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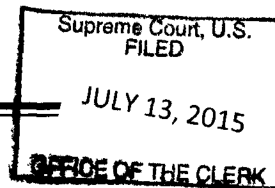


IN THE

# 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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether federal courts are free to ignore congressionally confirmed Indian treaty rights that impliedly reserve tribal jurisdiction over nonmember conduct within an Indian reservation, thereby effecting an impermissible judicial abrogation of those treaty rights.

2. Whether federal courts may disregard the Supreme Court's multifactor analysis for determining the status of a roadway existing on tribal trust land when deciding if an Indian tribe has inherent sovereign jurisdiction to adjudicate a collision occurring on that roadway between a tribally regulated tour bus and a passenger vehicle carrying tribal members.

3. Whether federal courts may decline to apply the consensual relationship exception of *Montana v. United States*, 450 U.S. 544 (1981), because nonmember conduct occurred on land deemed to be the equivalent of non-Indian fee land, where (a) the Supreme Court has indicated that *Montana*'s consensual relationship exception can justify tribal jurisdiction over nonmember conduct occurring on non-Indian fee land or its equivalent, and (b) there exists a consensual relationship of the qualifying kind between the tribe and the nonmembers.

4. Whether federal courts may deny that an Indian tribe has inherent civil jurisdiction, pursuant to the second *Montana* exception, over nonmembers' commercial touring of tribal lands that results in a fatal tour bus/auto collision where (a) the nonmembers' conduct implicates the tribe's interests in governing itself, controlling internal relations, and superintending land use, and (b) the impact of the commercial touring activity, unconstrained by tribal regulatory authority, is demonstrably serious and imperils the tribe's sovereign interests.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following lists identify all of the parties appearing here and in the courts below.

Petitioners Jamien Rae Jensen, individually, as parent and next friend of D. J. J., and as Personal Representative of the Wrongful Death Estate of C.J.J.; Chavis Johnson, individually and as Personal Representative of the Wrongful Death Estate of Butch Corey Johnson; Margaret Johnson, Frank Johnson, Francesca Johnson, Justin Johnson, Holly Johnson, and Dominique Johnson, individually; Raymond Jensen, Sr., Louise R. Jensen, Ryan Jensen, Justin Jensen, Katrina Jensen, Raymond Jensen, Jr., and Murphy Jensen, individually, are all enrolled members of the Navajo Nation and were defendants/appellants in the proceedings below. Petitioners Holly Johnson and Dominique Johnson having reached the age of majority, this list of parties now reflects their current status as individual Petitioners.

Respondents EXC, Inc., a Nevada corporation, d/b/a Express Charters; Conlon Garage, Inc., a Colorado corporation; Go Ahead Vacations, Inc., a Massachusetts corporation; Russell J. Conlon; and National Interstate Insurance Company were plaintiffs/appellees in the proceedings below.

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## PETITION FOR A WRIT OF CERTIORARI

The Jensen and Johnson families, enrolled members of the Navajo Nation, respectfully petition for a writ of certiorari to review the Memorandum disposition of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Memorandum opinion of the Ninth Circuit Court of Appeals, App., 5a-8a, is an unreported decision. *See EXC Inc. v. Jensen*, 588 F. App'x 720 (9th Cir. 2014) (unpublished). The order of the United States District Court, for the District of Arizona, App. F, 13a-29a, is also an unreported decision. *See EXC, Inc. v. Jensen*, No. CV 10-08197, 2012 WL 3264526 (D. Ariz. Aug. 9, 2012) (unpublished), *aff'd*, 588 F. App'x 720 (9th Cir. 2014). The opinion of the Navajo Nation Supreme, App. I, 47a-77a, is *EXC, Inc. v. Kayenta Dist. Ct.*, No. SC-CV-07-10,__ Nav.R. __, 2010 WL 3701050 (Nav. Sup. Ct., Sept. 15, 2010).

## JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit, which Petitioners ask this Court to review, was entered on December 23, 2014. On January 2, 2015, Petitioners filed an unopposed motion to extend time to file a petition for rehearing en banc, and on January 5, 2015, the Ninth Circuit issued an order granting the motion. An order denying Petitioners' motion for rehearing en banc was entered by the Ninth Circuit on February 12, 2015. On March 26, 2015, at least 10 days before the date a petition was due, Petitioners submitted to this Court an application to extend time for filing a petition for a writ of certiorari,

which was granted on March 31, 2015 and which extended the time for filing a petition for a writ of certiorari to, and including, Sunday, July 12, 2015. This petition is timely under 28 U.S.C. Section 2101(c) and Supreme Court Rules 13.1, 13.3, 13.5, 22, and 30, and it has been filed within the time limit specified by this Court's order granting Petitioners' application to extend time for filing a petition for a writ of certiorari and Supreme Court Rule 30.1. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATY, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

This matter involves Article VI, clause 2, of the United States Constitution, which declares that "all Treaties made, . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This matter also involves Article I, Section 8, clause 3, of the United States Constitution, which establishes the plenary authority of Congress "[t]o regulate Commerce . . . with the Indian Tribes."

This matter also involves (1) the Navajo Treaty of 1868, art. I, art. II, art. XIII, 15 Stat. 667, App. J, 78a-80a; (2) the Navajo-Hopi Rehabilitation Act Act of Apr. 19, 1950, Pub. L. No. 81-474, ch. 92, § 1, 64 Stat. 44-47 (codified as amended at 25 U.S.C. §§ 631-640), App. K, 81a-83a; and (3) the Navajo Nation Tour and Guide Services Act, 5 N.N.C. §§ 2501-2505 (as amended)[formerly Tourist Passenger

Services Act, adopted Nov. 2, 1972], and its associated regulations which were in effect on September 21, 2004, App. L, 84a-90a.

## STATEMENT OF THE CASE

### I. Background Facts and Issues

#### A. Tour Bus/Auto Collision of September 21, 2004

This matter arises out of a fatal, head-on collision between a tour bus chartered, owned, and operated by Respondents (hereinafter "Express Charter companies") and a 1997 Pontiac sedan, occupied by enrolled members of the Navajo Nation. The crash occurred on September 21, 2004 on U.S. Highway 160 in Kayenta, Arizona within the boundaries of the Navajo Reservation. In the early morning hours of September 21, 2004, a Van Hool tour bus operated by Express Charter companies was traveling on U.S. Highway 160 on the Navajo Reservation and collided head-on into a sedan driven by Butch Corey Johnson, and occupied by his wife Jamien Jensen, their unborn child, C.J.J., and their minor child, D.J.J., all enrolled members of the Navajo Nation. Butch Johnson died at the scene. Jamien Rae Jensen was seriously injured, sustaining a broken arm and a head injury. As a result of the collision, Jamien Rae Jensen later miscarried and her unborn child C.J.J. died. D.J.J. also sustained bodily injuries. App. G, 30a-37a.

The collision occurred on U.S. Highway 160 located on tribal trust land on the western edge of the Kayenta Township in Kayenta, Arizona. The portion of U.S. Highway that crosses the Navajo Nation is approximately

197.4 miles in length according to the Agreement for Construction and Maintenance of Roads, App. G, 34a and App. H, 39a. This portion of U.S. Highway 160 in Arizona is wholly within the boundaries of the Navajo Nation. App. G, 34a.

At the time of the collision the Express Charter companies were engaged in a 12-day tour of national monuments, which included two scheduled stops on their tour of the Navajo Nation, a visit to the Navajo Tribal Park at Monument Valley and an overnight stop at a Navajo Nation hotel, the Hampton Inn. The Monument Valley Visitors Center and the Hampton Inn in Kayenta, Arizona are both located on tribal trust land within the Navajo Nation. The Monument Valley Tribal Park is located at the end of a 5-mile loop road on which the tour bus entered and exited the Monument Valley Visitors Center, traveling upon Monument Valley Road [Co. Rd 486] and Navajo Indian Route 42. The tour route traversed almost 200 miles of contiguous Navajo Nation territory from its northeastern to western external borders, including travel on U.S. Highway 160. Monument Valley Road [Co. Rd 486], Navajo Indian Route 42, and U.S. Highway 160 are all located on tribal trust land within the Navajo Nation. On September 20, 2004, the Express Charter companies paid an entrance fee for their tour bus to enter the Monument Valley Tribal Park at Monument Valley, which is operated by the Navajo Nation Department of Parks and Recreation. App. G, 30a-36a.

### B. The Navajo Nation and the Navajo Indian Reservation

The Navajo Tribe of Indians is a federally recognized Indian Tribe whose reservation encompasses over 27,000 square miles, approximately the same size as the state of West Virginia, and is located within the boundaries of three states—Arizona, New Mexico and Utah. In 2004, over 2.5 million tourists visited scenic sites within the Navajo Nation. *EXC, Inc. v. Kayenta Dist. Ct.*, No. SC-CV-07-1 at 6, n.1, 2010 WL 3701050, at **3 n.1 (Nav. Sup. Ct., 2010) (citing 2005-2006 Comprehensive Economic Development Strategy of the Navajo Nation). App. I, 54a fn1. The Navajo Nation consists of over 17 million largely contiguous acres, traversed by 10,000 miles of public roads. *Id.* at 16 n.7, 2010 WL 3701050, at **9 n.7 (citing 2003 Navajo Nation Long Range Comprehensive Transportation Plan). App. I, 66a fn7.

### C. The Navajo Treaty of 1868

The Navajo Treaty of 1868 was intended to end hostilities between the Navajo Tribe of Indians and the United States. It permitted the Navajo people to return to part of their traditional homeland, and ended their imprisonment at Fort Sumner in eastern New Mexico, in an area called the Bosque Redondo. The Treaty of 1868 was signed on June 1, 1868 and ratified on July 25, 1868 by the United States Senate and signed by President Andrew Johnson on August 12, 1868. App. J, 78a-80a.

### D. The Navajo-Hopi Rehabilitation Act of 1950

In 1950, the United States Congress enacted the Navajo-Hopi Rehabilitation Act, authorizing funds for construction of Navajo Indian Route 1, which was later designated a part of U.S. Highway 160. App. K, 81a-83a. The Act's initial appropriation of $20,000,000 for construction of roads was increased to $40,000,000.00 under a 1958 amendment to the Act. Act of Aug. 23, 1958, Pub. L. No. 85-740, 72 Stat. 834.

The Navajo-Hopi Rehabilitation Act authorized funds for construction of Navajo Indian Routes 1 and 3: (1) "in order to *further the purposes of existing treaties with the Navajo Indians*" and specifies other objectives consistent with preserving those treaty rights, namely, (2) "to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes"; and (3) "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities," 25 U.S.C. § 631 (1958), App. K, 81a-82a. Another express purpose of the Act was to facilitate "the fullest possible participation of the Navajos in the administration of their affairs," 25 U.S.C. § 636 (1950), App. K, 82a-83a.

### E. Enactment and Violation of the Navajo Nation Tour and Guide Services Act

The commercial touring engaged in by the Express Charter companies was regulated by the Navajo Nation Tour and Guide Services Act, 5 N.N.C. §§ 2501-2505

[formerly Tourist Passenger Services Act], and its associated regulations. The Act requires commercial touring companies to (1) apply for and secure a touring permit; (2) pay an annual permit fee of $3,000.00; (3) provide proof of liability insurance; (4) execute a Tourist Passenger Service Agreement; and (5) follow any other requirements of the Act and its associated regulations. App. L, 84a-90a. According to the Tour and Guide Services Act, commercial touring companies are required to consent to the jurisdiction of the Navajo Nation courts to adjudicate disputes arising out of activities covered under the Act by executing a Tourist Passenger Service Agreement, before touring the Navajo Nation, which Agreement reads: "Permittee consents to the jurisdiction of the Navajo Nation Courts relating to the activities under this Agreement *on lands within the jurisdiction of the Navajo Nation*." App. L, 89a-90a (emphasis added). At the time of the fatal collision, the Express Charter companies were operating in violation of Navajo law, having failed to secure a permit, pay the required permit fee, provide proof of liability insurance, or execute a Tourist Passenger Service Agreement. App. F, 24a-26a, App. I, 60a-63a. The Navajo Nation reserves the right to exclude any tour operators violating the Act. App. F, 24a-26a, App. L, 84a-85a.

## II. Proceedings in the Navajo Nation Courts

On September 11, 2006, the Jensen/Johnson family filed a Complaint for Personal Injury and Wrongful Death in the Kayenta District Court against the Express Charter companies. On January 17, 2007, Defendants EXC, Inc. and National Interstate served their Special Appearance and Motion to Dismiss (which Defendant

Go Ahead Vacations, Inc. joined on February 16, 2007), seeking to dismiss the Jensen/Johnson family's Complaint against them, Russell J. Conlon, and Conlon Garage, Inc. The Express Charter Defendants argued that the Kayenta District Court lacked subject matter jurisdiction over the case. The parties briefed the issues raised in the Express Charter companies' motion to dismiss, and on September 20, 2007, a hearing was held in Kayenta District Court. On December 4, 2009, the Kayenta District Court issued its Order denying Defendants' Motion to Dismiss. On February 28, 2010, the Express Charter companies filed a Petition for a Writ of Prohibition asking the Navajo Nation Supreme Court to prohibit the trial court from proceeding to hear the case on the merits for an alleged lack of subject matter jurisdiction. On September 15, 2010, the Navajo Nation Supreme Court issued an opinion ruling that the Kayenta District Court has jurisdiction over the Express Charter companies and the claims in the underlying case and denying the petition for writ of prohibition. App. I, 47a-77a.

### III. Proceedings in the United States District Court

On October 8, 2010, the Express Charter companies, as Plaintiffs, filed a complaint in the United States District Court for the District of Arizona, seeking a declaratory judgment that Defendants, the Jensen/Johnson family and Estates of the deceased family members, had exceeded the subject matter jurisdiction of the Kayenta District Court in bringing a civil action for damages arising from the 2004 tour bus/auto collision at issue in this case and sought an injunction enjoining Defendants from pursuing their claims in any Navajo district court. On November 28, 2011, the Express Charter companies and the Jensen/Johnson

family filed Joint Stipulations Regarding Documents for Purposes of Motions for Summary Judgment, App. H, 38a-46a, and a Joint Stipulated Statement of Facts for Purposes of Motions for Summary Judgment, App. G, 30a-37a.

On February 27, 2012, the Express Charter companies filed a Motion for Summary Judgment and Separate Statement of Facts in Support, and the Jensen/Johnson family filed a Motion for Summary Judgment and Memorandum in Support and Statement of Undisputed Material Facts in Support. Oral argument on the motions was held before U.S. District Court Judge James A. Teilborg on August 6, 2012. By the court's Order, App. F, 13a-29a, and Judgment in a Civil Case, App. E, 11a-12a, both dated August 9, 2012, Judge Teilborg granted the Express Charter companies' Motion for Summary Judgment, entered a declaratory judgment that the Kayenta District Court lacks jurisdiction to hear the Jensen/Johnson family's claims relating to the September 21, 2004 tour bus/auto collision. The order permanently enjoined the Jensen/Johnson family from proceeding with their claims in Kayenta District Court, denied their Motion for Summary Judgment, and terminated the district court action. App. F, 29a. On September 5, 2012, the Jensen/Johnson family timely filed a Notice of Appeal from the district court order and judgment in the Ninth Circuit Court of Appeals.

## IV. Decision of the Ninth Circuit Court of Appeals

Petitioners appealed the district court's order and judgment enjoining the Jensen/Johnson family from proceeding with their claims in Kayenta District

Court, denying their motion for summary judgment, and terminating the district court action. On December 23, 2015, the Ninth Circuit Court of Appeals issued a Memorandum disposition affirming the order and judgment of the district court that "the Navajo Nation tribal courts may not exercise adjudicatory jurisdiction over a highway accident that occurred on a stretch of U.S. Highway 160—an Arizona state highway—within the exterior boundaries of the Navajo Reservation", App. C, 5a-8a. Petitioners filed a petition for rehearing en banc which the Ninth Circuit denied on February 12, 2015. App. A, 1a-2a.

## REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant the petition for a writ of certiorari and review the Ninth Circuit Court of Appeals' decision:

1. The Ninth Circuit's decision conflicts with Supreme Court precedent requiring courts to conduct a careful examination of tribal sovereignty and a detailed study of relevant treaty and statutory provisions when determining the existence and extent of an Indian tribe's civil jurisdiction over nonmember activities, an examination that compels validation of (1) the Navajo Nation's congressionally confirmed treaty-based jurisdiction over the tour bus/auto collision at issue in this case and (2) the Navajo Nation's jurisdiction to adjudicate the collision based on principles of inherent tribal sovereignty.

2. The Ninth Circuit's decision also improperly sanctions the district court's departure from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's supervisory power, where both lower courts (1) automatically aligned the roadway in question with non-Indian fee land without evaluating unabrogated, congressionally confirmed treaty rights reserving the Navajo Nation's jurisdiction and without considering all the factors demanded by this Court's framework for analyzing inherent tribal sovereignty; (2) failed to apply the consensual relationship exception of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and thus failed to acknowledge that the nonmember conduct in this case—commercial touring of the Navajo Nation—presents a consensual relationship of the qualifying kind, satisfying the first *Montana* exception; and (3) failed to address core sovereign tribal interests—which are implicated in this case and which are "key," according to this Court, to proper application of *Montana*'s exceptions—that validate tribal authority to regulate commercial touring of the Nation and to adjudicate disputes arising from that regulated activity, including the tour bus/auto collision which in this case killed and injured tribal members.

## I. The Decisions of the Ninth Circuit Court of Appeals and the District Court Conflict with Supreme Court Precedent That Requires Courts to Conduct a Detailed and Careful Study of Relevant Statutes, Treaties, and Executive Branch Policy When Determining the Existence and Extent of an Indian Tribe's Civil Jurisdiction over the Conduct of Nonmembers.

The Supreme Court repeatedly has emphasized that courts must conduct "a *careful examination* of tribal sovereignty" when determining "the existence and extent of a tribal court's jurisdiction" over nonmembers in civil cases, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (emphasis added), an exacting requirement that includes "the need to inspect relevant statutes, treaties, and other materials." *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997). Moreover, this Court itself has modeled the required "careful examination" of treaties and statutes as potential sources of tribal authority over nonmembers whenever parties have asserted the existence of such authority. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 687-94 (1993) (examining whether Cheyenne River Sioux Tribe retained treaty right to regulate nonmember fishing and hunting on reservation lands taken by Congress for construction of dam); *Montana*, 450 U.S. at 557-63 (examining whether Crow Tribe retained treaty right to regulate fishing and hunting by nonmembers on non-Indian fee lands within reservation). In *Strate v. A-1 Contractors*, this Court reiterated and underscored the required two-step judicial analysis for ascertaining tribal authority over nonmembers when *both* treaty rights *and* inherent tribal sovereignty are asserted as bases for such authority:

> In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained why those sources did not aid the Tribe's case. *Only after and in light of that examination* did the Court address the Tribe's assertion of "inherent sovereignty," and formulate, in response to that assertion, *Montana*'s general rule and exceptions to it.

520 U.S. at 449-50 (emphasis added) (citation omitted).

Disregarding the two-step analysis required by this Court, the Ninth Circuit's decision wholly neglects to address whether the Navajo Treaty of 1868, together with relevant implementing statutes and corresponding intergovernmental agreements pertaining to the right-of-way at issue in this case, establishes the Navajo Nation's civil jurisdiction over the fatal tour bus/auto collision. *See* App. C, 5a-8a (applying the common-law framework developed in *Strate* for determining tribal jurisdiction *without* first evaluating claim of tribal jurisdiction based on unabrogated, congressionally confirmed treaty rights). *But see Strate*, 520 U.S. at 453 (indicating that the Supreme Court's inherent tribal sovereignty analysis is "[s]ubject to controlling provisions in treaties and statutes" and that tribal jurisdiction is determined pursuant to that analysis "[a]bsent congressional direction enlarging tribal-court jurisdiction"). Failing to apply this Court's two-step method for analyzing claims of tribal jurisdiction based on reserved Indian treaty rights as well as inherent tribal sovereignty, the Court of Appeals instead *automatically* and *categorically* aligned the roadway at issue in this case with non-Indian fee land for jurisdictional purposes. The appellate court thus transgressed the Navajo Nation's

congressionally confirmed treaty rights, effecting an impermissible *judicial* abrogation in excess of the court's authority.

The Court of Appeals repeated the district court's similar failure to carefully examine "controlling provisions in treaties and statutes," *id.*, not once mentioning within its decision the 1868 Treaty upon which the Navajo Nation asserts its jurisdiction to adjudicate the tour bus/auto collision in this case. Instead of conducting the treaty and statutory analysis required by this Court, the Ninth Circuit sanctioned the district court's dismissal of the Nation's treaty-based jurisdiction in a single sentence, stating that "in this case, as in *Strate*, [Petitioners] fail to point to a treaty or statute authorizing the Navajo Nation to entertain highway-accident tort suits of the kind that [Petitioners] commenced against [Respondents]." App. F, 21a. The district court searched within the Navajo Treaty for a specific authorization to adjudicate motor vehicle-related tort suits—which, of course, will not be found in a nearly century-and-a-half-old treaty[1]—and thereby contravened longstanding canons of Indian treaty construction, most notably this Court's reserved rights doctrine, pursuant to which an Indian treaty is construed as "not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905).

1. As this Court noted in *Merrion v. Jicarilla Apache Tribe*, Congress "outlawed any future treaties with Indian tribes" in 1871. 455 U.S. 130, 161 & n.2 (1982) (discussing end-of-treatymaking statute, 25 U.S.C. § 71).

Furthermore, the district court's summary dismissal of treaty rights misapprehends *Strate* in conflating the *residual inherent sovereignty* analysis exemplified by that case with an analysis for *tribal authority derived from unabrogated and congressionally confirmed treaty rights*, the very kind of analysis this Court clarified was never undertaken in *Strate*. *See Strate*, 520 U.S at 456 (noting that the *Strate* petitioners "refer to no treaty or statute authorizing" tribal authority and that they instead "ground their defense of tribal-court jurisdiction exclusively on the concept of retained or inherent sovereignty"); *see also id.* at 445 (citation and internal quotation marks omitted) (defining "the inherent sovereign powers of an Indian tribe" as "those powers a tribe enjoys apart from express provision by treaty or statute"). *Cf. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 421-28 (1989) (emphases added) (examining "whether the Yakima Nation has the authority, derived *either* from its treaty with the United States *or* from its status as an independent sovereign," disposing of the treaty claim, and *then* turning to address the remaining claim of "inherent sovereignty independent of [treaty-based] authority"). By confusing and conflating this Court's separate analytical frameworks for (1) tribal power derived from treaty and statutory provisions, on the one hand, and (2) residual inherent tribal sovereignty, on the other, both the district court and the Court of Appeals ignored the methodology prescribed by this Court for ascertaining tribal authority stemming from treaty and statutory sources, a methodology this Court articulated and applied in *Bourland*, *Brendale*, and *Montana*—i.e., in cases which, unlike *Strate*, involved assertions of tribal jurisdiction over nonmembers derived from *both* sources.

The Court of Appeals improperly sanctioned the district court's departure from this Court's method for analyzing the issue of treaty-based and statutorily confirmed authority, and thus failed to reach the correct conclusion: the Navajo Nation's jurisdiction over the tour bus/auto collision at issue in this litigation exists pursuant to reserved treaty rights confirmed by Congress. As this Court ruled in *Montana*, treaty language reserving Indian lands for a tribe's exclusive use and occupation is a valid source of tribal jurisdiction to regulate the conduct of nonmembers unless Congress has abrogated those rights. Noting that the Ninth Circuit Court of Appeals in *Montana* properly had "[relied] on the treaties of 1851 and 1868," this Court stated:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe *or held by the United States in trust for the tribe*, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.

450 U.S. at 550 (emphasis added). Later, in *Strate*, this Court reiterated that *Montana* had given "unqualified recognition . . . that 'the [Crow] Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe.' " 520 U.S. at 445, 454 n.8 (quoting *Montana*, 450 U.S. at 557). Because the Navajo Treaty of 1868 affirms the Nation's rights of "exclusive use and occupation" within its reservation, App. J, 78a-80a—in

terms virtually identical to language this Court validated as sufficient for establishing the Crow Tribe's authority over nonmember fishing and hunting on reservation trust lands in *Montana*—the Nation's treaty-based authority remains intact unless abrogated by Congress.

This Court has formulated a test for determining whether Congress has abrogated Indian treaty rights. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)) ("There must be '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.' "). In *South Dakota v. Bourland* this Court undertook the required abrogation analysis—applying the *Dion* test—and concluded that "Congress abrogated the [Cheyenne River Sioux] Tribe's right to regulatory control in the taken area through the Flood Control and Cheyenne River Acts"; *only then* did the Court turn to the *additional and separate* question of whether the tribe retained regulatory authority pursuant to principles of inherent tribal sovereignty. 508 U.S. at 687-96; *see also Strate,* 520 U.S. at 447 n.6 (noting that in *Bourland* the Court "determined, dominantly, that no treaty or statute reserved to the Tribe regulatory authority over the area"). *Cf. Brendale*, 492 U.S. at 421-25 (addressing and disposing of (1) claim of tribal authority over nonmembers derived from allegedly unabrogated treaty rights *separately and apart from* (2) claim of "inherent sovereignty independent of that authority").

A proper examination by the federal courts, in accordance with this Court's relevant precedents, would

conclude that the Navajo Nation retains authority, pursuant to the Navajo Treaty of 1868, to adjudicate the highway collision arising out of the tribally regulated activity at issue in this case. Indeed, in enacting the Navajo-Hopi Rehabilitation Act of 1950, which funded construction of the Navajo reservation roadway on which the collision occurred, Congress, far from abrogating the Nation's treaty-based authority, stated explicitly that funds were appropriated "in order to *further the purposes of existing treaties with the Navajo Indians*," 25 U.S.C. § 631 (emphasis added), App. I, 69a; App. K, 81a. Congress's treaty-preserving objective in the Act was expressly acknowledged in *Warren Trading Post Company v. Arizona State Tax Commission*, where this Court noted that Congress had funded construction of this same roadway "*in compliance with its treaty obligations.*" 380 U.S. 685, 690 & n.17 (1965) (emphasis added) (citing 64 Stat. 44, as amended, 25 U.S.C. §§ 631-640 (1958 ed.)). Furthermore, when the Arizona State Highway Commission "accept[ed] all right, title, and interest to said right-of-way . . . formerly vested in the Bureau of Indian Affairs," the state itself expressly "agree[d] to be bound by and fulfill all the obligations, conditions, and stipulations in said right-of-way, and the rules and regulations of the Secretary of Interior applicable thereto." App. F, 29a; App. H, 40a.[2] Manifestly, the United States' treaty obligations to the Navajo Nation are among the "obligations,

2. Other intergovernmental agreements pertaining to construction and development of the roadway at issue in this case, as authorized by Congress, further evince the understanding of the Navajo Nation, the United States, and the state of Arizona that the Navajo Nation's consent to the grant of a limited right-of-way neither ceded tribal jurisdiction nor relinquished reserved treaty rights. *See* App. H, 39a-41a.

conditions, and stipulations" to which the state of Arizona "agree[d] to be bound." By disregarding this Court's directives for examining reserved treaty rights, the Court of Appeals (1) in effect *judicially* abrogated those rights, (2) contradicted Congress's statutory intent, and (3) failed to heed this Court's admonitions regarding the subordinate role of the judiciary in matters of Indian policy. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) (declining to reverse this Court's prior decision deferring to congressional Indian policy because "that action would replace Congress's considered judgment with our contrary opinion").

The legislative history of the Navajo-Hopi Rehabilitation Act of 1950 reinforces this Court's observation that Congress had funded this roadway "in compliance with its treaty obligations." *Warren Trading Post Co.*, 380 U.S. at 690 & n.17. A proposed (and ultimately defeated) precursor to the 1950 Act—a 1949 bill whose Senate version was titled S. 1407—would have altered the Navajo Nation's sovereignty and autonomy by allowing the state of Arizona to exercise concurrent jurisdiction within the Navajo Reservation. *See Williams v. Lee*, 358 U.S. 217, 222 n.9 (1959) (briefly summarizing legislative history of Navajo-Hopi Rehabilitation Act). The controversial, and rejected, portion of the bill, section 9, provided, in relevant part:

> From and after the effective date of this Act, all Indians within the tribal and allotted lands of the Navajo and Hopi Reservations shall be subject to the laws of the State wherein such lands are located, and shall have access to the courts of such State for the enforcement of their

> rights and the redress of wrongs to the same extent and in the same manner as any other citizen thereof . . . .

H.R. No. 1338, 81st Cong., 1st Sess. (1949) (Conference Report on Bill (S. 1407) Promoting Rehabilitation of Navajo and Hopi Indians). However, the drafters of the bill included additional language which sought to assure that the affected tribes' preexisting treaty rights and jurisdiction would be fully preserved:

> And provided further, That nothing in this Act provided shall be deemed to impair the terms and obligations of any existing statute or treaty between the United States Government and the said Indians, nor take away the jurisdiction now exercised by the Federal Government or the tribe, but in all cases the jurisdiction of the State, the Federal, and tribal courts shall be concurrent.

*Id.*

Notwithstanding the proposed bill's express concession that section 9 would leave all existing Navajo treaty rights unimpaired and the Tribe's jurisdiction undiminished, President Truman vetoed the bill because of his concern that section 9 nevertheless would violate the Navajos' treaty-based sovereignty and autonomy within the Navajo Reservation:

> I have withheld my approval with reluctance and only after the most careful consideration of all the provisions of S. 1407. The bill contains

> many meritorious features. In fact, its only objectionable provisions are those of section 9 which, with some qualifications, extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under Federal and tribal laws and courts. Section 9 is heavily weighted with possibilities of grave injury to the very people who are intended to be the beneficiaries of the bill. Its many serious defects outweigh, in my judgment, the merits of the rest of the bill.

95 Cong. Rec. 14,784 (1949) (veto message of President Harry S. Truman). Specifically, the President stated that he objected to what he regarded as the bill's "serious threats to the basic rights of these Indians," including "the tribal practices and customs governing the descent and distribution of personal property upon death." In more general terms, the President stated that section 9 was objectionable because

> its avowed purpose of accomplishing a broad-scale extension of State laws to the Navajo and Hopi Reservations is in conflict with one of the fundamental principles of Indian Law accepted by our nation, namely, the principle of respect for tribal self-determination in matters of local government. The Congress and the executive branch have repeatedly recognized that so long as Indian communities wished to maintain, and were prepared to maintain, their own political and social institutions, they should not be forced to do otherwise.

*Id.* The President added that the Navajo Nation's objections to section 9 played a critical role in his decision to veto the bill:

> In reaching my decision to veto S. 1407, I have been greatly influenced by the attitude of the Navajo Indians toward the bill. The Navajo Tribe includes about 65,000 of the approximately 70,000 Indians affected by S. 1407. They greatly favor the long-range rehabilitation program which the bill proposes. But much as they favor the constructive provisions of the bill, they fear section 9 more. This is indicated by the fact that at a meeting held on October 13, 1949, after final congressional action on the bill, the Navajo Tribal Council, the tribe's governing body, adopted a resolution urging that I veto S. 1407.

*Id.*

In response to the presidential veto, Congress eventually enacted a revised bill which "eliminate[d] all of the provisions of Section 9 which refer[red] to the applicability of State civil and criminal laws and court jurisdiction on the Navajo-Hopi Reservations." S. Rep. No. 1202, 81st Cong., 1st Sess. (1949); Act of Apr. 19, 1950, ch. 92, 64 Stat. 44; *see also Williams*, 358 U.S. at 222 n.9 ("After the objectionable features of the bill were deleted it was passed again and became law."). The enactment of this redrafted bill occurred after the House of Representatives also rejected a proposed amendment that would have extended state authority on the Navajo Reservation with respect to a limited number of subject matters, including "regulation of automotive traffic."

96 Cong. Rec. 2085-2094, 2089 (1950) (transcript of House debate over Senate Bill 2734). Rejecting even this proposed extension of limited state authority, Congress enacted the finalized version of the bill that provided, *inter alia*, that reservation roadways were to be developed "in order to further the purposes of existing treaties with the Navajo Indians," 25 U.S.C. § 631. The text and legislative history of the Act foreclose any argument that Congress abrogated the Navajo Nation's treaty-based jurisdiction over nonmember conduct occurring within the Navajo Reservation.

## II. The Decisions of the Ninth Circuit Court of Appeals and the District Court Disregard and Misapply Many of This Court's Directives for Determining Whether Tribal Civil Jurisdiction over Nonmember Conduct Exists as a Matter of Residual Inherent Tribal Sovereignty.

The requirement that federal courts conduct "a careful examination of tribal sovereignty" when determining "the existence and extent of a tribal court's [civil] jurisdiction" over nonmembers, *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 855-56, applies as fully to claims of tribal governance based on *inherent tribal sovereignty* as it does to claims of treaty-derived tribal power, as many common-law decisions of this Court illustrate. *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 445-60 (1997). In the instant litigation, both the district court and the Ninth Circuit utterly ignored this requirement, issuing perfunctory analyses and decisions in sharp conflict with

numerous directives carefully delineated by this Court in the "*Montana-Strate* line of authority," *Atkinson Trading Co.*, 532 U.S. at 653.

### A. The Ninth Circuit and District Court Decisions Disregard the Analysis Required by This Court for Determining the Status of a Roadway—in This Case, U.S. Highway 160—for Nonmember Governance Purposes.

In addressing whether the Navajo Nation possesses inherent sovereign authority to adjudicate claims of enrolled Navajos injured and killed in the tour bus/auto collision at issue in this case, the Court of Appeals summarily "aligned" the roadway in question with non-Indian fee land for nonmember governance purposes, based solely on the Navajo Nation's consent to the grant of a limited right-of-way across tribal trust land. App. C, 7a. The Ninth Circuit and the district court thus improperly treated the grant of a limited right-of-way over tribal trust land as requiring, *ipso facto*, automatic alignment of the roadway with non-Indian fee land. The Court of Appeals' decision ignores the multifactor, context-specific analysis required by *Strate* for determining the jurisdictional status of a roadway constructed across tribal trust lands. The Court of Appeals' *per se* approach to the land status issue, like that of the district court, squarely conflicts with this Court's controlling precedent.

The Ninth Circuit's decision posits that Petitioners "conceded at oral argument that the Navajo Nation has not retained the right to exclude nonmembers on U.S. Highway 160. Consequently, the highway is the equivalent of non-Indian fee land for jurisdictional purposes and this

case is governed by *Strate v. A-1 Contractors*." App. C, 7a. To be sure, Petitioners "conceded" (as previously stated in briefing to the Court of Appeals) only that the Navajo Nation granted a right-of-way, for limited purposes, that is open to the public and that permits free passage to persons merely "passing through" on U.S. Highway 160; but Petitioners emphasized that the Navajo Nation retains authority *to detain and exclude tour operators conducting commercial activities in violation of the Nation's laws. See* 5 N.N.C. § 2504, App. L, 84a-85a. Far from adopting a *per se* rule for determining the jurisdictional status of reservation roadways, this Court in *Strate* identified and applied a number of *other* factors—*in addition to* the tribes' allowing public access to a state-maintained highway—which *also* must be considered. *See Strate*, 520 U.S. at 454-56 (determining whether to align on-reservation right-of-way with non-Indian fee land in light of, *inter alia*, (1) the congressional purpose for constructing the roadway, (2) the extent to which the granting instrument reserved specific rights to the tribe, and (3) whether the tribe received compensation for use of the land). Further, this Court intimated that the jurisdictional status of any particular right-of-way must be ascertained in the context of congressional policy governing that right-of-way. *See id.* at 454 & n.9 (referring to Congress's "contextual treatment of rights-of-way" when judicially concluding that "[o]n the particular matter before us" the "6.59-mile stretch" of highway at issue in *Strate* was "equivalent, for nonmember governance purposes, to alienated, non-Indian land").

In this case the Court of Appeals and the district court, whose erroneous "bright-line" approach to the issue the appellate court sanctioned, ignored both

(1) *Strate*'s multifactor analysis for determining the status of a reservation roadway and (2) congressional policy specifically confirming the Navajo Nation's authority over this same roadway. *See* Ninth Circuit's Memorandum disposition, App. C, 7a (concluding "the highway is equivalent of non-Indian fee land for jurisdictional purposes" based on the erroneous conclusion that, without limitation, "the Navajo Nation has not retained the right to exclude nonmembers on U.S. Highway 160").[3] Had the Court of Appeals and the district court carefully examined *all* the factors required by *Strate*—especially the distinctly *tribal* interests Congress meant to promote in constructing Navajo Indian Route 1[4]—they would have

3. The District Court's decision, affirmed by the Ninth Circuit, validates the Navajo Nation's authority to regulate commercial tourism within the reservation generally, *see* App. F, 23a-25a, but the Ninth Circuit failed to recognize the Nation's authority to exclude from U.S. Highway 160 any tour operators who violate Navajo Nation law and to adjudicate claims arising from a collision that occurred while nonmembers were engaged in commercial touring. *Cf. Strate*, 520 U.S. at 453 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (alterations added by the *Strate* Court)) ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' ").

4. Congress's construction of the roadway in this case served distinctly tribal interests, namely, (1) "to further the purposes of existing treaties with the Navajo Indians"; (2) "to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo . . . Tribe[ ]"; and (3) "to promot[e] a self-supporting economy and self-reliant communities, and . . . diversified economic activities." App. K, 81a. Another express purpose of the Act was "to facilitate the fullest possible participation of the Navajos in the administration of their affairs." *Id.*, 81a-82a. The tribal purposes stated in the

arrived at the correct conclusion: the limited right-of-way where the fatal collision occurred *retains* its status as tribal trust land for nonmember governance purposes.[5]

### B. The Ninth Circuit and District Court Decisions Disregard and Misapply This Court's Directives for Determining Whether Tribal Civil Authority over Nonmember Conduct Exists Pursuant to the Two *Montana* Exceptions, Both of Which Validate the Navajo Nation's Inherent Sovereign Power to Adjudicate the Tour Bus/ Auto Collision in This Case.

The Court of Appeals' decision conflicts with numerous Supreme Court precedents in concluding that

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text of the Navajo-Hopi Rehabilitation Act are strongly supported by the Act's unique legislative history. *See* discussion *supra*, pp. 19-23.

5. Whether the ownership status of land within an Indian reservation remains a threshold determination triggering application of *Montana*'s presumption against tribal jurisdiction over the conduct of nonmembers is a question over which the federal appellate courts may be divided. *Compare, e.g., Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 814 (9th Cir. 2011) (holding, in case "where the non-Indian activity in question occurred on tribal land," that "the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*"), *with Dolgencorp v. Mississippi Band of Choctaw Indians,* 746 F.3d 167, 171-75 (5th Cir. 2014) (applying *Montana* presumption against tribal jurisdiction, without addressing issue of land status, in case where nonmember conduct allegedly occurred on land held in trust by the United States for tribe and leased by the tribe to nonmember corporation for operation of a store), *cert. granted*, 83 U.S.L.W. 3006 (__U.S.__, June 15, 2015) (No. 13-1496).

*Montana*'s first exception[6] categorically cannot apply to nonmember conduct on a roadway over which the Navajo Nation has, to *any* extent, relinquished its right to occupy and exclude. "This exception does not apply to this case," the Court of Appeals wrote, "because the unsigned permit agreement—even if binding on [Respondents]—did not provide sufficient notice EXC would be subject to tribal court jurisdiction on U.S. Highway 160 to be a basis for imputing consent." App. C, 7a. This statement duplicates the error of the district court, which opined that the permit agreement's language requiring tour bus companies' consent to Navajo jurisdiction over activities "on lands within the jurisdiction of the Navajo Nation," App. L, 90a, cannot extend to conduct on a highway right-of-way deemed to be the equivalent of non-Indian fee land. App. F, 2a. According to the district court, the permit language

> cannot encompass the stretch of land maintained as part of the State's highway because the Nation's right to occupy and exclude does not extend to that stretch of land. Accordingly, even if [Respondents] had followed the Nation's laws and entered into the Agreement regulating touring services, the contents of that Agreement do not give rise to an implication of consent by [Respondents] to the tribal court exercising jurisdiction over them for the automobile accident that occurred on the State's Highway.

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6. In *Strate* this Court summarized the two *Montana* exceptions: "The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." 520 U.S. at 446.

> Therefore, the highway accident at issue in this case does not fall within a consensual relationship as required by *Montana*'s first exception.

App. F, 27a.

This analysis by the district court, which the Court of Appeals summarily adopted, directly conflicts with this Court's application of *Montana*'s exceptions. In *Strate*, this Court's finding that the tribes in that case had lost rights to use and occupy the roadway was simply one of several factors for aligning it with non-Indian fee land for nonmember governance purposes, an alignment that triggered analysis of the *Montana* exceptions. *See Strate*, 520 U.S. at 456 ("We . . . align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case."). Failing to follow *Strate*, the district court instead relied on its finding regarding the status of the roadway to *forego* further analysis and prematurely deny tribal jurisdiction *without actually applying* the first *Montana* exception.

Because the district court and the Ninth Circuit, *see* App. C, 7a-8a, both improperly relied on their alignment of the roadway *alone* as the bases for their ultimate rulings denying tribal jurisdiction, *they failed to proceed to analyze* the existence and extent of the Navajo Nation's jurisdiction *under* the first *Montana* exception. The conflict could not be clearer between (1) the decisions of the district court and the Court of Appeals in this litigation declining to apply *Montana*'s first exception because the nonmember conduct occurred on land deemed to be the equivalent of non-Indian fee land and (2) the

binding precedents of this Court applying *Montana*'s exceptions *almost exclusively* on such non-Indian land or its equivalent. *See, e..g., Atkinson Trading Co.* 532 U.S. at 649-51; *Strate*, 520 U.S. at 456; *Bourland*, 508 U.S. at 686-90; *Montana*, 450 U.S. at 565-66.

The district court and the Court of Appeals thus failed to adhere to this Court's clear guidance for determining whether the first *Montana* exception in fact is satisfied, i.e., whether the nonmember conduct at issue presents a "consensual relationship of the qualifying kind." *Strate*, 520 U.S. at 457 (citation and internal quotation marks omitted). For instance, the lower courts failed to properly apply this Court's directive that under *Montana*'s consensual relationship exception, consent may be established "expressly *or by [the nonmember's] actions*." *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 337 (2008) (emphasis added). This disregard is all the more surprising in light of the district court's concession—which the Court of Appeals implicitly accepted—that "[t]here is no question that the Navajo Nation has the right to regulate tourism on the reservation" and that the Express Charter companies "cannot claim that, by ignoring the [Navajo] Nation's laws, they have not consented to the Nation's jurisdiction." App. F, 25a. A "consensual relationship of the qualifying kind" was established in this case by the *actions* of the Express Charter companies in entering the reservation to *conduct* commercial touring activities, without any need to consent in writing to the inherent jurisdiction of the Navajo Nation courts.

The decisions of both the Court of Appeals and the district court likewise dispose of *Montana*'s second

exception in a manner that sharply conflicts with this Court's precedents. The Court of Appeals confined its analysis to a single conclusory statement: "A tort suit arising out of a state highway accident does not implicate the second *Montana* exception." App. C, 8a. The appellate court's perfunctory denial of tribal jurisdiction over a tort suit arising from an on-reservation highway collision flouts this Court's careful guidance for analyzing tribal jurisdiction under the second *Montana* exception. "Key to its proper application," this Court explained in *Strate*, is judicial consideration of whether the tribe's asserted authority " 'is necessary to protect tribal self-government or to control internal relations.' " *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). In the most recent decision articulating proper application of the *Montana-Strate* framework, this Court stated that ascertaining tribal authority by reference to the tribe's "sovereign interests in protecting its members and preserving tribal self-government" or in "managing tribal land" is *required* with respect to *both Montana* exceptions. *Plains Commerce Bank*, 554 U.S. at 334, 336; *see also id.* at 341 ("The second *Montana* exception stems from the same sovereign interests that give rise to the first . . . .").

The same sovereign interests that this Court requires be judicially addressed are clearly implicated in the Navajo Nation's assertion of authority to regulate commercial tourism and adjudicate the tour bus/auto collision at issue in this case.[7] When the fatal tour bus/

7. Congress's funding construction of Navajo Indian Route 1 in the Navajo-Hopi Rehabilitation Act made possible commercial tourism which the Navajo Nation sought later to regulate by its enactment of the Tour and Guide Services Act. The Navajo Nation fulfilled purposes specified by Congress in funding improvements

auto collision occurred, Respondents were engaged in commercial touring, a heavily regulated activity that is intimately connected with the Nation's sovereign interest in "managing tribal land," *id.* at 334, circumstances that perfectly satisfy this Court's requirement that the particular governing authority "imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656. Yet the Court of Appeals' decision disregards the Navajo Nation's core sovereign interests in this case, evading consideration of an essential jurisdictional factor that this Court has stated is "[k]ey to . . . proper application" of the second *Montana* exception. *Strate*, 520 U.S. at 459; *see also Plains Commerce Bank*, 554 U.S. at 335 (noting that pursuant to proper application of *Montana*'s exceptions tribes "may

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to the Nation's infrastructure. *See* 25 U.S.C. §§ 631 & 636; App. K, 81a-83a. Accordingly, the congressionally supported core sovereign interests of the Navajo Nation are implemented through enactment and enforcement of the Tour and Guide Services Act, by which the Nation (1) exercises its retained treaty rights by defining the conditions upon which commercial touring businesses may enter and tour the Navajo Reservation and by asserting the Nation's treaty-based power to exclude those tour businesses that do not conform to its laws; (2) promotes economic development by raising revenue through the collection of permit fees and by regulating the commercial touring industry, an important component in the economic development plan of the Navajo Nation; (3) protects the health and welfare of Navajo people by prescribing safety rules for the touring industry, by requiring proper licensing and proof-of-insurance for drivers and vehicles traversing the Reservation, and by requiring written acknowledgment of tribal court jurisdiction; and (4) more fully participates in the administration of the its own affairs by regulating commercial activities on tribal lands, by providing needed governmental services, and by establishing an effective and broad-based court system. App. K, 81a-84a.

regulate nonmember behavior that implicates tribal governance and internal relations").

This case, if properly analyzed, involves exceptionally strong interests in both tribal self-government and internal relations. Denying Navajo civil jurisdiction to adjudicate Respondents' claims would seriously imperil the Nation's development of its own common law. At stake, for example, is the Navajo Nation's authority to define the qualified beneficiaries of a wrongful death estate pursuant to Navajo law, which differs significantly from state law. *Compare In re Estate of Tsinahnajinnie*, No. SC-CV-80-98 (Navajo Sup. Ct. 2001), 8 Nav.R. 69 (2001) (holding that under Navajo law, all members of decedent's "immediate family" are qualified as beneficiaries of wrongful death estate), *with* Ariz. Rev. Stat. Ann. Section 12-612 (2015) (stating wrongful death action may be brought under Arizona law only "by or in the name of the surviving husband or wife, children or parents" and that wrongful death proceeds can be distributed only to these named beneficiaries). At risk too is the Nation's ability to determine the circumstances under which injury to, or death of, a Navajo child *in utero* is compensable. *Compare EXC, Inc. v. Jensen*, No. SC-CV-07-10, (Nav. Sup. Ct. 2010), App. I, 69a-70a, (finding injury or death to unborn child *in utero* compensable under Navajo law from point of conception), *with Summerfield v. Superior Court*, 698 P.2d 712, 722 (Ariz. 1985) (en banc) (holding Arizona does not recognize right of recovery for wrongful death of unborn child who is not viable).

These core sovereign interests, so crucial to the Navajo Nation's self-government and internal social and political life, are strengthened by Congress's preemption of state

jurisdiction over Navajo Indians through congressional enactment of the Navajo-Hopi Rehabilitation Act. *See* discussion *supra*, pp. 19-23. *Cf. Strate*, 520 U.S. at 458 (noting that in cases cited in *Montana* after formulation of the second *Montana* exception "the character of the tribal interest" was evaluated to determine "whether a State's . . . exercise of authority would trench unduly on tribal self-government" so as to amount to "impermissible intrusion" on tribal jurisdiction). Although the threshold established by this Court for satisfying the second *Montana* exception is high, *see, e.g., Atkinson Trading Co.*, 532 U.S. at 659 (citation and internal quotation marks omitted) (intimating that "the impact of the nonmember's conduct must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe"), proper judicial analysis of the unique facts and circumstances of this case—including the character of the Navajo Nation's sovereign interests as well as Congress's statutory promotion of those interests and its preemption of state jurisdiction with respect to the very roadway at issue—compels the conclusion that the threshold is satisfied here. *See also Williams v. Lee*, 358 U.S. 217, 222 (1959) (emphasis added) (referring to the Navajo-Hopi Rehabilitation Act in stating that "Congress . . . [has] assisted in strengthening the Navajo tribal government *and its courts*").

This Court recently declared that "[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014). Congress has defined the contours of Navajo Nation sovereignty and has statutorily preserved Navajo treaty rights with respect to the very roadway at issue in this case.

App. K, 81a; *see also Bay Mills*, 134 S.Ct. at 2039 (citations omitted) (recognizing that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty"). Yet the decision of the Ninth Circuit Court of Appeals tramples Congress's express protection of the Navajo Nation's treaty-based authority, *judicially* abrogating the treaty by categorically aligning the roadway with non-Indian fee land. The Ninth Circuit decision conflicts in numerous ways, moreover, with Supreme Court precedent the Court of Appeals purported to follow. *See, e.g., Strate*, 520 U.S. at 446 (emphasis added) (noting rule of *Montana* that generally denies tribal authority over nonmembers applies "*absent a different congressional direction*"); *id.* at 454-56 (prescribing multifactor analysis for deciding how to "align" highway right-of-way); *id.* at 456-59 (requiring consideration of tribe's core sovereign interests when determining if *Montana* exceptions are satisfied). By ignoring the Navajo Nation's treaty-based jurisdiction and misapplying this Court's rules for analyzing issues of inherent sovereignty as well, the Ninth Circuit decision collides head-on with many Supreme Court precedents. *Cf. Bay Mills*, 134 S. Ct. at 2039 (cautioning against judicial decision-making that "would entail both overthrowing our precedent and usurping Congress's current policy judgment").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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