No. 15-64

IN THE

Supreme Court of the United States

JAMIEN RAE JENSEN, individually and as Parent and Next Friend of D.J.J., *et al.*,
Petitioners,

v.

EXC, INC., dba D.I.A. EXPRESS INC., dba EXPRESS CHARTERS, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EILEEN DENNIS GILBRIDE
Counsel of Record
EDWARD G. HOCHULI
BRANDI C. BLAIR
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue
Suite 800
Phoenix, AZ 85012
(602) 263-1700
EGilBride@jshfirm.com

Counsel for Respondents

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QUESTION PRESENTED

Petitioners, members of the Navajo tribe, attempted to hale non-Indian Respondents into tribal court to respond to a lawsuit arising from the parties' motor vehicle accident, which occurred on a state highway within the Navajo reservation. Consistent with *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Arizona district court and Ninth Circuit Court of Appeals held that the tribal court lacked civil jurisdiction over the lawsuit.

Should certiorari be denied where the lower courts' decisions are right in line with every federal case addressing this jurisdictional issue, all of which have found tribal jurisdiction lacking over non-members for a traffic accident occurring on a state or federal right-of-way within an Indian reservation?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents make the following disclosures:

EXC Inc. and Conlon Garage, Inc. have no parent corporation and no publicly owned company owns 10% or more of their stock.

National Interstate Insurance Company is wholly owned by National Interstate Corporation, a publicly traded company.

Go Ahead Vacations, Inc., a Massachusetts corporation, is owned by EF Education First, Inc., a privately held company.

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BRIEF IN OPPOSITION

Respondents respectfully request the Court to deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners omit critical facts in an apparent effort to distance themselves from the clear and abundant federal authority holding that a tribal court lacks jurisdiction over a member's lawsuit against a non-member arising from a traffic accident occurring on a state or federal right-of-way.

A. The accident occurred on a right-of-way granted to the State of Arizona without any relevant restrictions.

In 1958, Congress appropriated $20 million to improve Routes 1 and 3 on the Navajo and Hopi reservations. In 1959, the Navajo tribal council granted the Bureau of Indian Affairs a right-of-way to construct these improvements, and consented to the BIA transferring the right-of-way to the State of Arizona when construction was completed. The tribe's consent stated it was "for the survey, construction and grant of rights of way for Routes 1 and 3; . . . and all claim of the Tribe to compensation for use of its lands for highway purposes within such rights of way is hereby waived." The consent contained only one reservation: "reserving the right of the Tribe to compensation for the use of its lands within said rights of way if after such transfer said routes or any part of them are made controlled access highways."[1]

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[1] The roads have not been made into controlled access highways. A controlled access highway is a high-speed roadway like an interstate that has no traffic controls.

The State of Arizona and the BIA then entered into an agreement whereby the United States agreed to pay for and construct the roadways, and upon completion, grant the state a right-of-way easement for a public highway; and the state agreed, upon completion, to designate and maintain those portions within Arizona as state highways in accordance with state law. Upon completion, the Arizona State Highway Commission signed a document accepting "all right, title and interest in and to said right of way," and agreeing "to be bound by and [to] fulfill all the obligations, conditions and stipulations in said right of way, and the rules and regulations of the Secretary of the Interior applicable thereto."

Today, U.S. Highway 160 is part of a 1,465-mile federal highway that connects Arizona, New Mexico, Colorado, Kansas, and Missouri. 197.4 miles of that highway (thirteen percent) crosses the Navajo reservation. U.S. Highway 160 forms part of the state's highway, is maintained by the state, and is open to the public.[2]

At oral argument in the Ninth Circuit, Petitioners' counsel conceded, as they must, that the Navajos have no right or authority to exclude any travelers from U.S. Highway 160. *EXC, Inc. v. Jensen*, 588 Fed.Appx. 720, 721 (9th Cir. 2014).[3] The undisputed facts required

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[2] The fact that tribal trust land lies underneath the federally-granted right of way, Pet. 3-4, is irrelevant for jurisdictional purposes. *See Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (state's right-of-way is the equivalent to alienated, non-Indian fee land; rejecting tribal member's argument that the case involved tribal land because trust land was underneath the right-of-way).

[3] Thus, it is disingenuous for Petitioners to assert that the Navajos reserve the right to exclude tour operators from tribal

this concession. The Navajos' grant of the right-of-way to the United States (and their agreement to the BIA's further assignment of the right-of-way to the State of Arizona) was not "limited" in any relevant way, as Petitioners suggest. Pet. 18, n.2; and Pet. 24, 27. As noted above, the tribal council's only reservation in its consent was the right to be compensated if the roadway became a controlled access highway, which did not occur.

The State of Arizona, in accepting assignment of the right-of-way, did not obligate itself to take on the BIA's fiduciary duties to the tribes, as Petitioners assert. Pet. 18-19. The acceptance documents provide that the state agreed to be bound by the stipulations in the right-of-way and "the rules and regulations of the Secretary of the Interior applicable thereto." Petitioners cite no stipulation *in the right-of-way*, and no federal rule or regulation dictating that right-of-way holders owe the tribe a fiduciary duty like that of the BIA, or that such holders hold rights-of-way in trust for the tribes. In fact, the rules and regulations applicable to these rights-of-way contain no such requirement. *See* 25 C.F.R. § 169.5 (setting forth right-of-way applicants' duties and obligations, which do not include holding the right-of-way in trust for Indian tribes). Rsp. App. 1a.[4]

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property, Pet. 7, without conceding that U.S. Highway 160 is not tribal property for jurisdictional purposes.

[4] Petitioners thus err in arguing that the state's acceptance of the right-of-way bound it to accept the United States' treaty obligations. Pet. 18-19. No right-of-way document mentions the United States' treaty obligations. Moreover, as is explained in the text, *infra*, even if the state had so bound itself, the Treaty of 1868 applies only to lands over which the Navajos have "absolute and undisturbed use and occupation," *Montana v. United States*,

B. The tour.

At the time of the accident, the tour bus was passing through the Navajo reservation on its way to the Grand Canyon—a U.S. national park—as part of a 12-day tour of U.S. National Parks. The tour began in Albuquerque, New Mexico and ended in Jackson, Wyoming. The day before the accident, the tour bus had gone through Monument Valley, stopped at the Visitors Center, and stayed overnight at the Hampton Inn in Kayenta.[5] Plaintiffs had not obtained a touring permit from the Navajo Nation to make this stop.

C. Petitioners sue in tribal court.

Petitioners sued Respondents for negligence in tribal court. Respondents moved to dismiss based on lack of jurisdiction, which the tribal court denied. Respondents then filed a Writ of Prohibition with the Navajo Supreme Court, raising the lack of jurisdiction issue. The Navajo Supreme Court held that the tribal court had jurisdiction based on the Treaty of 1868. Pet. App. I. Citing Navajo law and Barboncito,[6] the Navajo court (a) considered the state highway to be tribal land, despite the contrary ruling in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); (b) ruled that the Treaty of 1868 reserves to the Navajos tribal court jurisdiction over non-Indians on state rights-of-way;

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450 U.S. 544, 558 (1981), and thus does not apply to a U.S. highway.

[5] Monument Valley is not on U.S. Highway 160. It lies on the border between Arizona and Utah.

[6] Barboncito was a Navajo spiritual and political leader who signed the Treaty of 1868 that ended the Long Walk to Bosque Redondo.

and (c) disagreed with this Court's cases holding that tribal court jurisdiction over non-Indians is inconsistent with the tribe's dependent status. *Id.*

D. Respondents file this declaratory action.

Having exhausted their tribal remedies, Respondents sought declaratory and injunctive relief in the Arizona district court, again arguing that the tribal court lacked jurisdiction over the tort suit relating to a non-member accident on a state highway. The district court granted Respondents summary judgment, ruling that (a) under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), tribes cannot assert a landowner's "right to occupy and exclude" from a right-of-way so long as the state maintains the roadway as part of its highway system; (b) nothing in the right-of-way agreement here expressly reserved to the tribe a right to exercise dominion and control over the right-of-way; (c) no treaty or statute authorizes the Navajos to exercise jurisdiction over tort suits like this one; (d) this case did not implicate any consensual relationship with the tribe, because even if Respondents had obtained a touring permit, the permit's language includes consent to tribal jurisdiction over "lands within the jurisdiction of the Navajo Nation"; and the state highway is not "land within the jurisdiction of the Navajo Nation"; (e) this case did not threaten the political integrity, economic security or health and welfare of the tribe, and (f) there is no difference between the *Strate* sub-contractor driving carelessly on a state highway (for which there was no tribal jurisdiction) and a tour bus operator driving allegedly carelessly on a state highway. Pet. App. 13a.

The Ninth Circuit affirmed. *EXC, Inc. v. Jensen*, 588 Fed.Appx. 720 (9th Cir. 2014); Pet. App. 5a. The court prominently noted Petitioners' concession at oral argument that the Navajos had not retained the right to exclude travelers from U.S. Highway 160, Pet. App. 7a, and ruled that *Strate* controlled and neither *Montana*[7] exception applied: (a) consent could not be imputed to Respondents because the permit Respondents failed to obtain did not provide sufficient notice that Respondents would be subject to tribal jurisdiction on U.S. Highway 160, and (b) a tort suit arising out of a state highway accident does not threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Id.*[8]

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAIL TO RAISE ANY CERT-WORTHY ISSUE

Petitioners fail to establish any compelling reason warranting this Court's discretionary review. Their argument for certiorari is that the lower courts should have decided this case differently. Petitioners do not identify an unsettled issue of law; a newly arising or recurring federal issue; a federal or even state case

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[7] *Montana v. United States*, 450 U.S. 544 (1981). *Montana*'s general rule is that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, except where (1) the underlying suit arises out of the non-member's private "consensual relationship" with the tribe, or (2) non-member conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565.

[8] The record thus shows that, contrary to Petitioners' assertions, the lower courts did, in fact, "carefully examine" the issue of tribal jurisdiction. *See* Pet. 12-16.

that conflicts with the Ninth Circuit's decision; or a circuit split that needs resolving. Nor do Petitioners alert the Court to any widespread, deleterious effect that the Ninth Circuit's unpublished memorandum decision will have on an important group or industry. Furthermore, any practical significance of the Ninth Circuit's ruling in this case is thoroughly undermined by the fact that Petitioners have been actively pursuing their civil claim against Respondents in federal district court, as Respondents agreed not to raise any statute of limitations defense to that action.[9] Certiorari is not warranted.

II. EVERY FEDERAL CASE ADDRESSING THE JURISDICTIONAL ISSUE HAS HELD TRIBAL JURISDICTION LACKING OVER NON-MEMBER ACCIDENTS ON FEDERAL OR STATE RIGHTS-OF-WAY

The lower courts' decisions are consistent with not only *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no tribal jurisdiction over non-member traffic accident occurring on state highway), but with every other federal case that has considered whether tribal courts have jurisdiction over suits against non-members involving vehicle accidents on state or federal rights-of-way. Not one has held that tribal jurisdiction exists in these circumstances. *See Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008) (tribal court lacks jurisdiction over suit by member against non-member driver for injuries sustained in accident on state highway within reservation); *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir.1999) (rejecting tribal court jurisdiction over tribal members' action against

[9] That case has been stayed pending this Court's ruling on certiorari.

non-Indian railroad for injuries sustained in train-vehicle collision on railroad's right-of-way on reservation); *Wilson v. Marchington*, 127 F.3d 805, 814-15 (9th Cir.1997) (rejecting tribal court jurisdiction over tribal member's action against non-Indian arising from vehicle collision on U.S. highway on reservation); *Austin's Express, Inc. v. Arneson*, 996 F.Supp. 1269, 1272 (D.Mont. 1998) (rejecting tribal court jurisdiction over tribal member's action against non-Indians for injuries sustained in vehicle accident on federal highway on reservation; rejecting argument that tribal jurisdiction existed under Treaty of 1868).

The Ninth Circuit's failure to specifically mention the Treaty of 1868 when affirming the district court's "no tribal jurisdiction" decision is of no moment. *See* Pet. 12-14. In light of Petitioners' concession that the Navajos have no right to exclude travelers from the U.S. highway (and thus that the Navajos do not have "absolute and undisturbed use and occupation" of the roadway), the Ninth Circuit clearly concurred with the district court's ruling that the tribe does not, as Petitioners claimed, continue to enjoy treaty-based ownership rights over the U.S. highway. *EXC, Inc. v. Jensen*, 2012 WL 3264526, *4 (D.Ariz. 2012).

III. THE TREATY OF 1868 DOES NOT CREATE A CERT-WORTHY ISSUE

Petitioners err in suggesting that there is something about the Treaty of 1868 that makes this case cert-worthy. Pet. 16. As noted above, any treaty-based right to control tribal land extends only to land on which the tribe exercises "absolute and undisturbed use and occupation." *Montana v. United States*, 450 U.S. 544, 558 (1981) (Crow Indians had no treaty-based right to prevent non-member hunting and fishing on non-

member fee land within the reservation).[10] "Treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Id.* at 561.[11] Because the Navajos no longer have the right to "absolute and undisturbed occupation" of the U.S. highway, the Treaty of 1868 does not apply. Indeed, Petitioners' concession that the tribe has no right or power to exclude travelers from U.S. Highway 160 disabled their treaty-based argument.[12]

Likewise, since the tribe has no right of absolute and exclusive use of the U.S. highway, abrogation of such a right is simply not an issue. Pet. 17-19. Equally irrelevant is Petitioners' extended discussion regarding the history of the Navajo-Hopi Rehabilitation Act. Pet. 19-23. No one is trying to "accomplish a broad-scale extension of State laws to the Navajo and Hopi Reservations," as Petitioners suggest. Pet. 21. To the contrary, it was Petitioners who attempted to hale these non-members into tribal court for an accident occurring on a state roadway over which the Navajos

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[10] The 1868 Fort Laramie Treaty at issue in *Montana* mirrors the 1868 Treaty here.

[11] *See also Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 422 (1989) (because Yakima Nation "no longer retains the 'exclusive use and benefit' of all the land within the reservation boundaries," Yakima Treaty did not authorize tribe to zone non-member fee land in open area of reservation).

[12] In suggesting that the Navajos had jurisdiction "pursuant to reserved treaty rights confirmed by Congress," Pet. 16, the cert petition cites only those portions of *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that address tribes' treaty-based rights to "prohibit non-members from hunting or fishing *on land belonging to the Tribe or held by the United States in trust for the tribe*." (Emphasis added).

have no exclusive right of dominion. The Treaty of 1868 does not create any cert-worthy issue here.

IV. ASKING THE COURT TO ASSESS THE FACTS DIFFERENTLY DOES NOT RAISE A CERT-WORTHY ISSUE

Petitioners' argument that the Ninth Circuit should have assessed the facts differently, Pet. 25, certainly fails to raise a cert-worthy issue. *See* Sup. Ct. R. 10.[13] Furthermore, in light of Petitioners' concession that the Navajos have no authority to exclude travelers from U.S. Highway 160, it is irrelevant for our purposes that the Navajos have retained authority to regulate commercial tourism on *tribal* lands. Pet. 26, n.3, and 30, 31, n.7. The power to regulate commercial activities on tribal land does not translate to the power to regulate on or exclude travelers from a U.S. highway. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (1982). No fact in the record and no federal case supports Petitioners' assertion that the Navajos have the authority to exclude from U.S. Highway 160 non-member tour operators who fail to obtain a touring

[13] The Ninth Circuit correctly assessed the facts in any event. Our facts are virtually identical to those in *Strate*, where the Court held the state highway equivalent to non-Indian fee land: accident on state roadway; non-Indian defendant; document granting right-of-way did not reserve to tribe any right of dominion or control over state roadway; road formed part of the state's highway, was open to the public, and traffic on it was subject to state control. *See also Nord v. Kelly*, 520 F.3d 848, 854 (8th Cir. 2008) (the Red Lake Band has no "right of absolute and exclusive use and occupation" of [the state highway], and the public highway at issue, as in *Strate*, is the equivalent of alienated, non-Indian land for purposes of regulating the activities of nonmembers).

permit from the Navajo Nation. Pet. 26, n.3.[14] To support that assertion, Petitioners miscite *Strate*'s quote from *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Pet. 26, n.3.[15] In quoting that language, *Strate* was actually reiterating that tribal jurisdiction presumptively does not exist over non-members. 520 U.S. at 453.

V. PETITIONERS IDENTIFY NO CERT-WORTHY ISSUE INVOLVING THE *MONTANA* ANALYSIS

Petitioners also fail to identify any cert-worthy issue with respect to the lower courts' *Montana* analysis. Petitioners again identify no unsettled issue of law; no newly arising or recurring federal issue; no case that conflicts with the Ninth Circuit's decision; and no circuit split that needs resolving.[16] Petitioners continue to argue only that the lower courts should have considered other factors—or should have assessed the facts differently—in determining whether the U.S. highway

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[14] The tribe may certainly enforce its tourism regulations on *tribal* land: for example, by excluding tour operators without permits and their passengers from the Navajo Tribal Park at Monument Valley; prohibiting such tour buses from traversing the tribal roads to the park or elsewhere; or conducting spot checks of tour buses traveling over tribal roads.

[15] *LaPlante* (which did nothing more than set forth a prudential rule of tribal exhaustion) involved an insurance dispute regarding an accident on a tribal road.

[16] Petitioners question in a footnote whether there might be a two-case circuit split on whether the ownership status of land triggers application of the *Montana* test. Pet. 27, n.5. The question is not appropriate for this Court's review, as Petitioners have not raised this as a question presented, and the lower courts failed to consider it. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194, (2007).

was the equivalent of alienated, non-Indian fee land. Pet. 29. This does not raise a cert-worthy issue.[17]

Petitioners then argue, erroneously, that the lower courts failed to analyze whether *Montana*'s first exception applied. Pet. 29-30. This is incorrect. The district court did conduct an analysis, spending eleven pages of its decision discussing Respondents' touring business and the consensual relationship exception. Pet. App. 21a-27a. Petitioners' true contention is that they believe the analysis should come out differently, which again fails to raise a cert-worthy issue.

In any event, contrary to Petitioners' contention, the lower courts correctly analogized this case to *Strate*. Pet. App. 7a, 26a. *Strate* held that the consent exception did not apply to the vehicle accident on the state highway even though the driver's employer, A–1, was engaged in subcontract work and had a "consensual relationship" with the tribes. The Court reasoned that the requisite nexus was missing between the consensual relationship and the accident: the Indian plaintiff in the vehicle accident was not a party to the tribes' subcontract; and the tribes were strangers to the accident. 520 U.S. at 456-57. The same is true here. Even if we assume a consensual relationship between the touring company and the Navajos, the requisite nexus is missing. Petitioners, the Indians involved in the highway accident, were not parties to the permit or touring relationship, and the tribe was a stranger to

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[17] The lower courts correctly found U.S. Highway 160 to be the equivalent of non-Indian fee land in any event, as *Strate* did. *See* n. 13, *supra*.

the accident.[18] Plainly, the fact that the non-members in this case were driving a tour bus instead of a truck engaged in a consensual subcontract with the tribe, as in *Strate*, is a distinction without a difference. *Strate*, 520 U.S. at 457 ("Measured against the [types of cases where a *Montana* consensual relationship does exist], a highway accident presents no 'consensual relationship' of the qualifying kind.").

Petitioners similarly fail to raise any cert-worthy issue with respect to *Montana*'s second exception. They only deride the Ninth Circuit's analysis as "perfunctory," Pet. 31, and say the court should have decided the case differently on the facts. *Id.* at 31-35. This does not raise a cert-worthy issue. Truthfully, the Ninth Circuit need not have engaged in a belabored analysis of the second exception when *Strate* already set forth the applicable precept: "Opening the Tribal Court for [the Indian plaintiff's] optional use is not necessary to protect tribal self-government; and requiring A–1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'" 520 U.S. 438, 459, *citing Montana*, 450 U.S. at 566. The same analysis applies here. This case certainly does not implicate the Navajos' authority to develop its own common law, as Petitioners assert. Pet. 33. Navajo common law can be and is freely developed in the context of cases that do not involve non-member accidents on state or federal rights-of-way.

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[18] Petitioners assert that a consensual relationship existed here, Pet. 30, but fail to address the nexus gap.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EILEEN DENNIS GILBRIDE
Counsel of Record
EDWARD G. HOCHULI
BRANDI C. BLAIR
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue
Suite 800
Phoenix, AZ 85012
(602) 263-1700
EGilBride@jshfirm.com

Counsel for Respondents

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