No. 05-10357

IN THE
Supreme Court of the United States

JAMES SMITH,
Petitioner,

v.

SALISH KOOTENAI COLLEGE, A MONTANA CORPORATION, AND THE COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

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

RESPONDENT TRIBAL COURT OF APPEALS' BRIEF IN OPPOSITION

John T. Harrison
Counsel of Record
Ranald McDonald
TRIBAL LEGAL DEPARTMENT
CONFEDERATED SALISH AND KOOTENAI TRIBES
Post Office Box 278
51383 Highway 93 North
Pablo, Montana 59855-0278
(406) 675-2700; Fax: 675-4665
Counsel for Respondent Court of Appeals of the Confederated Salish and Kootenai Tribes

QUESTION PRESENTED

The Respondent Confederated Salish and Kootenai Tribal Court of Appeals restates the issue before this Court as follows: Should this Court review a decision of the Ninth Circuit Court of Appeals that found a tribal court had jurisdiction over a non-tribal member's tort claim against a tribal entity for alleged reservation based negligence where the non-tribal member expressly consented to the exercise of jurisdiction pursuant to tribal law?

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BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because it presents no issue worthy of this Court's attention. An *en banc* panel of the Ninth Circuit Court of Appeals held that tribal court jurisdiction is proper when a non-member plaintiff elects the tribal court forum to litigate tort claims against an Indian defendant for alleged reservation based negligence. That decision made no new law. Quite to the contrary, the *en banc* panel based its decision entirely on this Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Williams v. Lee*, 358 U.S. 217 (1959). By grounding its legal analysis in this Court's precedent, the *en banc* panel's decision remains faithful to this Court's well established federal Indian law precedent.

Smith seeks to manufacture a conflict between federal circuit courts by recasting the decision below as "dictat[ing] that the act of exhausting one's remedies in the tribal court system operates to establish subject-matter jurisdiction where it would not otherwise exist." Pet. at 9, ¶ 2. Smith concludes that the Ninth Circuit has rendered a "distortion" of this Court's tribal court exhaustion doctrine, thus placing the Ninth Circuit in conflict with this Court, as well as other circuits. *Id.* However, the record in this case bears no resemblance to Smith's assertion that he was simply exhausting his tribal court remedies when he litigated his claim on the merits in tribal court. Rather, the *en banc* panel's finding of tribal court jurisdiction was based on a strict following of this Court's path-marking cases for

examining tribal court jurisdiction set out in *Montana* and *Williams*. This is a case that turns on its facts, not on any new law allegedly announced by the Ninth Circuit. Smith's claim that there is conflict among the circuits regarding tribal exhaustion is an after-the-fact argument crafted from whole cloth. Since there is no conflict, review by this Court should be denied.

This case rests on its facts. No extraordinary circumstances justify review. Despite the sometimes complex jurisdictional structure of federal Indian law, most plaintiffs (unlike Smith) do not affirmatively pursue a claim in tribal court and then, upon an adverse jury verdict, initiate a first-time challenge of the court's jurisdiction to hear the case just litigated. Hence the absence of published opinions on tribal court jurisdiction addressing any case with a procedural history similar to Smith's. Because this case turns on its uncommon facts, it is unlikely the issue it presents will arise frequently, if at all. Smith's assertion that the decision below creates new legal precedent is wrong, as the Ninth Circuit rendered its decision through a textbook application of this Court's established precedent for determining tribal court jurisdiction. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. Factual and Procedural Background

In the interest of judicial economy, the Tribal Court of Appeals incorporates by reference the factual and procedural history as presented in the Brief in Opposition from Salish and Kootenai College (SKC), with the following summary:

Smith proceeded as the plaintiff in the Confederated Salish and Kootenai

Tribes' (CSKT) Tribal Court and lost a jury verdict. He then challenged the CSKT Tribal Court's jurisdiction for the first time. The Tribal Court found jurisdiction was proper, and this was affirmed by the Tribal Court of Appeals. The federal district court affirmed tribal court jurisdiction and declined to allow Smith to relitigate the case in the federal system. A three judge panel of the Ninth Circuit Court of Appeals overturned the district court and found no tribal jurisdiction. The Tribal Court of Appeals and SKC petitioned for *en banc* review of the three judge panel decision based on a conflict created between that panel's decision and the Ninth Circuit's opinion in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002), coupled with an improper application of this Court's path-marking decision in *Montana v. United States*, 450 U.S. 544 (1981). The Ninth Circuit granted *en banc* review. Pet. App. 32a.

B. The Ninth Circuit's *En Banc* Decision

Eight of the eleven judges on the *en banc* panel of the Ninth Circuit voted to reverse the three judge panel and affirm the federal district court's finding of tribal court jurisdiction. Pet. App. 1a. Judge Gould wrote a dissent in defense of the three judge panel opinion he had penned, joined by two other judges.

Writing for the majority of the *en banc* panel, Judge Bybee stated up front: "Our analysis of the tribal court's jurisdiction starts with the Supreme Court's decision in *Montana*, a 'pathmarking case concerning tribal civil authority over nonmembers.'" Pet. App. 6a, ¶ 1 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)). The *en banc* panel went on to examine the particular facts of this case

using this Court's framework for determining tribal court jurisdiction under the *Montana* line of cases, noting that tribal jurisdiction over non-members is generally not found, subject to two 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." Pet. App. 7a, ¶ 1 (quoting *Montana*, 450 U.S. at 465; *Strate*, 520 U.S. at 446).

The *en banc* panel notes that this Court has stated that the membership status of the uncontesting party counts as an important jurisdictional factor. Pet. App. 8a, ¶ 1 (citing *Nevada v. Hicks*, 533 U.S. 353, 382 (2001)) (Souter, J., concurring). The *en banc* panel then provided a detailed examination of the status of SKC and found it to be a tribal entity. Pet. App. 11a - 13a. The *en banc* panel referenced the fact that this conclusion was consistent with other circuits' examination of tribal colleges and tribal entities similar to SKC. *Id.* Relying on this Court's statements pertaining to the relevant nature of party status from *Hicks*, 533 U.S. at 358 & n. 2, as well as *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854-55 (1985), Judge Bybee expressed the *en banc* panel's puzzlement with the dissent's "insistence that the *Montana* 'framework applies to legal actions involving 'nonmembers' without limitation,' and that we have 'err[ed]' in holding that jurisdiction may turn on 'whether the nonmember party is a plaintiff or defendant.'" Pet. App. 9a, n. 3 (quoting dissent at 25a-26a).

After a lengthy and careful analysis of controlling precedent from this Court,

the *en banc* panel concluded that tribal court jurisdiction was proper under the first *Montana* exception (consensual relationship). In rejecting the three judge panel's holding that the first *Montana* "consent" exception is limited to written agreements only, Judge Bybee wrote: "We are of the opinion that, even though his claims did not arise from contracts or leases with the Tribes, Smith could and did consent to the civil jurisdiction of the Tribes' courts." Pet. App. 16a, ¶ 2. The *en banc* panel also noted that the factual situation of this case might fit within the second *Montana* exception (non-member's conduct has direct effect on the political integrity, economic security, or health or welfare of the tribe) in as much as Smith's lawsuit was a tort claim naming a tribal entity located on tribal land as the defendant. Pet. App. 15a, ¶ 3 - 16a. The *en banc* panel went on to explain that denying the tribal court jurisdiction to hear such a case could "seriously limit the tribe's ability to regulate the conduct of its own members through tort law." *Id.* However, because this case "fits more comfortably" within the first *Montana* exception, the majority found tribal court jurisdiction on this basis alone. Pet. App. 16a, ¶ 1.

Like the district court before, the *en banc* panel went on to find the case most analogous to Smith's was *Williams*, a decision this Court has held out as exemplifying the first *Montana* exception for tribal court jurisdiction. "Smith is within the *Williams* rule. Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against SKC." Pet. App. 17a, ¶ 3. The *en banc* panel noted that this Court continues to rely on *Williams* in

its tribal jurisdiction cases. "The [Supreme] Court's recent decisions in *Hicks* and *Strate* reaffirm the validity of *Williams*." Pet. App. 17a, ¶ 2. The *en banc* panel continued, "[m]ost recently, in *Hicks*, the Court cited *Williams* as an example of 'private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they...entered into.'" *Id.*, (quoting *Hicks*, 533 U.S. at 372). Furthermore, "the [Supreme] Court made clear that *Williams* was a case involving 'claims brought against tribal defendants.'" *Id.*

From start to finish the *en banc* panel utilized this Court's bedrock precedent for analyzing tribal court jurisdiction, concluding that tribal court jurisdiction in this case was consistent with the first *Montana* exception. The issue of tribal court exhaustion was not a factor in the *en banc* panel's decision, nor did the dissent mention it. Signifying that tribal exhaustion was not an issue in this case, the *en banc* panel simply disposed of the matter in a footnote by reciting this Court's precedent on tribal court exhaustion, and noting that the district court did not issue its decision until Smith had already exhausted his tribal court remedies. Pet. App. 7a, n. 1.

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's attention. Contrary to Smith's assertion, the Ninth Circuit did not create any new law. Smith misconstrues the basis for the *en banc* panel's decision in this case. The *en banc* panel began with the assumption that this Court's *Montana* precedent was the controlling law, then applied that jurisdictional template to the facts of this case,

concluding that Smith's actions amounted to a clear and unambiguous consent to tribal court jurisdiction under the first *Montana* exception. *See,* Pet. App. 15a-16a. The record shows that Smith agreed tribal court jurisdiction was proper and sought to affirmatively litigate his claims in that forum. Pet. App. 102a ¶ 1, 106a-107a. Smith could and did consent to tribal court jurisdiction by electing to proceed as the plaintiff in the tribal forum. The *en banc* panel also found that Smith's case might very well fall under the second *Montana* exception.

To further ensure that its jurisdictional analysis was firmly tethered to this Court's guiding law, the *en banc* panel cited to this Court's rule in *Williams,* which held that tribal courts have jurisdiction over claims brought by non-members against Indian defendants for reservation-based conduct. The court below found *Williams* particularly applicable because the facts justifying jurisdiction in that case are similar to the facts presented in Smith's case. The *en banc* panel was careful to point out that this Court has held *Williams* exemplifies both the first *and* second *Montana* exceptions, and continues to be cited as precedent by this Court. Pet. App. 16a-18a. The *en banc* panel examined numerous avenues through which both *Montana* exceptions could be met, as well as the rule in *Williams.* Given this Court's holdings in *Montana* and *Williams,* there was no need for the *en banc* panel to create new law in order to find tribal court jurisdiction. The Ninth Circuit announced no new law. Consequently, review should be denied.

2. This is not a situation in which the Ninth Circuit ignored relevant law from this Court. Quite the contrary. The Ninth Circuit marched in lockstep with

this Court's history of law regarding tribal court jurisdiction. The decision below is a faithful rendering of this Court's established precedent.

Federal Indian law is a unique body of law developed from this Court's earliest days. See e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Unlike the other courts, there is no constitutional or statutory basis for civil subject matter jurisdiction of tribal courts. Tribal jurisdiction is derived from the sovereign nature of Indian tribes, and this Court's historical body of federal Indian law. This Court has held that consent to tribal court jurisdiction can properly vest a tribal court with subject matter jurisdiction. This principle is the bedrock of tribal court jurisdiction, definitively announced by this Court in *Montana* and its progeny. The *en banc* panel's finding of tribal court jurisdiction using a first *Montana* consent exception is not new law, but fits squarely within the four corners of this Court's doctrinal law on tribal court jurisdiction. Smith would have this Court ignore its own precedent and examine this case through the inappropriate lens of federal court subject matter jurisdiction.[1] Such a request reflects a deep misunderstanding of the reasoning behind the *en banc* panel's holding. Smith's petition asks this Court to rewrite its own history of federal Indian law. Review should be denied.

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[1]However, even under a federal court jurisdictional analysis this Court has found voluntary consent to jurisdiction dispositive. *See, Lapides v. Board of Regents of the University of Georgia*, 535 U.S. 613 (2002) (holding that the State of Georgia was barred from claiming Eleventh Amendment immunity from suit once it voluntarily invoked federal court jurisdiction by removing the case from state court). Similar to the present situation with Smith, this Court noted, "[i]t would seem anomalous or inconsistent" for a state to both invoke and dispute the jurisdiction of the federal court, and that allowing states to freely assert both claims in the same case could "generate seriously unfair results." *Id.* at 619.

3(A). The decision below does not conflict with this Court or any other circuit court. Smith seeks to manufacture a conflict by recasting the decision as "dictat[ing] that the act of exhausting one's remedies in the tribal court system operates to establish subject-matter jurisdiction where it would not otherwise exist." Pet. at 9. Such an assertion presumes that Smith sought to affirmatively litigate his case in tribal court solely for the purposes of exhausting his tribal court remedies, an assertion that the *en banc* panel never accepted. The opinion below gave a verbatim recitation of the exhaustion law from this Court and previous Ninth Circuit precedent, then acknowledged that by the time the district court ruled on the case Smith had exhausted his jurisdictional challenge in the tribal court system. Pet. App. 7a, n. 1. The *en banc* panel went on to find tribal jurisdiction based on Smith's express consent to affirmatively litigate his case in the tribal forum, not, as Smith alleges, on a "distorted" view of this Court's exhaustion doctrine. To the contrary, it is Smith who has a distorted view of this Court's law on tribal court exhaustion.

The exhaustion doctrine (based in comity) directs federal courts to abstain from ruling on challenges to tribal court jurisdiction in order to permit the tribal court the opportunity to determine in the first instance whether it has jurisdiction. *National Farmers*, 471 U.S. 845; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). If a tribal court properly decides it has jurisdiction, it proceeds with the case. *Id.* If the federal court later agrees that jurisdiction was proper, it will not relitigate the case. *LaPlante*, 480 U.S. at 19. This is the exhaustion law applied in

the Eighth and Ten Circuit cases cited by Smith. In both *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986), and *Brown v. Washoe Housing Authority,* 835 F.2d 1327 (10th Cir. 1988) the non-member plaintiff filed suit in federal court only to have the tribal defendant respond by stating jurisdiction should lie with the tribal court. Both the Eighth and Tenth Circuits followed this Court's exhaustion doctrine, holding tribal courts should have the first opportunity to determine jurisdiction, and that federal courts should abstain from taking the case until the tribal courts had made their determinations.

The Ninth Circuit's law on tribal court exhaustion remains absolutely faithful to this Court's exhaustion doctrine, and falls right in line with the Eighth and Ten Circuits. *See, Stock West Corp. v. Taylor,* 964 F.2d 912 (9th Cir. 1992)(*en banc*); *Allstate Indemnity Co. v. Stump,* 191 F.3d 1071 (9th Cir. 1999). Under the exhaustion doctrine, Smith would indeed have been required to exhaust his tribal court remedies if he had initially challenged the jurisdiction of the tribal court, but this was not the case. Smith's answer to the original tribal court complaint explicitly *affirmed* the statement of tribal court jurisdiction that is required before a case can be heard in the CSKT Tribal Court. Pet. App. 102a, ¶ 1 (referencing Pet. App. 94a, ¶ 1). He then proceeded with his cross claim and engaged in discovery and pretrial motions, all of which culminated in a five day trial on the merits.

Every case cited in Smith's petition addresses a party's challenge to jurisdiction from the outset of the case. However, the record here shows Smith affirmatively consented to tribal court jurisdiction, litigated his case, and was only

required to exhaust his tribal court remedies once he initiated a *post-verdict* jurisdictional challenge. The decision below turns on those facts. The Ninth Circuit *did not* find that exhaustion equals consent, nor does Smith cite to any express holding from the *en banc* panel that makes any such pronouncement. Rather, it found that Smith had consented to tribal jurisdiction long before the exhaustion doctrine ever came into play. To hold otherwise would allow any non-member plaintiff the opportunity to litigate a case in tribal court, then mount a jurisdictional challenge based upon the jury verdict. Such a rule would be an outright endorsement of forum shopping, something this Court hardly had in mind when it established the exhaustion doctrine. Smith, not the Ninth Circuit, has a "distorted" characterization of the exhaustion doctrine resulting from his distorted view of the record. Smith's recasting of the decision below does not justify review by this Court.

3(B). Smith also asks this Court to correct what he perceives to be a conflict within the Ninth Circuit. Pet. at 27-32. Smith cites to alleged distinctions between this case and the Ninth Circuit's rulings in *McDonald v. Means*, 309 F.3d 530 (2002) and *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (2005). However, aside from the materially distinguishable facts in all three cases, the *en banc* panel reheard Smith's case in part to remedy the three judge panel's conflict with *McDonald*. Smith also asserts that the Ninth Circuit's *Todecheene* decision cited to the original three judge panel in this case, and by reversing the three judge panel the *en banc* court is now in conflict with *Todecheene*. However, Smith

acknowledges that the *Todecheene* decision is still awaiting *en banc* review in the Ninth Circuit. Pet. at 30, ¶ 1. Smith's request for this Court to review an alleged internal conflict within the Ninth Circuit is particularly unwarranted. The Ninth Circuit has a mechanism for reviewing internal conflicts and correcting them (if necessary) through the *en banc* rehearing process. Because the *Todecheene* petition for en banc review is still pending, Smith's petition for review by this Court is misplaced and mistimed. Review should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 15th day of May, 2006.

John T. Harrison
Counsel of Record
Ranald McDonald
TRIBAL LEGAL DEPARTMENT
CONFEDERATED SALISH AND
KOOTENAI TRIBES
Post Office Box 278
51383 Highway 93 North
Pablo, Montana 59855-0278
(406) 675-2700; Fax: 675-4665
Counsel for Respondent Court of Appeals of the Confederated Salish and Kootenai Tribes