservation and transferred it to the Forest. As the Bureau of Indian Affairs has explained, the lands were thereby "severed" and "detached" from "the Indian reservation" and "tribal control." *Id.* at 52, 89. The Tribe requested compensation but did not "wish the lands returned"; the federal government paid the Tribe roughly $1.2 million. *Id.* at 55-56. These lands have since been administered by the U.S. Forest Service. The parties call them "Forest lands."

Ownership of other extensive non-trust lands has passed from the Tribe and its members to non-Indians. For example, members sold allotted lands to non-Indians.

The non-trust lands are now overwhelmingly either (a) populated by non-Indians, many of whom live in a number of towns and unincorporated areas; or (b) held and administered by agencies of the federal government (the Forest Service and Bureau of Land Management) for public use. The federal, state, and local governments—not the Tribe—regulate, provide governmental services, and tax those non-trust lands.

B. The Tenth Circuit Holds That The Reservation Has Not Been Diminished, But This Court Expressly Rejects That Ruling In *Hagen*

In 1975, the Tribe asserted for the first time since at least the turn of the century jurisdiction over not merely its trust lands and land owned by members of the Tribe but *all* of the land originally encompassed in the Reservation, including with respect to non-Indians living in and around several towns within the boundaries. Ute Indian Tribe of the Uintah and Ouray Reservation, Law & Order Code Ch. 2, § 1-2-1. That would make the non-Indian residents for the first time potentially subject to law enforcement and civil regulation by the Tribe.

The Tribe's position then (as now) was that the original Reservation remains intact, *i.e.*, not

diminished. "If the reservation has been diminished, then the [diminished land] is not in 'Indian Country,' *see* 18 U.S.C. § 1151, and the Utah state courts properly exercise[] criminal jurisdiction over" state law offenses. *Hagen*, 510 U.S. at 401-02. Otherwise, state courts lack jurisdiction because "Congress has not granted criminal jurisdiction to the State of Utah to try crimes committed by Indians in Indian Country." *Id.* at 408.

The Tribe filed suit in federal court seeking a declaratory judgment. The State was a defendant. But although the original Reservation lies in parts of seven counties, the Tribe named only two as defendants. Petitioner Wasatch County was not a party.

A Tenth Circuit panel ruled against the Tribe, holding that Congress had broadly diminished the Reservation. The panel held that the unallotted lands in the Uintah Valley Reservation were diminished and the Uncompaghre Reservation was disestablished. *Ute Indian Tribe v. Utah*, 716 F.2d 1298, 1315 (10th Cir. 1983). The same reasoning—*i.e.*, that lands had been transferred from the Reservation to public use—"convince[d] [the panel] that the forest reserve lands are not part of the reservation." *Id.* at 1314.

The en banc court reversed the panel, by a divided vote. This is the first of two prior Tenth Circuit decisions that are critical to this petition. The parties call it "*Ute III*." *Ute Indian Tribe v.*

Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986) (*Ute III*).

Ute III held that Acts "restoring" lands to the "public domain" do not diminish tribal reservations. *Id.* at 1092. Under that legal standard, the Tribe retained full sovereignty over all of the original Reservation lands, including the unallotted lands and the Forest lands. *Id.* at 1093.

Several years later, the Utah state courts expressly rejected that conclusion. Ruling in a dispute over unallotted lands in the Uintah Valley Reservation, the Utah Supreme Court held that Congress had diminished the Reservation. *State v. Hagen*, 858 P.2d 925 (Utah 1992); *State v. Perank*, 858 P.2d 927 (Utah 1992). That ruling effectively deemed the Reservation to encompass only the million-plus acres held in trust for the Tribe by the federal government. *See infra* at 21-22.

At the urging of the United States, this Court granted certiorari in *Hagen v. Utah* "to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen*, 510 U.S. at 409. This Court expressly agreed with the Utah Supreme Court and expressly rejected *Ute III*. *Id.* at 414-15. This Court reasoned that Congress had diminished the Reservation by transferring the unallotted lands out of the Reservation and into the public domain. *See*

infra at 32-36 (discussing *Hagen*'s reasoning in detail).

C. The Tenth Circuit Holds That Its Prior Precedent Remains Binding On The Parties To That Case

As the Tenth Circuit itself subsequently recognized, *Hagen* "held that the state had jurisdiction to prosecute Hagen because Congress had diminished the Uintah Reservation in the early 1900s. The *Hagen* decision effectively overruled the contrary conclusion reached in the [*Ute III*] case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *United States v. Cuch*, 79 F.3d 987, 989 (10th Cir. 1996) (internal citation omitted). That seemed to be the end of the matter, even to the Tenth Circuit.

It was not. Then as now, the Tribe avowedly defied this Court's decision in *Hagen*, even with respect to the precise unallotted lands at issue in that case. *See* Br. of Appellant Ute Indian Tribe, No. 14-4080, *Ute Indian Tribe v. Myton City* 19 (Aug. 19, 2015). The Tribe sought an injunction in federal court (where it had won *Ute III*) against the State and certain localities (again not including the County) to prevent them from taking any action to follow this Court's decision in *Hagen*.

The Tenth Circuit largely granted that request in the second prior decision that is critical to this petition. The parties call it "*Ute V*." *Ute Indian Tribe*

v. Utah, 114 F.3d 1513, 1515 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998) (*Ute V*). *Ute V* largely accepted the Tribe's argument that it could "continue[] to rely on *Ute Indian Tribe III* in exercising civil and non-felony jurisdiction on lands within the original reservation boundaries." *Id.* at 1524.

Ute V did not dispute that "*Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based—namely, that statutory restoration language is insufficient to infer diminishment." *Id.* at 1528. Moreover, the State was not collaterally estopped by the prior judgment in *Ute III*, because the State had also won a favorable judgment in *Hagen*. *Id.* at 1522-25. There was no basis to give preclusive effect to one but not the other. *Id.* at 1525.

But *Ute V* found another way to hold that the parties to *Ute III* were bound by that decision despite *Hagen*: *Ute III* was "law of the case," because the mandate had issued. *See id.* at 1521 ("Accordingly, we hold that the district court properly followed our mandate in *Ute* [*III*] by continuing to enjoin the state and local defendants from exercising jurisdiction pursuant to *Hagen*."); *id.* at 1519 (ruling resolves Reservation boundaries "as between the parties"). Yes, this Court had rejected *Ute III* by name with respect to this precise reservation, but that was "not sufficient to justify departing from [the Tenth Circuit's] earlier judgment." *Id.*; *see also id.* at 1523 (court of appeals had refused to apply *Hagen* beyond

the limited facts of that case, even if doing so might "achieve a more accurate judgment" or would avoid "injustice").

Ute V did, however, narrowly recall a small bit of the *Ute III* mandate—the bit that governed "precisely the category of fee lands at issue in *Hagen*": the unallotted lands located on the original Uintah Valley Reservation. *Id.* at 1530. *Ute V* held that those specific lands on that particular reservation were diminished.

But as to the parties to *Ute III*, the rest of that decision remained intact. Of particular note, the indistinguishable unallotted lands on the adjoining Uncompaghre Reservation remained undiminished. *Id.* at 1530-31. So did the Forest lands and lands that non-Indians had acquired in the last century when, for example, they were exchanged by the Tribe for other trust lands or sold by members of the Tribe. *Id.* at 1529-31. It made no difference that they had obviously been diminished under the legal standard adopted in *Hagen*. *Id.* at 1529

Ute V produced a hot mess. It was binding only on the parties to *Ute III* and even then only in federal court. The court also admitted its decision would produce "a checkerboard allocation of jurisdiction" with respect to land owned by non-Indians. *Id.* at 1530. Some would be outside the Tribe's jurisdiction (the unallotted lands on the Uintah Valley Reservation) while some (for example, lands sold over

one hundred years ago by members of the Tribe) would be Indian Country.

Much worse, the checkerboard had no lines or colored squares. It turned on a fact that was almost never known *ex ante*: how any given parcel came to be owned by Indians and non-Indians. So *Ute V* recognized that often only "a title search" could determine whether the Tribe or counties had jurisdiction over, for example, the location of a crime or over a business subject to taxation. *Id.*

D. The Case Settles Rather Than Producing A Judgment Adverse To The Governmental Parties

Ute V just remanded the case; it did not order the district court to enter an injunction or a judgment in favor of the Tribe. There was far too much left to do to try and put the decision in place. The district court entered a preliminary injunction requiring the parties to follow *Ute V*, whatever that meant.

The two counties that were parties to *Ute V* (as noted, the County was not) sought certiorari. No. 97-570, *Duchesne County v. Ute Indian Tribe*. They pointed to the court of appeals' refusal to give effect to *Hagen* and the utterly unworkable jurisdictional regime that resulted.

The State of Utah did not seek certiorari or otherwise encourage this Court to grant the counties' petition. Responding to an Order of this Court to set forth its position, the State explained that *Ute V* created "jurisdictional chaos." Response of the State

of Utah to Request for Statement of Position 3, No. 97-570, *Duchesne County v. Ute Indian Tribe* (Dec. 23, 1997). But Utah indicated that review was unnecessary at that time, because it had "determined to address the problem through negotiation, not litigation." *Id.* at 2. The State was "committed to serious negotiations," had made "important progress in negotiating difficult issues," and indeed had signed a "Letter of Intent" with the Tribe. *Id.* at 4. The State explained that it had not sought certiorari so as not to "jeopardize [those] ongoing negotiations." *Id.* With the state that won *Hagen* not supporting immediate review of *Ute V*, and with the settlement likely creating doubts about mootness, the Court denied certiorari. *Duchesne Cty. v. Ute Indian Tribe*, 522 U.S. 1107 (1998).

The parties to *Ute V* then settled. The settlement itself did not address any lands located within Wasatch County, which was not a party to either the *Ute* litigation or the settlement.

As stipulated by the parties, including the Tribe, the district court vacated its preliminary injunction and dismissed the Tribe's complaint with prejudice. Stipulated Order Vacating Preliminary Injunction and Dismissing the Suit with Prejudice, *Ute Indian Tribe v. Utah*, 2:75-CV-00408, Dkt. No. 145 (D. Utah Mar. 28, 2000) ("[Q]uestions of jurisdiction on the various categories of land within the original boundaries of the Uintah and Ouray Reservation have been determined by the decisions of the United States Supreme Court and the Tenth Circuit Court of

Appeals, *as modified by the agreements between the parties . . . .*" (emphasis added)). The court did not enter a judgment in favor of the Tribe or against any of the named governmental parties. *Id.*

The settlement departed significantly from *Ute V*. The Tribe agreed *not* to exercise its full sovereign authority over the non-trust lands that the Tenth Circuit had deemed to be Indian Country notwithstanding *Hagen*. *See* Disclaimer of Civil/Regulatory Authority at 1 (Exhibit to Dkt. No. 96). In consideration, the Tribe could exercise misdemeanor criminal jurisdiction over tribal members throughout the original Reservation, even in areas *Ute V* determined were not Indian country. *Id.*; *see also* Cooperative Agreement to Refer Tribal Members Charged with Misdemeanor Offenses to Tribal Court for Prosecution at 3 (Exhibit to Dkt. No. 96). Law enforcement officers representing all the parties would be "cross deputized." *See* Cooperative Agreement for Mutual Assistance in Law Enforcement at 3 (Exhibit to Dkt. No. 96). All other civil and criminal jurisdiction was assigned to the federal, state, and local governments that were parties to the settlement.

Major terms of the settlement expired in 2008, but the signatories continued to adhere, in some respects, to them voluntarily. In 2012, the Tribe stopped completely. The jurisdictional dispute—which *Hagen* supposedly resolved—then arose again. The Tribe filed suit to "reopen" the *Ute* litigation in 2013.

II. Factual And Procedural History

A. The County Maintains That The Reservation Has Been Diminished

Petitioner Wasatch County, Utah, is located southeast of Salt Lake City, more than one hundred miles from the tribal headquarters. The County was established in 1862. It has a total area of roughly 1200 square miles.

The County provides the usual array of traditional governmental services. For example, the Wasatch County School District manages elementary, middle, and high schools. The Emergency Medical Service provides urgent health care. The County Sheriff polices the region, including on state and county roads. The County Justice Court adjudicates civil and criminal matters.

There are 25,000 residents; roughly 125 are Native American. Most residents live in several communities, including Heber City, the County seat. Many work in the tourist recreational areas in nearby Park City and other locations near Salt Lake City.

Roughly half of the County lies within the Reservation's original boundaries. But that includes only one small area of trust land. For at least the last one hundred years, the Tribe made no jurisdictional claim to any of the rest. Much of it is Forest lands, which are patrolled by the County Sheriff under a contract with the Forest Service. There are also plots owned by non-Indians.

The County believes that the state courts are right and that *Ute III* and *V* are wrong, particularly given *Hagen*. The County believes that it *must* follow the precedent of this Court. So the County believes it is legally obligated to patrol the state and county roads within its borders, where it must enforce the validly enacted laws and regulations of the county, state, and federal governments. In turn, the County prosecutes state misdemeanor offenses that occur on those roads in Wasatch County Justice Court.

Before this litigation, the Tribe had never objected. There is no evidence that the Tribe has effectively policed (or can effectively police) those roads, including those in the Forest lands.

B. The Tribe Seeks A Federal Court Injunction

Lesa Jenkins was arrested on a state road in the County that traverses the Forest lands. The officer cited her for several state law offenses: speeding, driving with a suspended or revoked license, and driving without the device to detect intoxication required by her prior state drunk driving conviction.

The County sought to prosecute Ms. Jenkins. But she is an enrolled member of the Tribe. If she objected to the County's jurisdiction, the state court could decide that argument (as in *Hagen*). But there is no question that argument would be doomed in that court.

So the Tribe went back to the federal courts that had previously ruled in its favor, seeking declaratory and injunctive relief. It named petitioner and the State of Utah as defendants. The district court combined the suit with the original *Ute* litigation. That made the two county defendants in *Ute III* and *Ute V* parties here too. (They are contemporaneously filing their own follow-on petition.)

The Tribe's position in federal court is that "*Hagen* does not prevent the Tribe—a non-party to *Hagen*—from enforcing the *Ute III*/*Ute V* mandate," because (in language that perfectly captures the Tribe's views) "the United States Supreme Court in *Hagen*" did not "have *the constitutional authority* to divest and diminish . . . the Tribe's Reservation lands." Br. of Appellant Ute Indian Tribe, No. 14-4080, *Ute Indian Tribe v. Myton City* 19, 21 (Aug. 19, 2015) (emphasis added). The Tribe requests a declaration that it has exclusive sovereignty throughout the original Reservation, including even the lands *Hagen* held were diminished. The Tribe also seeks a permanent injunction prohibiting the State and its counties from pursuing criminal prosecutions of Indians in state court for offenses arising in areas declared by *Ute III* and *Ute V* to be Indian Country—and prohibiting the State and its subdivisions from otherwise relitigating matters settled by those decisions. *See* Complaint, *Ute Indian Tribe v. Utah*, No. 2:13-CV-01070 at 8-10 (Dkt. No. 2) (D. Utah Dec. 3, 2013); Complaint, *Ute Indian Tribe*

v. Utah, No. 2:13-CV-00276 at 9-10 (Dkt. No. 2) (D. Utah Apr. 17, 2013)

As to the County in particular, the Tribe seeks to enjoin the prosecution of Ms. Jenkins. *See* Complaint, *Ute Indian Tribe v. Utah*, No. 2:13-CV-01070 at 9 (Dkt. No. 2) (D. Utah Dec. 3, 2013). It also seeks to enjoin the County from arguing in any state or federal court that the lands within the original Reservation are not Indian Country or from following a contrary ruling of any other court—including *Hagen*. *Id.* at 9-10.

C. The Tenth Circuit Enjoins The State Court Prosecution

With very narrow exceptions, the Anti-Injunction Act bars a federal court from enjoining a state court proceeding. 28 U.S.C. § 2283. The Act does not permit an injunction to enforce federal court precedent in state court. *Id.* So even if *Ute III* and *Ute V* were rightly decided, they could not be a proper basis to enjoin the prosecution of Ms. Jenkins. Instead, the state courts would decide the Reservation's boundaries themselves.

The district court refused to give the Tribe an injunction. But the court of appeals reversed in the decision that gives rise to this Petition.

The scorching ruling below excoriated the state and counties for challenging *Ute V*'s refusal to apply *Hagen* beyond its narrowest facts. Pet. App. 6a-7a. It chided this Court for even hearing *Hagen*, "despite

having denied review in *Ute III* and despite the fact the mandate in that case had long since issued." *Id.* 5a. And it admonished the defendants that if they continued to pursue the issue, "they may expect to meet with sanctions in the district court or in this one." *Id.* 26a.

The Tenth Circuit held that an injunction was required to enforce the judgment in *Ute V*. *Id.* at 8a-9a. It opined that the Anti-Injunction Act was no obstacle, because it permits a federal court to enjoin a state court proceeding when "necessary 'to protect or effectuate'" its judgments. *Id.* 14a.

Of course, the County was not a party to *Ute V*. Also, *Ute V* only bound the parties to *Ute III*, because *Ute V* relied only on the finality of the *Ute III* judgment. No matter. The Tenth Circuit held that every county was *ipso facto* in privity with the State, which had lost *Ute V*. Pet. App. 15a. The court identified no evidence that the State had litigated *Ute V* in the County's interests. To the contrary, the State had settled without any judgment being entered in favor of the Tribe. And the settlement gained the County nothing.

The Tenth Circuit nonetheless deemed all the defendants bound by *Ute V*, enjoined the County from prosecuting Ms. Jenkins, and remanded. Put otherwise, it enjoined a state court prosecution to "effectuate" a non-existent judgment (with respect to a non-party) that is in diametric opposition to an actual judgment of this Court. And, what is more, it

directly threatened sanctions if the governmental parties ever tried to exercise their sovereign authority over their own lands in their own courts again.

This petition followed.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has forever forbidden state and local governments—under the force of an injunction and a direct threat of sanctions—to apply this Court's on-point decision in *Hagen* in state or federal court to correctly identify their jurisdiction within the original Reservation. It disparages this Court's choice to decide *Hagen* at all. That ruling is a barely veiled attempt to strip this Court's ruling of its force and to reinstate the court of appeals' contrary decisions.

That ruling below moreover intrudes directly on the County's responsibility to conduct an ongoing criminal prosecution in state court for violations of state law on a state road. It puts the County to the choice of being sanctioned or abandoning its responsibilities to its citizens. It also upends the justifiable expectations of those citizens, specifically recognized in *Hagen*, that they are subject to the jurisdiction of ordinary civil authorities, not the Tribe.

The state courts would reach the opposite result in a case not brought by the government and also in this prosecution, were it not for the injunction. This

Court should resolve that conflict, just as it did in *Hagen*. But the basis for the Court's intervention is far stronger now. The ruling below conflicts directly with the decisions of this Court construing the Anti-Injunction Act and applying bedrock, long-accepted principles of collateral estoppel.

Certiorari accordingly should be granted.

I. This Court's Intervention Is Required Once Again To Establish The Correct Legal Test To Determine The Boundaries Of The Reservation.

The Reservation's boundaries are in chaos, which is precisely why this Court granted certiorari in *Hagen*. *Ute V* all but admitted that Tenth Circuit precedent produces an inadministrable "checkerboard" of jurisdictional responsibilities. *Ute V*, 114 F.3d at 1530. *Ute V* holds that the Reservation was diminished only with respect to the unallotted lands that were before this Court in *Hagen—i.e.*, those lands on the Uintah Valley Reservation that were opened to settlement under legislation in the early 1900s. *Id.* at 1529-30. All the other non-trust lands owned by non-Indians remained within the Reservation, including lands that Congress terminated from federal and tribal supervision, and lands that were previously allotted to members of the tribe but were long, long ago sold to non-Indians. *Id.* at 1529-31.

But no one even knows ahead of time where the squares of the checkerboard lie and who has

jurisdiction. No current, official map or database resolves the dispositive fact under *Ute V*: *how* non-Indians acquired the lands. So "a title search" may be required for each plot each time a question arises. *Id.* at 1530. For example, people obviously commit crimes on non-tribal land. So it can take a survey and title search each time to figure out what law applies and who has jurisdiction to prosecute.

Don't believe just us. The Tribe told this Court in *Hagen* that this exact system would produce "jurisdictional chaos" that would be "virtually impossible" to administer, as "the State may have jurisdiction over one lot, but the Tribe and the United States may have jurisdiction over the lot next door." *See* Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g, No. 92-6281, *Hagen v. Utah* at 4-5. A single store could be situated on two lots with conflicting jurisdictions, with the "absurd situation of a tribal member being subject to or exempt from paying State sales taxes depending on the location within the store of the item purchased." *Id.*

Actually, it is much worse than a "checkerboard" without squares; it is an impossible-to-play game of three dimensional chess because the court systems apply conflicting jurisdictional rules and Tenth Circuit precedent applies to some parties but not others. So County residents have no way to know *ex ante* whether they are bound to the Tribe's laws or instead Utah law. Such "inequalities in the administration" of the law are "a fertile basis for

litigious confusion" rendering estoppel inappropriate. *Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948).

As parties to the *Ute* litigation, the State and the other named local governments are bound by Tenth Circuit precedent. Everyone else—for example, a business contesting the Tribe's right to tax—is bound by *Hagen* and state court precedent, which very often will reach a different result.

That is true in *both* federal and state court. In federal court, the collateral estoppel effect of the Tenth Circuit's decision binds the State and the named local governments. But everyone else is subject to *Hagen*.

In state court, the Tenth Circuit has made clear it will enforce its precedent against the State and local governments through injunctions of prosecutions (as well as sanctions). But everyone else is bound by *Hagen*'s finding of diminishment and state court precedent.

The differences are radical. The Tenth Circuit essentially admitted that *Hagen* overrules *Ute III*. State court precedent also deems the Reservation much smaller. The Tribe told this Court that state court precedent amounts to "finding that the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians." *See* Mot. of Ute Indian Tribe to Intervene as a Matter of Right, No. 92-6281, *Hagen v. Utah* at 4-5, 7. It told the district court that state court precedent "holds that the Uintah Valley Reservation

was disestablished, except for those lands which are held in trust by the United States for the benefit of the Tribe." *See* Mem. in Supp. of Renewed Mot. for Injunctive Relief, *Ute Indian Tribe v. Utah*, No. 2:75-CV-00408, at 8-10 (D. Utah July 31, 1992). The United States agrees that under state court precedent "the exterior boundaries of the Uintah [Reservation] have been disestablished." United States' Memorandum as *Amicus Curiae* in Support of Ute Indian Tribe's Motion for Injunctive Relief, *Ute Indian Tribe v. Utah*, No. 2:75-CV-00408 at 2 (Dkt. No. 10) (Nov. 23, 1992).

This is a real practical problem, right now, every day. The Tribe has barred some non-members from traveling on county roads. It has interfered with county efforts to fix the roads. It has banished non-member business owners, as well as their non-member employees and lawyers, from public lands and state roads.

In sum, this petition presents the conflict between state and federal courts that led the Court—at the urging of the United States—to grant certiorari in *Hagen*, but in a far more intractable and consequential form. This Court's intervention is obviously required once again.

II. The Ruling Below Violates The Anti-Injunction Act, Impermissibly Preventing The State Courts From Adhering To This Court's Precedent.

The Anti-Injunction Act prohibited the Tenth Circuit from enjoining the County's prosecution of Ms. Jenkins based on *Ute V*. The court of appeals had two choices. It could give full effect to this Court's ruling in *Hagen* and reject the request for an injunction. Or it could let the state courts make the collateral estoppel determination for themselves.

The relevant part of the Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in State court except as . . . necessary . . . to . . . effectuate its judgments." 28 U.S.C. § 2283. "[T]he Act's core message is one of respect for state courts." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011).

The Tenth Circuit's concern that it must put an end to state court litigation over the boundaries of the Reservation was just wrong. Even if the state courts had erroneously failed to apply collateral estoppel, "an injunction is not the only way to correct a state trial court's erroneous refusal to give preclusive effect to a federal judgment. As we have noted before, 'the state appellate courts and ultimately this Court' can review and reverse such a ruling." *Id.* at 2376 n.5 (quoting *Atl. Coast Line R. Co. v. Locomotive Eng'rs*, 398 U.S. 281, 287 (1970)).

The Tenth Circuit invoked the Act's "relitigation exception." But it never acknowledged that the exception is "strict and narrow" and "not [to] be enlarged by loose statutory construction," *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-48 (1988), so that *"[a]ny doubts* as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed," *Atlantic Coast Line*, 398 U.S. at 297 (emphasis added). "[E]very benefit of the doubt goes toward the state court; an injunction can issue only if preclusion is clear beyond peradventure." *Bayer Corp.*, 131 S. Ct. at 2376 (internal citations omitted). "Under this approach, close cases have easy answers: The federal court should not issue an injunction, and the state court should decide the preclusion question." *Id.* at 2382.

That means that the Tribe was entitled to an injunction only if it can show beyond doubt that the ordinary requirements of collateral estoppel exist here: (i) *Ute V* decided the same issue that is presented by the state court prosecution; and (ii) *Ute V* produced a final judgment embodying the court of appeals' ruling on that issue. Then, because the County was not a party to *Ute V*, the Tribe must also show beyond question that two additional conditions are satisfied: (i) the County was in privity with the State in the sense that (at a minimum) the State sought to protect the County's interests while it litigated *Ute V*; and (ii) the State adequately

represented the County's interests by fully and fairly litigating *Ute V*.

In fact, none of those requirements was satisfied here at all, much less satisfied "beyond peradventure." *Bayer Corp.*, 131 S. Ct. at 2376.

A. Collateral Estoppel Does Not Attach To The Judgment In *Ute V*, Which Does Not Preclude Later Litigation By Any Entity

The essential requirements of collateral estoppel are not satisfied in this case. *Ute V* was an *opinion*, not a *judgment*.[1] That opinion was not implemented: the parties settled. *See Arizona v. California*, 530 U.S. 392, 414 (2000) ("But settlements ordinarily occasion no issue preclusion (sometimes called

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[1] *See, e.g.*, *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1580 (Fed. Cir. 1994) (holding that there was no preclusive effect when an appellate decision "resulted in a remand for further proceedings," because a "final judgment is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'" (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945))); *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1341 (Fed. Cir. 2013) (holding that there was no preclusive effect when an appellate court vacated and remanded, because "where the scope of relief remains to be determined, there is no final judgment"); *see also* 18A Wright & Miller, *Federal Practice and Procedure* § 4432 (2d ed. West 2015) ("There is no preclusion as to the matters vacated or reversed, unless further proceedings on remand lead to a new judgment that expands the scope of preclusion. . . . Reversal and remand for further proceedings on the entire case defeats preclusion entirely until a new final judgment is entered by the trial court or the initial judgment is restored by further appellate proceedings." (internal footnotes omitted)).

collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect." (citing Restatement (Second) of Judgments § 27 (1982) (issue preclusion applies only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment")).[2] Further, the settlement was temporary and contained very different terms than *Ute V* would have imposed.[3] That is a particularly significant concern under the Anti-Injunction Act.[4]

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[2] *See, e.g.*, *Cell Therapeutics Inc. v. Lash Grp. Inc.*, 586 F.3d 1204, 1212 (9th Cir. 2009), *as amended on denial of reh'g and reh'g en banc* (Jan. 6, 2010) (ruling ending in settlement lacks collateral estoppel effect, especially with respect to nonparty, including because doing so "would upend the settlement process . . . [and] inevitably chill the settlement spirit"); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 284-85 (5th Cir. 2006) (holding that collateral estoppel did not apply when the parties had settled after a denial of a motion to dismiss, because the denial was "*not* a final judgment on the merits because the action continues after the denial," and "[s]ettlement agreements, like consent judgments, are *not* given preclusive effect unless the parties manifest their intent to give them such effect"); *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990) ("[C]onsent judgments, while settling the issue definitively between the parties, normally do not support an invocation of collateral estoppel."); *Hughes v. Santa Fe Int'l Corp.*, 847 F.2d 239, 241 (5th Cir. 1988) ("A consent judgment ordinarily does not give rise to issue preclusion because the issues underlying the judgment are neither actually litigated nor necessary and essential to the judgment. However, consent judgments will be given preclusive effect if the parties manifest such an intention." (internal citations omitted)).

[3] *See, e.g.*, *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 913-14 (4th Cir. 2013) (holding that there was no claim

The district court did eventually enter a "judgment" after the parties settled. But if anything it was adverse to the Tribe: it dismissed the Tribe's complaint *with prejudice*. So *Ute V* did not result in a preclusive judgment in favor of the Tribe.

Independently, an important "issue" that the County is being prevented from litigating in the state court prosecution of Ms. Jenkins was not an "issue" in *Ute V*. The County argues that even if *Ute III* and *V* are correctly decided, the County has jurisdiction over the offense because an element of the crime occurred outside Indian Country. *Ute III* and *Ute V* do not decide that question; they only address the antecedent question of the Reservation's boundaries. Because the issues are different, collateral estoppel does not apply, and an injunction is forbidden: "[A]n *essential prerequisite* for applying the relitigation exception is that the claims or issues which the

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preclusion when the previous action had been dismissed in accordance with a settlement, because "the preclusive effect of a judgment based on such an agreement can be no greater than the preclusive effect of the agreement itself" and the settlement terms did not bar lawsuits by non-signatories).

[4] *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (holding that relitigation exception did not apply because the "contention that [an appellate opinion] is a 'judgment' that has res judicata or collateral estoppel effect is flawed"); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 179-80 (5th Cir. 1996) (holding that AIA relitigation exception did not apply because the federal court order (denying class certification) was not a final judgment on the merits).

federal injunction insulates from litigation in state proceedings actually have been decided by the federal court. Moreover, . . . this prerequisite is strict and narrow." *Chick Kam Choo*, 486 U.S. at 148 (emphasis added).

The Tenth Circuit's ruling is thus contrary to the Anti-Injunction Act because collateral estoppel does not attach to *Ute V*, much less attach beyond any doubt.

B. At The Very Least, *Ute V* Does Not Bind The County, Which Was Not A Party To That (Non)Judgment

The County was not a party to *Ute V*. As the district court has recognized, the Tribe "seems to lump all the Defendants together. But it is obvious, under the *Ute V* Mandate, that they are not the same." Order Fixing Hearing Date on Pending Motion and Related Matters, *Ute Indian Tribe v. Utah*, No. 2:75-CV-00408 at 9 (Dkt. No. 956) (D. Utah Sep. 18, 2015).

That means the requirements of collateral estoppel are even more rigorous. "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329

(1971). Indeed, this Court's "decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008).

The Tenth Circuit's desire to end the litigation over the Reservation's boundaries—which is doomed to failure in any event, because it does not bind other parties—is not a basis to bind the County. "[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment." *Bayer Corp.*, 131 S. Ct. at 2381.

The strict prerequisites for applying non-party estoppel are not satisfied here. The State of Utah was not in privity with the County. The Tenth Circuit had the presumptive rule exactly backwards: "[c]ourts have . . . generally found that *no privity exists* . . . between state and local governments." 47 Am. Jur. 2d Judgments § 625 (emphasis added); *see also, e.g.*, *Bank of Kentucky v. Commonwealth of Kentucky*, 207 U.S. 258, 265-66 (1907) (county was not bound by res judicata to the result of previous litigation by the state and other counties).

That presumption is not overcome here. Merely describing the Tenth Circuit's preclusion ruling shows it is wildly wrong. The County—*a non-party*,

with no ability to participate in the case—was bound by *Ute V*. But the *actual parties* to *Ute V* were not bound; they entered into a settlement under which they agreed not to follow it in some important ways. That cannot be right.

The State also did not litigate *Ute V* in the County's interest. None of the State's filings suggest that it was representing the distinct interests of absent local governments such as the County. Two other counties represented themselves and the district court said others could intervene. If the State acted for them all, that would have been unnecessary.

The State also did not protect the County in settling. The County would not have given up its own jurisdictional claim in exchange for the settlement, which gave it nothing. So the County cannot be bound. *See Taylor*, 553 U.S. at 896 (preclusion violates due process when the party to the first action neither "'took care to protect the interests' of absent parties" nor "'understood their suit to be on behalf of absent" parties) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 802 (1996)) (alterations omitted); *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999).

This case is accordingly much closer to other circuits' rulings that a county is not in privity with a

state. The decision below is irreconcilable with those decisions.[5]

The State did not protect the County's interests for a second reason: it did not fully litigate *Ute V*. *Ute V*'s refusal to give effect to *Hagen* was novel and controversial, to say the least. But the State did not seek certiorari; instead, it told this Court that review was unnecessary because it preferred to settle. And it then did settle, rather than continuing to litigate the case on remand. The County cannot be bound to the State's decision. *See Blonder-Tongue Labs.*, 402

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[5] For example, in *Baraga County v. State Tax Commission*, 645 N.W.2d 13 (Mich. 2002), the Michigan Supreme Court held that consent judgments by local governments regarding the taxation of Indian land did not bind the state, because the governmental entities were not in an agency relationship. That was particularly so because the state relied for its position on intervening precedent of this Court. *See also United States v. Dominguez*, 359 F.3d 839, 843-44 (6th Cir. 2004) (discussing *Baraga*). *See, e.g.*, *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 764 (9th Cir. 2003) (city and state agency were not in privity in a lawsuit over oil spill damage, because the city had property interests (a private easement) at stake that the state did not); *Froebel v. Meyer*, 217 F.3d 928, 934 (7th Cir. 2000) (county and state agency were not in privity in lawsuit over state's removal of a dam on county land, because the county was uninvolved in the events giving rise to the previous lawsuit and was represented by different counsel than the state); *Harris Cty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 316-19 (5th Cir. 1999) (county was not in privity with either state attorney general or another county because "the attorney general does not represent all district and county attorneys in the state when he makes decisions regarding the conduct of litigation," and the county "neither knew of nor participated in the [previous] suit").

U.S. at 329 ("Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.").

C. The Tenth Circuit's Ruling Cannot Be Reconciled With This Court's On-Point Decision In *Hagen*.

Whatever the rule in ordinary collateral estoppel cases, here the basis for allegedly preclusive judgment was *expressly rejected by this Court*. It cannot be "clear beyond peradventure," *Bayer Corp.*, 131 S. Ct. at 2376, that a state court should be enjoined from following this Court's precedent. *See Montana v. United States*, 440 U.S. 147, 161 (1979) ("major changes in the law" would be an appropriate basis not to hold a non-party bound by collateral estoppel (citing *Comm'r v. Sunnen*, 333 U.S. 591 (1948)).[6]

Ute III and *Ute V* are irreconcilable with *Hagen*. *Ute V* held that Tenth Circuit precedent "precludes

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[6] *See, e.g., Ginters v. Frazier*, 614 F.3d 822, 827 (8th Cir. 2010) (holding that collateral estoppel did not apply because of a relevant intervening Supreme Court decision, which "constitutes a significant change in controlling legal principles under the 'change in law' exception to the doctrine of collateral estoppel"); *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 399 (5th Cir. 2004) (holding that collateral estoppel did not apply because of relevant intervening Supreme Court and circuit court decisions).

the defendants from enforcing the contrary holding in *Hagen*," "even where [*Ute III*] is erroneous in light of a later change in law." *Ute V*, 114 F.3d at 1522. It made no difference that applying *Hagen* would "achieve a more accurate judgment or . . . avoid the injustice that might result," because the fact "that *Ute Indian Tribe III* may have been wrongly decided or operates unfairly against the state and local defendants is not a concern." *Id.* at 1523.

The Tenth Circuit's jurisdictional rulings conflict with *Hagen* regarding several different types of non-Indian lands. Take the unallotted lands, for example. This Court held that the unallotted lands of the Uintah Reservation were diminished. Nothing about the allotment statutes of the adjoining Uncompaghre Reservation changes that result, yet the Tenth Circuit holds they remain in the Reservation.

Next take the Forest lands. *Hagen* did not expressly decide their status. But they are obviously diminished under the legal standard adopted by this Court. *Ute III* held the opposite on the theory that statutes restoring reservation land to the "public domain" do not diminish the reservation. *Ute III*, 773 F.2d at 1092. It ruled that diminishment would arise only from a "clear expression of congressional intent to change the status of the reservation." *Id.* at 1088. That test would be satisfied if Congress withdrew reservation lands and provided "an unconditional commitment to compensate Indians for their opened lands." *Id.* Alternatively, the historical record could "unequivocally reveal a widely-held,

contemporaneous understanding that the affected reservation would shrink." *Id.*

Hagen rejected the court of appeals' plain statement rule and moreover held that "the payment of a sum certain to the Indians" is not a prerequisite to diminishment. *Hagen*, 510 U.S. at 412. Instead, the determination whether Congress diminished a reservation turns on three factors:

> (1) "the statutory language used to open the Indian lands";
>
> (2) the historical context surrounding the passage of the surplus land Acts"; and
>
> (3) "who actually moved onto opened reservation lands."

Id. at 411.

Those three factors, the Court concluded, established that Congress had diminished the Reservation with respect to the unallotted lands at a minimum:

First, the 1902 Act stated that unallotted lands "shall be *restored to the public domain*," so that "their previous public use was extinguished" and they no longer were Indian Country. *Hagen*, 510 U.S. at 412. Indeed, this Court noted, the Tenth Circuit *itself* had since rejected *Ute III*'s conclusion that statutory language providing for restoration of lands to the public domain does not diminish a reservation. *Id.* at 414 (citing *Pittsburgh & Midway Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990)).

Second, the Indian Inspector had recognized that as a result of the congressional Acts, "there will be no outside boundary line to this reservation." *Id.* at 417.

Finally, the members of the Tribe overwhelmingly reside on Indian Trust lands and "[t]he seat of Ute tribal government is in Fort Duchesne, which is situated on Indian trust lands." *Id.* at 421. By contrast, "[t]he State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened until the Tenth Circuit's *Ute Indian Tribe* [*III*] decision." *Id.* These facts "demonstrate[] a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Id.*

Even *Ute V* did not dispute that "*Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based—namely, that statutory restoration language is insufficient to infer diminishment." *Ute V*, 114 F.3d at 1528. Specifically, as the original Tenth Circuit panel correctly anticipated, under *Hagen*, Congress diminished the Reservation by removing not just the unallotted lands but the Forest lands too. 716 F.2d at 1314. *Ute III itself* essentially acknowledged that conclusion, recognizing that "the case against disestablishment" is stronger with respect to the unallotted lands of "the Uintah Indian Reservation than the other areas," including the subject Forest lands. *Ute III*, 773 F.2d at 1088. Just as the unallotted lands were restored to public use,

the Forest lands—which are federally managed—were converted to "*public land* bearing forests . . . as *public reservations*." *Id.* at 1100. The federal government moreover paid the Tribe $1.2 million for the Forest lands. The Tribe lost control over those lands, just as it did the unallotted lands. The U.S. Forest Service—not the Tribe or the Bureau of Indian Affairs—manages the Forest lands, and the Bureau of Indian Affairs itself has explained that they were "severed" and "detached" "from the reservation" and "from tribal control." A Forest History of the Uintah and Ouray Indian Reservation, *supra*, at 52, 55-56, 86-87, 89.

Hagen's other diminishment factors indeed support finding that Congress disestablished the Uncompahgre Reservation altogether. The Court recognized that "[o]ur cases considering operative language of restoration have uniformly equated it with a congressional purpose to terminate reservation status." *Hagen*, 510 U.S. at 413 (emphasis added). Further, *Hagen* indicates that nothing in the historical records required a contrary conclusion. *Id.* at 420. The same conclusion follows from the facts that the Tribe's members do not occupy the other non-trust lands and that non-Indians have been governed by the federal, state, and local governments rather than the Tribe. *Id.* at 420-21.

When they function as intended, the doctrines of "res judicata and collateral estoppel . . . promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."

Allen v. McCurry, 449 U.S. 90, 95-96 (1980). But here, the Tenth Circuit is applying those doctrines to do the opposite. The County is pursuing a solemn responsibility assigned to it under both the federal and state constitutions: it is enforcing the criminal law. It is doing so in furtherance of a decision and judgment of this Court. As the Tenth Circuit itself recognized, the state court litigation does not seek to apply *Hagen* retroactively or to undo any individual judgment from the past, but instead seeks "to apply *Hagen* prospectively to the continuing conduct of separate sovereigns and the individuals living in and around the Uintah Valley Reservation." *Ute V*, 114 F.3d at 1526. The defendant (Ms. Jenkins) was not a party to the prior federal court litigation, so she has no fair claim to repose from litigating the Reservation's boundaries. This must be the context in which the federal courts are least likely to find preclusion and most hesitant to interfere with proceedings in state court.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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