No. 15-64

IN THE

Supreme Court of the United States

JAMIEN RAE JENSEN, *et al.*,

Petitioners,

v.

EXC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. Supervisory Review is Needed Because the District Court and the Ninth Circuit Automatically Aligned U.S. Highway 160 with Alienated, Non-Indian Fee Land, Ignoring this Court's Context-Specific, Multifactor Methodology for Determining the Status of Reservation Roadways for Tribal Jurisdictional Purposes.

Mirroring the position of the district court and the Ninth Circuit Court of Appeals, Respondents argue that the roadway on which the fatal tour bus/auto collision occurred in this case—U.S. Highway 160 within the Navajo Reservation—should be treated as non-Indian fee land for jurisdictional purposes, as was the segment of state highway within the Fort Berthold Reservation in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Yet proper application of *Strate* dictates that the roadway should retain its status as tribal trust land and *not* be aligned with non-Indian fee land, underscoring the Ninth Circuit's impermissible sanctioning of the district court's departure from the usual and accepted course of judicial proceedings for addressing the jurisdictional status of an on-reservation roadway. Granting certiorari in this case is crucial for bringing both the district court and the Ninth Circuit in line with this Court's precedents governing judicial treatment of reservation roadways for tribal jurisdictional purposes.

In their opposing brief, Respondents misrepresent the facts of *Strate* in their effort to make that case appear factually indistinguishable from the instant one.

Respondents thus falsely portray *Strate* as "rejecting *tribal member's* argument" about tribal jurisdiction and as involving "the *Indian* plaintiff in the vehicle accident." Rsp. Opp. Br. 2 n.2, 12 (emphases added). But as this Court made clear, Gisela Fredericks, the tribal-court plaintiff in *Strate*, was a *nonmember* and a *non-Indian*. *See Strate*, 520 U.S. at 443 ("Neither Stockert nor Fredericks is a member of the Three Affiliated Tribes or an Indian."). Indeed, Respondents go so far as to make a misleading change to this Court's own language to conceal the important factual differences between *Strate* and the present case for tribal jurisdictional purposes. *Compare id.* at 457 (emphasis added) (concluding that on the specific facts of *Strate*, which involved only nonmember parties, "*the Fredericks-Stockert highway accident* presents no 'consensual relationship' of the qualifying kind"), *with* Rsp. Opp. Br. 13 (emphasis added) (misquoting *Strate* as stating generally that " '*a highway accident* presents no "consensual relationship" of the qualifying kind' ").[1]

These distortions serve only to underscore why this Court's supervisory review is needed: both lower courts took a *categorical* approach to the issue of the jurisdictional status of U.S. Highway 160 in this litigation, by *automatically* aligning the right-of-way with non-Indian fee land and refusing to engage the careful, context-specific, multifactor inquiry *Strate* demands. For example, Respondents and both lower courts disregard language from this Court indicating that preexisting treaty guarantees and/or "a different congressional

1. Respondents' misrepresentations persist even though they were refuted in briefing to the Ninth Circuit. *See* Reply Brief of Appellants at 16-17, No. 12-16958 (citing *Strate*, 520 U.S. at 444 n.3).

direction" may compel judicial deference to federal policy upholding tribal jurisdiction in any particular case, *Strate*, 520 U.S. at 446, 449-50, 456, contextual factors that are present and controlling in this case. *See infra* Part II.

But more generally, *Strate* simply does *not* sanction *categorical* treatment of every reservation roadway as non-Indian fee land merely because the roadway is open to the public or maintained by a state. In this regard, Respondents misrepresent past federal decisions in asserting that the lower courts' decisions in the present case "are consistent with not only *Strate* . . . 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." Rsp. Opp. Br. 7. Indeed, each of those past federal appellate cases employed *Strate*'s multifactor analysis rather than the categorical approach to the status of the roadway taken by the district court and the Ninth Circuit in the instant case. *See Nord v. Kelly*, 520 F.3d 848, 851, 853-55 (8th Cir. 2008); *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1062-64 (9th Cir. 1999); *Wilson v. Marchington*, 127 F.3d 805, 813-15 (9th Cir. 1997).[2] Moreover, Respondents are simply wrong in claiming that with respect to every past federal case addressing tribal jurisdiction over nonmember conduct on state or federal rights-of-way "[n]ot one has held that tribal jurisdiction exists in these circumstances." Rsp. Opp. Br. 7. In *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002),

2. Unlike the present case, none of these previous federal appellate decisions involved the kind of "different congressional direction" this Court has indicated may compel validation of tribal authority to adjudicate a lawsuit stemming from a reservation highway accident involving nonmembers. *Strate*, 520 U.S. at 446.

the Ninth Circuit faithfully applied *Strate*'s multifactor methodology and concluded tribal jurisdiction *existed* on a federal right-of-way, a roadway open to the public, reasoning that the "scope of rights and responsibilities retained by a tribe over a BIA road exceed those retained over the state highway in *Strate*, and that these additional retained rights suffice to maintain tribal jurisdiction over nonmember conduct on BIA roads." *Id.* at 538-39.

Respondents argue that the instant case is factually identical to *Strate* because the Navajo Nation's "consent contained only one reservation," i.e., " 'the right of the Tribe to compensation for the use of lands within said rights of way if after such transfer said routes or any part of them are made controlled access highways.'" Rsp. Opp. Br. 1. Respondents fail to disclose numerous key differences between the instant case and *Strate* that are relevant and crucial to the analysis *Strate* requires.[3]

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3. Attempting to reinforce the fiction that the right-of-way in this case is identical to the one in *Strate*, Respondents further distort the Ninth Circuit panel's representation of statements made by Petitioners during oral argument, asserting that Petitioners' counsel "conceded . . . that the Navajos have no right or authority to exclude any travelers from U.S. Highway 160." Rsp. Opp. Br. 2. Respondents' assertion is false. Petitioners clarified both at oral argument and in briefing to the Ninth Circuit that they "conceded" only that the Navajo Nation consented to the grant of a limited right-of-way for a roadway that is open to the public (a use consistent with the original grant of the right-of-way), but Petitioners emphasized that the Nation retains authority *to detain and exclude tour operators conducting commercial activities in violation of the Nation's laws*. Brief of Appellants at 31-32, No. 12-16958. *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) ("When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian

To begin with, Respondents are wrong when they claim the Nation's consent to the granting of the right-of-way "contained only one reservation." Besides the provision cited by Respondents the relevant intergovernmental agreements in fact contain express reservations (1) opposing right-of-way fencing by the state, (2) stating the tribal chairman's approval was "[s]ubject to any prior valid existing right or adverse claim" and was restricted "to the Tribal consents he is . . . empowered to give" pursuant to a Navajo Tribal Council Resolution incorporated by reference into the right-of-way agreement itself, and (3) exempting "extraordinary actual damages" from the Navajo Nation's waiver of compensation. *See* Joint Stipulations Regarding Documents, App. 39a-41a. These additional restrictions, concealed by Respondents, belie Respondents' claim that the intergovernmental agreements "contained only one reservation."

Moreover, there are *additional* distinctions implicated in this case that *Strate* indicates are crucial for assessing the jurisdictional status of an on-reservation roadway. *See Strate* 520 U.S. at 449 (reiterating "the need to inspect relevant statutes, treaties, and other materials" when determining the extent of tribal jurisdiction over the conduct of nonmembers). These distinctions include (1) Congress's preservation of the Navajo Nation's treaty-based jurisdiction with respect to the very roadway at issue in this case, (2) other distinctly tribal interests served by the roadway's construction and by which Congress preserved the contours of tribal sovereignty with respect to the roadway, (3) the lack of any compensation—conceded by Respondents—paid to the Navajo Nation for the limited

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complies with the initial conditions of entry.").

right-of-way, and (4) the state's agreement to be bound by preexisting federal obligations when accepting assignment of the right-of-way. Disregard of these crucial factors further demonstrates the lower courts' failure to follow this Court's governing precedents when analyzing the status-of-the-roadway issue in this case.

II. Supervisory Review is Also Necessary Because Both Lower Courts Refused to Apply Supreme Court Precedents Governing Whether an Indian Tribe Retains Treaty-Based Authority over the Conduct of Nonmembers on a Tribe's Reservation, Effecting an Impermissible Judicial Abrogation of the Navajo Nation's Congressionally Confirmed, Treaty-Based Jurisdiction in This Case.

Respondents contend that the district court and the Ninth Circuit properly addressed Petitioners' treaty argument, and that the Navajo Treaty of 1868 therefore "does not create any cert-worthy issue here." Rsp. Opp. Br. 10. In fact, the lower courts failed to faithfully apply this Court's precedents for determining whether Congress has abrogated Indian treaty rights. Although Respondents attempt to trivialize the matter as a thing "of no moment," Rsp. Opp. Br. 8, the Ninth Circuit's sanctioning the district court's disregard of this Court's prescribed treaty analysis in this case has effected an impermissible *judicial* abrogation of Indian treaty guarantees that subverts the judiciary's role in safeguarding those rights. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

In particular, Respondents argue the lower courts were correct in "ruling that the tribe does not . . . continue

to enjoy treaty-based ownership rights" to the roadway at issue. Rsp. Opp. Br. 8. Yet Respondents, like the lower courts, point to no act of Congress abrogating those treaty rights. Nor can they. In this case Congress enacted legislation prompting the Navajo Nation's consent to the grant of a limited right-of-way "in order to further the purposes of existing treaties with the Navajo Indians." 25 U.S.C. § 631. Moreover, this Court has confirmed the treaty-preserving purpose and effect of the legislation in question. *See Warren Trading Post Co. v. Arizona St. Tax Comm'n*, 380 U.S. 685, 690 & n.17 (1965) (observing with respect to the Navajo-Hopi Rehabilitation Act that "in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians").

Respondents purport to rely on *Montana v. United States*, 450 U.S. 544, 561 (1981), for the proposition that "[t]reaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." But in *South Dakota v. Bourland*, 508 U.S. 679, 687-94 (1993), this Court made clear that the abrogation inquiry—i.e., the search for "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty," *United States v. Dion*, 476 U.S. 734, 740 (1986)—must be undertaken with respect to the particular legislation at issue. In the unique legislative context of the present case, wherein Congress deliberately confirmed treaty obligations and supported tribal jurisdiction, the Navajo Nation's grant of a limited right-of-way was an *exercise* of the Nation's treaty rights and sovereignty, *not* an abrogation or a relinquishment of them. *Cf. Williams v.*

Lee, 358 U.S. 217, 223 (1959) (noting that "cases in this Court have consistently guarded the authority of Indian governments over their reservations" and affirming that "Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since").

III. Supervisory Review is Further Needed Because Both Lower Courts' Denial of the Navajo Nation's Retained Inherent Sovereignty over the Tour Bus/Auto Collision Conflicts with This Court's Precedents for Proper Application of the *Montana* Exceptions.

Respondents' arguments reflect the erroneous analyses of the district court and the Ninth Circuit, wherein both lower courts failed to heed the requirements of this Court's precedents for assessing inherent tribal authority over nonmember conduct based on the two *Montana* exceptions. Respondents seek to trivialize Petitioners' objections to the lower courts' misapplication of the *Montana-Strate* framework when they repeatedly accuse Petitioners of asking this Court merely to "assess[ ] the facts differently" than the lower courts. Rsp. Opp. Br. 10, 11, 13. Rather, Petitioners point to the lower courts' failure to apply *legal rules and principles*, set forth in this Court's precedents, that require judicial consideration of several critical factors in determining the extent of retained inherent tribal jurisdiction over the conduct of nonmembers within an Indian reservation.

Respondents nevertheless insist that the lower courts' application of the two *Montana* exceptions was adequate. As to the first *Montana* exception—the "consensual relationship" exception—Respondents assert that "the

lower courts correctly analogized this case to *Strate*." Rsp. Opp. Br. 12. Respondents argue that in *Strate* "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." Rsp. Opp. Br. 12. In actuality, of course, *Strate* did not involve an "Indian plaintiff" at all, and Respondents' repeated misrepresentation of this fact underscores the fallacy in their position that commercial touring activity, validly subject to tribal regulation for the safety and protection of tribal members,[4] entails no " 'consensual relationship' of the qualifying kind," *Strate*, 520 U.S. at 457, when a regulated tour bus collides head-on with a passenger vehicle on a reservation highway, killing and injuring tribal members. Far from "fail[ing] to address the nexus gap," Rsp. Opp. Br. 13 n.18, Petitioners argued at length to the Ninth Circuit that in light of the Navajo Nation's commercial touring regulations, binding upon Respondents, the requisite "nexus is thoroughly established in this case." Reply Brief of Appellants at 19-20, No. 12-16958; *see also* Pet. 32 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001)) (noting that the circumstances of this case "perfectly satisfy this Court's requirement that the particular governing authority 'imposed by the Indian tribe have a nexus to the consensual relationship itself'").

4. The district court ruled—and the Ninth Circuit accepted—that "[t]here is no question that the Navajo Nation has the right to regulate tourism on the reservation" and that Respondents "cannot claim that, by ignoring the Nation's laws, they have not consented to the [Navajo] Nation's jurisdiction." App. F, 24a-25a; *see also* Pet. 30.

Embracing the lower courts' erroneous application of the second *Montana* exception—this Court's requirement that tribal jurisdiction over nonmember conduct be shown to be "crucial to 'the political integrity, the economic security, or the health or welfare'" of the tribe, *Strate*, 520 U.S. at 459 (citation omitted)—Respondents again misrepresent the plaintiff in *Strate* as an Indian, arguing that the lower courts properly followed *Strate* to deny Navajo Nation jurisdiction over the tour bus/auto collision in the present case. *Compare id.* ("Opening the Tribal Court for her [Gisela Frederick's] optional use is not necessary to protect tribal self-government . . . ."), *with* Rsp. Opp. Br. 13 (emphasis added) (alteration added by Respondents) (altering quote from *Strate* as follows: " 'Opening the Tribal Court for [*the Indian plaintiff's*] optional use is not necessary to protect tribal self-government . . . .'"). In truth, the fact that (unlike the situation in *Strate*) tribal members were killed and injured in this case magnifies the error of both lower courts in refusing to heed this Court's admonition that "[k]ey to . . . proper application" of the second *Montana* exception is judicial inquiry into whether the exercise of tribal jurisdiction in a given case implicates the tribe's sovereign interest in protecting tribal self-government, controlling internal relations, or managing tribal land. *Strate*, 520 U.S. at 459; *see also Plains Commerce Bank v. Long Family Land & Cattle Co. Inc.*, 554 U.S. 316, 334, 336 (2008). Indeed, the lower courts' disregard of all three qualifying types of core sovereign interests—each abundantly implicated in this litigation—constitutes one of the most important reasons for supervisory review to rectify the resulting conflict with this Court's precedents.[5]

5. Respondents argue that the Navajo Nation's sovereign interest in developing its own common law is not at risk in this

"[A] fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2039 (2014). In this case, Congress deliberately chose to support the Navajo Nation's treaty rights and jurisdiction when it enacted legislation prompting tribal consent to the grant of the limited right-of-way at issue. Accordingly, supervisory review is needed to rectify the decisions of the lower courts in this case that conflict sharply with this Court's precedents for analyzing assertions of sovereign tribal authority over the on-reservation conduct of nonmembers. Leaving those decisions intact would effect a judicial abrogation of the Navajo Nation's treaty rights; a usurpation of "Congress's current policy judgment," *id.*, protecting Navajo Nation autonomy; and a subversion of this Court's own *Montana-Strate* framework for analyzing issues of inherent tribal sovereignty.

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litigation because "Navajo common law can be and is freely developed in the context of cases that do not involve non-member accidents on state for federal rights-of-way." Rsp. Opp. Br. 13. Respondents ignore this Court's caveat in *Strate* that the second *Montana* exception is especially important in situations like the present one, where "the character of the tribal interest" shows that "a State's . . . exercise of authority would trench unduly on tribal self-government," rendering state jurisdiction an "impermissible intrusion." *Strate*, 520 U.S. at 458; *see also* Pet. 19-23 (discussing Congress's preemption of state jurisdiction through passage of the 1950 Navajo-Hopi Rehabilitation Act, the very statute that funded construction of the reservation roadway at issue in this litigation).

CONCLUSION

Petitioners respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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