Supreme Court, U.S.
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In The

Supreme Court of the United States

VALINDA JO ELLIOTT,

Petitioner,

vs.

WHITE MOUNTAIN APACHE TRIBAL COURT; HONORABLE JOHN DOE TRIBAL JUDGE; AND WHITE MOUNTAIN APACHE TRIBE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Tribal courts are not courts of general jurisdiction. A tribal court's civil jurisdiction over non-consenting non-Indian defendants is limited to the two specific exceptions to the general rule established in *Montana v. United States*, 450 U.S. 544, 565–566 (1981), which created a presumption against tribal court jurisdiction over nonmembers. Thus, where a tribal court is attempting to broaden the scope of its own jurisdiction in violation of United States Supreme Court precedent, and where jurisdiction plainly does not exist, a non-consenting non-Indian cannot be forced to defend a civil case on the merits in that unfamiliar tribal court before bringing her claim of lack of jurisdiction to the federal courts.

One question is presented:

> Can a tribal court assert jurisdiction over a non-consenting non-Indian and force her to defend against civil claims in that unfamiliar forum when it is plain that the tribal court has neither regulatory nor adjudicatory jurisdiction and where the conduct at issue by the non-consenting non-Indian on tribal land does not and cannot ever threaten or directly effect the tribal political integrity, economic security, or the health or welfare of the tribe?

LIST OF PARTIES

The parties below are listed in the caption. In addition, the Inter Tribal Council of Arizona, Inc., appeared as *amicus curiae* in support of Respondents the White Mountain Apache Tribal Court and the White Mountain Apache Tribe.

CORPORATE DISCLOSURE STATEMENT

Valinda Jo Elliott is an individual non-consenting non-Indian, and is not subject to the corporate disclosure requirement.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was issued on May 14, 2009, and is reported at 566 F.3d 842 (9th Cir., 2009).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The basis for the District Court's and the Ninth Circuit Court's subject matter jurisdiction is federal question jurisdiction. *See* 28 U.S.C. § 1331; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53, 105 S.Ct. 2447 (1985); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir., 2006). Venue was proper in the Arizona District Court pursuant to 28 U.S.C. § 1391(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a question of federal common law and does not require resolution of a problem with a specific constitutional or statutory provision.

STATEMENT OF THE CASE

On June 11, 2003, the White Mountain Apache Tribe instituted Tribal Civil Action #C-03-97, against Valinda Jo Elliott, a non-Indian, alleging claims for

relief resulting from a fire Ms. Elliott started on tribal lands that ultimately caused substantial damage to property within the boundaries of the White Mountain Apache Tribe reservation as it raged out of control during the months of June and July 2002. Ms. Elliott filed a Motion to Dismiss based on lack of jurisdiction since the Tribal Court clearly did not have civil jurisdiction over her, a non-consenting non-Indian, and since neither of the two very limited exceptions contemplated under *Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245 (1981), and further discussed in *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304 (2001), was applicable.

On December 18, 2003, the Tribal Court issued a ruling denying Ms. Elliott's Motion to Dismiss. (App. 39.) In the ruling, the Tribal Court, stated that *Montana* and *Nevada*, were satisfied and that jurisdiction was proper. (App. 41.) The ruling indicated that Ms. Elliott's "conduct" on "*Nn'dee Bi-Kee Yuh*" land was sufficient to establish Tribal jurisdiction. (App. 41.) The court also relied on the fact that the "conduct" violated White Mountain Apache Law, and the Apache standard of "*C'hinl-seeh Hoz-unh*," further supporting a finding of tribal jurisdiction. (App. 41.)

Ms. Elliott immediately filed an appeal in the White Mountain Apache Court of Appeals, which was pending for over a year. Then, in April of 2005, the appeal was dismissed. (App. 43.) The appellate court accepted jurisdiction to review the Petition, but found that, under tribal law, no "interlocutory appeals with regard to motions to dismiss for lack of jurisdiction"

are allowed. (App. 46.) The court then noted the differences between tribal law and the law of other jurisdictions, like Arizona, and found that the appellate court lacked jurisdiction under tribal law to consider the denial of the Motion to Dismiss. (App. 44-45.) The court, therefore, returned the matter to the Tribal Court, and lower court pre-trial proceedings continued through the Fall of 2005.

The federal case was commenced in the Federal District Court for the District of Arizona in December of 2005 when Ms. Elliott filed a Complaint for declaratory and injunctive relief against the Tribe in the form of an injunction against further prosecution of a civil action in the Tribal Court due to the Tribal Court's complete lack of jurisdiction over her as a non-consenting non-Indian. Valinda Jo Elliott argued in the District Court first, that exhaustion was not required in tribal court, second, that she had exhausted her jurisdictional claim in tribal court, to the extent such exhaustion was necessary, and third, that her circumstances established several of the exceptions to the exhaustion doctrine. Most importantly, Valinda Jo Elliott alerted the District Court that tribal court jurisdiction plainly did not exist pursuant to *Montana*.

The White Mountain Apache Tribe filed a Motion to Dismiss, and the District Court granted that Motion finding that Ms. Elliott had not fully exhausted her jurisdictional argument in Tribal Court, that such exhaustion was necessary, and that none of the exceptions to the exhaustion requirement

were satisfied. The District Court entered its Order on December 7, 2006. (App. 19.)

On December 31, 2006, Valinda Jo Elliott filed a Notice of Appeal, which was timely pursuant to Federal Rule of Appellate Procedure 4. Following full briefing and oral argument, the Ninth Circuit issued its Opinion affirming the District Court's decision. (App. 1.)

The Ninth Circuit Court of Appeals made several findings that Ms. Elliott is not requesting this Court to review. Ms. Elliott is not contending that there was any error in the finding that the District Court Order was a final Order for purposes of appeal and pursuant to 28 U.S.C. § 1291. She is also not requesting review of the determination that the first three exceptions to the exhaustion doctrine do not apply. Valinda Jo Elliott is instead only requesting review and challenging the decision of the issue raised herein in the question presented involving the Ninth Circuit's finding of a colorable claim of jurisdiction in the tribal court based on the second exception to *Montana*'s main rule. The Ninth Circuit issued its Opinion on May 14, 2009.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Ninth Circuit has decided an important federal question in a way that conflicts with this Court's precedent in *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001) and *Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245 (1981).

In *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 2315 (2001), this Court explicitly disposed of the assertion that non-member petitioners were required to fully exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court. In fact, this Court has repeatedly noted that tribal exhaustion is first and foremost a prudential nonjurisdictional rule and not a jurisdictional requirement. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404 (1997); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 20, n.4, 107 S.Ct. 971 (1987); *National Farmers Union Ins. Cos. v. Crow*, 471 U.S. 845, 856, 105 S.Ct. 2447 (1985). Thus, federal courts should, *not must*, as a matter of comity, afford tribal courts the first opportunity to determine whether or not jurisdiction exists. *Nevada*, 533 U.S. at 368-69; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578 (1980).

In *Nevada,* this Court went on to establish that, where it is plain that jurisdiction does not exist, exhaustion of the jurisdictional claim in tribal court is not necessary. *See Nevada*, 533 U.S. at 369; *Strate*, 520 U.S. at 449 (suggesting intervention is

appropriate where cause for immediate federal court action exists).

Here, the Ninth Circuit, citing its own precedent in *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir., 2008), instead found that exhaustion is *required*, when tribal court jurisdiction is merely *plausible*. (App. 11.) The Ninth Circuit explicitly found that where jurisdiction is plausible or colorable the exception established by this Court in *Nevada* and *Strate*, does not apply. (App. 11.) And, although the Ninth Circuit has equated the inquiry into whether jurisdiction is plain with the question of whether it is plausible or colorable, the inquiry is not the same. *See Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1075-76 (9th Cir., 1999). In fact, the Ninth Circuit's decision conflicts with *Nevada*, because the court refused to apply this Court's exception to the exhaustion doctrine based, not on the analysis expressly discussed in *Nevada*, but instead on its own asserted analysis regarding whether there is a colorable claim of jurisdiction. *See Nevada*, 533 U.S. 353, 358, n.2; *Strate*, 520 U.S. at 459-60 & n.14, 105 S.Ct. 2106. The burden is not on the non-consenting non-Indian to establish that the Tribe does not have a colorable claim. The law is clear that the Tribal government has no jurisdiction over non-consenting non-Indians unless and until the White Mountain Apache Tribe affirmatively establishes one of the exceptions pursuant to *Montana*. *Nevada*, 533 U.S. at 369; *Strate*, 520 U.S. at 449. As discussed hereinafter, neither of the exceptions to *Montana* apply in this

case. Thus, the Ninth Circuit's Opinion must be reviewed and corrected in order to conform to this Court's precedent in both *Nevada* and *Montana*.

II. The Ninth Circuit has published an Opinion wrongly deciding an important question of federal law that has not been, but should be, settled by this Court.

To the extent the Ninth Circuit's Opinion does not directly conflict with this Court's precedent, it must be reviewed by this Court as the Ninth Circuit has gone beyond the ruling in *Montana* and wrongly decided the question of whether tribes may exercise civil jurisdiction over non-consenting non-member civil defendants. This question has been explicitly left open by this Court in both *Nevada* and *Montana*, and it must now be answered. Otherwise, defendants like Valinda Jo Elliott will continue to be hailed into tribal court against their will and forced to endure a costly litigation and suffer a tribal civil ruling before ever having the opportunity to remove the case to federal court jurisdiction where it belongs. The lingering confusion in tribal and federal courts resulting in the improper exercise of tribal jurisdiction over non-consenting non-Indians must be stopped.

The Ninth Circuit especially erred in making its ruling, because it allowed the status of the land to be dispositive and because it found the second exception to *Montana* based on the amount of damage to the land, where neither of these findings are supported

by this Court's law. The Ninth Circuit has improperly expanded tribal jurisdiction beyond that supported or even contemplated by this Court's authority.

A. *Montana*'s main rule clearly establishes a presumption of lack of jurisdiction and that rule must be explicitly applied to cases involving non-consenting non-Indian defendants.

The Ninth Circuit noted in its opinion that the question of jurisdiction over a non-member defendant in tribal court is "murkier" than other jurisdictional questions. (App. 11.) This is only arguably so, because of the continuing problem that the specific question raised in this case has yet to be answered by this Court. What is clear, however, is that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. Yet here, the Ninth Circuit has nonetheless issued an Opinion that finds jurisdiction where it simply does not exist and where this Court must certainly find to the contrary.

The questions regarding tribal jurisdiction over non-Indians have plagued this Court and others for many years, and have culminated in a few set principles, all of which indicate the direction this Court must move in establishing the rule regarding lack of jurisdiction in tribal courts over non-consenting non-Indians.

In *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978), this Court held that tribes lack criminal jurisdiction over non-Indians. *See also Duro v. Reina*, 495 U.S. 676, 684-85, 110 S.Ct. 2053 (1990) (no criminal jurisdiction over non-member Indians). The reason this is so turns on an analysis of tribal "status" and also encompasses the fact that tribes are discrete or sovereign communities within states but outside state law, so that their laws do not necessarily provide adequate protections to non-Indians.

Thereafter, in *National Farmers Union Ins. Cos. v. Crow*, the Court noted that the decision in *Oliphant* relied largely on federal preemption (which does not necessarily exist in civil situations), causing differences between the determination of criminal jurisdiction and civil jurisdiction. 471 U.S. at 854. The Court concluded:

> . . . that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of Oliphant would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers, 471 U.S. at 855-56 (footnotes omitted).

Then, in *Montana*, this Court determined that tribes do not have authority "independently to determine their external relations." *Montana*, 450 U.S. at 564. This Court held that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The powers retained by tribes involve self-government and relations among tribe members. *Montana*, 450 U.S. at 564. Thus, this Court found that tribes do not have civil jurisdiction over non-Indians absent two very limited circumstances. *Id.*

The first exception allows that a tribe may exercise civil jurisdiction over a non-Indian who has entered a consensual business relationship with the tribe. *Nevada*, 533 U.S. at 371. The second exception allows that a tribe may exercise civil jurisdiction over a non-Indian where the conduct of the non-member non-Indian threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe. *Id.*

In discussing the two limited exceptions to *Montana*'s general rule of non-jurisdiction, this Court noted that "[w]here nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express

congressional delegation.'" *Nevada*, 533 U.S. at 360. In fact, in *Nevada*, the Court recognized that it has "never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358, n.2; *see also Smith*, 434 F.3d at 1132 (noting that the Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land).

Then, in *Strate v. A-1 Contractors*, the Court noted that its precedent establishes that "absent express authorization by federal statute or treaty tribal jurisdiction over the conduct of non-members exists only in limited circumstances." 520 U.S. at 445.

Thus, after *Montana* and its progeny, it is clear that the presumption is that tribes do not have jurisdiction over non-Indians unless one of the two specific exceptions contemplated by *Montana* is established. *Strate*, 520 U.S. at 456; *Nevada*, 533 U.S. at 376 (Souter, J., concurring). It is also clear that these two exceptions exist only within the context of the tribe's ability to self-govern and/or to control internal relations. *Id.* Otherwise, if the analysis is taken out of the context of the realm of self-government and management of internal relations, any activity could be broadly construed to "impact" the "economy" or "welfare" of the tribe. This is exactly what the Ninth Circuit has done in this case, and why this Court must review the matter and issue a final decision that settles the question once and for all.

B. The Ninth Circuit's Opinion improperly decided the question of tribal jurisdiction over non-consenting non-Indians based on the second exception to *Montana*'s main rule and must be reviewed by this Court in order to establish that tribal sovereignty does not include jurisdiction over non-consenting non-Indian defendants.

In this case, there has never been a consensual business relationship between Ms. Elliott and the White Mountain Apache Tribe, nor was one ever alleged prior to the Ninth Circuit, and thus, as the District Court properly determined, the first exception to *Montana* is clearly inapplicable.

The Tribe continues to assert, and the lower federal courts determined, however, that the basis of the Tribal Court's jurisdiction is found within the second exception to *Montana* and involves the Tribe's inherent sovereignty. (App. 15-17, 30.) The Ninth Circuit has thus broadly and improperly construed the second exception to allow civil jurisdiction in favor of the Tribe when the law that exists on the issue clearly points to a contrary conclusion. An individual non-consenting non-Indian could never engage in any conduct on tribal land that impacts the political integrity, economic security or health or welfare of the tribe in the manner contemplated by this Court in *Montana*.

This Court has provided numerous examples of what acts fall within the ambit of the second

exception. The examples include matters such as adoption, *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943 (1976), suits by non-Indians against an Indian in a state court when the incident took place on a reservation, *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269 (1959), and taxation, *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 26 S.Ct. 197 (1906) and *Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340 (1898). In *Strate*, the Court also recognized that the cases referenced in *Montana* itself regarding the second exception, involved only those issues of a "question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." 520 U.S. at 457-58. The Court has also discussed the fact that self-government implicitly means involvement in the political process. *See Williams v. Lee,* 358 U.S. at 220-21. This insight clarifies the second exception greatly, as it is impossible for an individual non-Indian's activities to ever directly affect the purely internal activities of a tribe with regard to self-government, because that non-Indian could not, for example, order an Indian to state court or tax the tribe in the manner a state could. Tribal self-government is the crux of the second exception.

Ms. Elliott's case does not involve or disrupt membership, inheritance, adoption, government generally or taxation, so jurisdiction is not established. Ms. Elliott's actions of wandering onto Tribal land and starting a signal fire form the total basis for the assertion of jurisdiction. Under no circumstances,

however, could this conduct ever logically support a finding of the type of "impact" to the self-government and internal relations of the Tribe as discussed by *Montana*. No matter how much damage a trespassing non-Indian causes to tribal land, that action in no way touches on tribal self-government. Nor does it touch on tribal sovereignty. As discussed in *Strate*, "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 457-58. Here, the Ninth Circuit has issued a decision that allows the exception to shrink the rule, and it cannot be allowed to remain as federal precedent.

The White Mountain Apache Tribe argued below, and the Ninth Circuit implicitly agreed, that the action against Ms. Elliott cannot be distinguished from the Tribe's inherent power to license and regulate hunting and fishing type activities on Tribal land. (App. 13.) There is a critical distinction, however, between licensing and regulation of non-Indian activities on trust lands and in forests on those lands, and civil suits brought by tribes in tribal court against non-consenting non-Indians. The White Mountain Apache Tribe has the ability to regulate its land, and it has the ability to exclude non-Indians from its land, but it has no ability to hail non-consenting non-Indians into tribal court.

Ms. Elliott's action of trespassing onto Tribal property without authority to do so and causing damage thereon is an activity that would allow Tribal jurisdiction in limitless cases over non-Indians if the Ninth Circuit's Opinion is sustained. But, when the Court decided *Montana*, it made clear that the *presumption* is that tribes do not have jurisdiction over non-Indians. 450 U.S. at 565. Just like States that are faced with Indians who commit wrongs outside of the reservation, the proper forum for hailing a violator into court is to hail her into court in the federal system. *See* 28 U.S.C. §§ 1331, 1332; *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S.Ct. 676, 679 (2005); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267 (1973); *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir., 1984) ("When directed against non-Indians, assertion of Indian sovereignty is circumvented and defined by federal law, and thus, federal question is raised by the attempt to exercise such sovereignty, thus establishing basis for federal jurisdiction."); *Richmond v. Wampanoag Tribal Court Cases*, 431 F.Supp.2d 1159, 1178 (D. Utah, 2006). Ms. Elliott did not choose to purchase a permit or license to enjoy the benefits of the Reservation. By failing to do so, she manifested her absolute lack of any consent to tribal jurisdiction over her. Whether her actions of entering the reservation and starting a signal fire thereon were appropriate or not and whether they mandate that she be held civilly liable is a question to be

adjudicated in the federal court, not in the tribal court.

The Ninth Circuit based its finding on the Tribe's "strong interest in enforcing its regulations governing trespass, prevention of forest fires, and preservation of its natural resources." (App. 17.) The Ninth Circuit fails to recognize that Ms. Elliott's alleged conduct does not in any way alter the Tribe's ability to create and/or enforce its regulations, prevent forest fires, or preserve natural resources. Ms. Elliott did not, and could not ever prevent the Tribe from establishing and creating its own internal regulations. Nor is there any allegation that her conduct somehow touches on the Tribe's ability to self-govern. To find otherwise is to blatantly ignore the critical distinction between the power to regulate and exclude and the affirmative power of reaching out and exercising jurisdiction in Tribal Court over someone who has by no means asked to be licensed or regulated and who has not agreed to any exercise of Tribal authority over her.

Tribal dominion and control over its members and its own government does not equate to reaching out and exercising dominion and control over non-consenting non-Indian defendants for purposes of imposing its own codes of conduct and civil liability upon that person. Nothing in the history of Tribal sovereignty suggests that the United States Supreme Court has contemplated Tribes reaching out and broadening their jurisdiction in the manner allowed in this case.

The Ninth Circuit made another incorrect step in logic when it discussed the ownership status of the land. (App. 13.) This Court has stated that "[t]he ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Nevada*, 533 U.S. at 360. Here, the Ninth Circuit and the Tribal Court both treated that status as dispositive, when it certainly is not. (App. 14.)

The Ninth Circuit even recognized that this Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land, yet it went on to find exactly that in Valinda Jo Elliott's case. (App. 14-15.) *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 (9th Cir., 2006) (noting that the Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land). The Ninth Circuit found jurisdiction, nonetheless, because the case involves "the destruction of millions of dollars of the tribe's natural resources." (App. 17.) That significant portions of tribal land were damaged, however, does not alter the jurisdictional analysis. Resulting damages to tribal property alone, no matter how high, can *never* establish the second exception to *Montana* and thereby provide the Tribe with jurisdiction. 450 U.S. at 565. This Court recognized in *Strate*, that there was a flaw in that type of argument and pointed out that the Court read its "precedent differently." 520 U.S. at 448. What the Ninth Circuit

did here, was what this Court warned about in *Strate*: it read the second exception in "isolation," which caused a misperception about whether the second exception applies. *Strate*, 520 U.S. at 459.

To the extent this Court has hinted that the land status could be dispositive, that is only true if the status of the land is dispositive in precluding tribal court jurisdiction. Precedent establishes instead that the analysis turns on Ms. Elliott's status as the *defendant* in a civil action in Tribal Court and *as a non-Indian* who has *not consented* to jurisdiction in that court. *See Smith*, 434 F.3d at 1131. As Justice Souter observed in his concurrence in *Nevada*, "[i]t is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." 533 U.S. at 382 (Souter, J., concurring); *Smith*, 434 F.3d at 1131. And, as the Supreme Court has further noted, "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. The courts throughout the country need explicit law from this Court establishing that fact once and for all, so that no further misperceptions occur. Tribal court jurisdiction plainly does not lie over a non-consenting non-Indian defendant.

The Supreme Court's concern has always been that non-Indians not be forced to defend themselves in unfamiliar courts for what would otherwise be an ordinary claim. *Strate*, 520 U.S. at 459; *Smith*, 434 F.3d at 1131. This is exactly the problem in this case. How can a non-Indian such as Ms. Elliott, ever

defend, for example, against the Apache concept of "*C'hinl-seeh Hoz-unh*" in an unfamiliar forum where there is no federal requirement that the United States Constitution be followed, and in front of a jury made up only of members of the Tribe to which she has caused so much damage? The answer is quite simply that she cannot defend in such a forum.

The Ninth Circuit has now expanded Supreme Court precedent and effectively obliterated the very limited exception to *Montana*, by establishing a rule that allows non-consenting non-Indian defendants to be hailed into tribal court based on nothing other than the status of the land. (App. 18.) But while the Tribe certainly can exclude Ms. Elliott from Tribal land (escort her off the reservation), the Tribe clearly has neither regulatory nor adjudicatory jurisdiction over Ms. Elliott. *See Williams v. Lee*, 358 U.S. at 220; *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710 (1975). *Oliphant* and all the cases that follow explain that the Tribes cannot exercise any powers inconsistent with their status. *See Montana*, 450 U.S. at 556; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 102 S.Ct. 894 (1982); *Oliphant*, 435 U.S. at 191. In other words, the Tribe can make laws and rules, such as "*C'hinl-seeh Hoz-unh*" for itself and its members, but it cannot assert those laws over non-Indians, such as Ms. Elliott in a civil suit in Tribal Court.

What the Ninth Circuit failed to do in issuing its Opinion, and what this Court must do in order to establish the correct analysis once and for all is to

look instead to the cases cited in *Montana* as they "indicate the character of the tribal interest the Court envisioned." 520 U.S. at 457-58, 117 S.Ct. at 1415. It is only when the activity alleged somehow effects the sovereignty and self-government of the tribe that tribal jurisdiction is appropriate. *See Strate*, 520 U.S. at 457 (accident tort); *Burlington Railroad v. Crow Tribe*, 196 F.3d 1059, 1062-63 (9th Cir., 2000) (train accident); *County of Lewis v. Allen*, 163 F.3d 509, 513-14 (9th Cir., 1998) (tort action involving a law enforcement officer); *Wilson v. Marchington*, 127 F.3d 805, 813-14 (9th Cir., 1997) (accident tort); *Louis v. United States*, 967 F.Supp. 456, 459-60 (Dist. N.M., 1997) (medical negligence resulting in death in a hospital on reservation). There is simply no question here that jurisdiction is appropriate. It clearly is not.

This Court needs a bright line rule that forecloses the problems inherent in "frequently" being "required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." *National Farmers*, 471 U.S. 845, 851 (1985). The *Montana* rule is a generally applicable rule establishing the lack of jurisdiction, but it left open the question of jurisdiction over defendants such as Valinda Jo Elliott. Thus, tribal courts are continuing to exercise jurisdiction over non-consenting non-Indian defendants and federal courts are continuing to allow jurisdiction in tribal court, based on individual case review and inconsistent analysis, and because there is no definitive answer by this Court to the specific

question relating to non-consensual non-Indian defendants. However, when the tribe and the defendant have no consensual relationship and where the exercise of jurisdiction is in no way necessary to preserve tribal sovereignty, the lower federal courts and tribal courts must be clearly informed that tribal courts plainly do not have jurisdiction.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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