No. 17-447

In the Supreme Court of the United States

WINDOW ROCK UNIFIED SCHOOL DISTRICT,
Petitioner,

v.

ANN REEVES; KEVIN REEVES; LORETTA BRUTZ; MAE Y. JOHN; CLARISSA HALE; MICHAEL COONSIS; RICHIE NEZ; CASEY WATCHMAN; BEN SMITH; WOODY LEE; JERRY BODIE; EVELYN MEADOWS,
Respondents.

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

BRIEF OF ARIZONA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTRODUCTION[1]

The Ninth Circuit's decision in this case extends tribal court jurisdiction over nonmembers even where tribal jurisdiction (1) was not necessary to protect activities that directly implicated the tribe's power to manage its own lands and (2) interfered with the State's undisputed, compelling interest in maintaining uniformity of its public schools. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 917 (9th Cir. 2017) (Pet. App. 47a-48a) (Christen, J., dissenting). The Ninth Circuit's holding thus clashes with the "general proposition that . . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). The decision also ignores the Court's express extension of *Montana's* general bar to tribal court jurisdiction to nonmember conduct on Indian land. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (stating that "the general rule of *Montana* applies to both Indian and non-Indian land"). Given the Ninth Circuit panel's fundamentally flawed analysis, it is not surprising that the analysis conflicts with at least three other circuits' analysis of the same issue. Pet. App.48a-49a (Christen, J., dissenting).

The State of Arizona acknowledges and appreciates the cooperative relationship that it enjoys with the Navajo Nation. The Navajo Nation is a federally recognized sovereign that exercises broad authority over its land and its people, and maintaining a healthy

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[1] The State of Arizona gave notice of its intent to file this brief to counsel for the parties on October 13, 2017. *See* Sup. Ct. R. 37(2)(a). Arizona does not need the parties' consent to file this brief. *See* Sup. Ct. R. 37(4).

government-to-government relationship is essential for Arizona and the Navajo Nation because they have many common interests. The Ninth Circuit's decision, however, threatens to both disrupt the respectful and effective balance of authority that exists between the two sovereigns and impede the delivery of a uniformly high-quality public education to students throughout the State. By holding that Arizona public school employees could bring employment-related claims (most of which had already been adjudicated in state court) against Arizona public school districts in Navajo tribal court, the decision below exposes school districts to a patchwork of tribal adjudicative bodies. Pet. App. 6a. This outcome is unacceptable where the districts are run by the State and operate public schools within tribal boundaries pursuant to federal law and state constitutional requirements. *E.g.*, Ariz. Enabling Act, Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 570 (1910) (requiring "establishment and maintenance of a system of public schools which shall be open to all the children" of Arizona); Ariz. Const. art. 11, § 1 (requiring the "establishment and maintenance of a general and uniform public school system"). The Court should grant certiorari to confirm what *Montana* and *Hicks* already require and, in the process, enable States to provide a quality public education to all children within their boundaries.

INTEREST OF AMICUS CURIAE

Amicus curiae the State of Arizona has school districts located within Indian Country. Therefore, Arizona has a compelling interest in building, maintaining, and regulating its public schools, including those located on Indian land, and in requiring state officials to engage in official conduct on Indian land when necessary to fulfill their statutory or constitutional obligations. Indeed, providing for the education of Arizona's citizens is among its most important functions. Thus, the State of Arizona is directly affected by the question of whether tribal courts may exercise jurisdiction over state schools, officials, or similar entities under the Ninth Circuit's cramped reading of this Court's decisions in *Hicks* and *Montana*.

Under the Ninth Circuit's interpretation, *Hicks* precludes tribal jurisdiction over nonmembers' conduct on tribal land *only* where "state criminal law enforcement interests" are present. Pet. App. 21a. As a result, tribal court jurisdiction is "colorable or plausible" in virtually any dispute related to the operation of public schools on Indian land or where an official's conduct occurs on Indian land. *Id*. Further, under the Ninth Circuit's ruling, the parties to such a dispute must first give a tribal adjudicative forum the opportunity to decide whether it has jurisdiction over the matter. Moreover, the State and its officials are incapable of seeking review in the federal courts until the tribal-court appellate process has concluded. *See* Pet. App. 30a (Christen, J., dissenting) (noting that the Navajo Nation did not rule on the school districts' motion to dismiss but ordered an evidentiary hearing).

The Ninth Circuit's approach to tribal adjudicatory jurisdiction over nonmembers exposes state entities and officials to myriad tribal court forums that could attempt to resolve disputes related to all aspects of public schools. This outcome threatens to increase school districts' expenses and to delay resolution of cases while the districts exhaust their tribal-court appeals before obtaining review in the federal courts. And it undermines the finality of state court decisions. (Pet. App. 29a-30a, 47a-48a) (Christian, J., dissenting) (noting that five of the seven state employees had brought claims in state court and lost and that the State "has vitally important competing interests in the finality of state-court judgments and its ability to enforce them").

Amicus curiae operate schools in Indian Country under federal and state laws. Both federal law and the state constitution require that the State provide a "general and uniform public school system" that is "open to all children of [the] State" and "under the exclusive control of the [ ] State." Ariz. Const. art. 11, § 1; Act of June 20, 1910, ch. 310, §§ 20, 26, 36 U.S. Stat. 557, 568-79.[2] Arizona's constitutional obligation to provide public schools extends to schools on Indian

[2] Other States have constitutional requirements similar to Arizona's that require uniformity in public school education. *See, e.g.*, Cal. Const. art.IX, § 5; Idaho Const. art. IX, § 1; Nev. Const. art. XI, § 2; N.C. Const. art. IX, § 2; Or. Const. art. VIII, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; Wis. Const. art. X, § 3. Many of these States provide public education on Indian land. *See, e.g.,* Idaho: http://www.pwsd44.com/; Nevada: http://www.ecsdnv.net/; Oregon: http://jcsd.k12.or.us/schools/ws; South Dakota: http://www.olcsd.com/DistrictInformation.aspx; Washington: https://www.wellpinit.org/domain/170; Wisconsin: http://www.misd.k12.wi.us.

land. *See* Act of Feb. 15, 1929, ch. 216, 45 Stat. 1185; Act of Aug. 9, 1946, ch. 216, 45 Stat. 1185. Within Arizona there are twenty-two Indian reservations, which cover approximately 25% of the State.[3] Approximately 500 of the State's public schools (one-fourth of the total number of public schools in the state) are located on or near Indian reservations. *Id.*

Arizona's public schools are operated by local school districts, which are political subdivisions of the State. Ariz. Rev. Stat. § 15-101(23). The Arizona State Board of Education (the "State Board"), however, "[e]xercise[s] general supervision over and regulate[s] the conduct of the public school system." Ariz. Rev. Stat. § 15-203(A)(1). In addition, the State Board "[s]upervise[s] and controls the certification of persons engaged in instructional work." Ariz. Rev. Stat. § 15-203(A)(14).

Tribal court jurisdiction over school districts' decisions related to employee benefits and employment termination directly undermines the State's ability to maintain uniformity in administering its public schools. The State Board has authority to grant certification to teachers, to discipline certified teachers, and to revoke certifications. *See* Ariz. Rev. Stat. § 15-534(C), (D). In addition, the State Board may suspend or dismiss a certified teacher for cause. *See* Ariz. Rev. Stat. § 15-539. A teacher subject to such suspension or dismissal is entitled to an administrative hearing and may appeal a decision of the State Board to the

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[3] *Indian Education in Arizona, Nevada, and Utah: a Review of State and National Law, Board Rules, and Policy Decisions*, at 12, West Comprehensive Center at WestEd (2014), https://westcompcenter.org/wp-content/uploads/2013/11/P6IndED_finalreport_WestEdcomm_cl_9.24.pdf.

superior court. Ariz. Rev. Stat. §§ 15-541, -543. Decisions of the State Board regarding teacher certification fall within the same category as the employment matters at issue in the decision below.

The Ninth Circuit decision also threatens the State's ability to protect state-law remedies that apply to state agency activity on Indian land. For example, Arizona has a School Facilities Board ("ASFB"), which administers state funding for new school construction and maintenance of existing public school facilities. *See* Ariz. Rev. Stat. §§ 15-2032(A), -2041(A). Before ASFB awards funds to a school district, ASFB executes a contract with the district. Under the contract, the district must adhere to ASFB's terms and conditions, one of which requires compliance in all respects with Arizona law. If the Ninth Circuit's decision stands and the district must litigate its employment-related decisions in tribal court, the district will be in breach of its contract with ASFB. ASFB could invoke its state-authorized remedy of discontinuing funding to the district and terminating the contract. The district's loss of funding would, in turn, have a detrimental impact on the ability of the district to provide its tribal and non-tribal students with the "general and uniform public school system" mandated by law. This illustrates the far-reaching impact of the Ninth's Circuit's decision, which requires the district, a political subdivision of the State, to adjudicate its employment decisions with district employees in tribal court.

This Court should grant certiorari and reverse the Ninth Circuit's erroneous decision. Something as fundamental as the forum where litigants may pursue

their case against non-member entities (such as school districts) should not vary from circuit to circuit. Moreover, state entities in the Ninth Circuit should not be subject to tribal court jurisdiction when all other circuits that have addressed a similar issue have determined that tribal court jurisdiction is lacking.

REASONS TO GRANT THE PETITION

I. The Ninth Circuit's Failure to Follow *Montana* and *Hicks* Potentially Exposes Amicus Curiae and Its School Districts to Multiple Different Tribal Court Systems.

The Ninth Circuit's restriction of *Montana*'s framework to officials' activities on Indian land *only* where criminal law enforcement interests are present cannot be squared with *Hicks*. It subjects States in the Ninth Circuit to a patchwork of tribal adjudicative systems that have varying degrees of resources and efficiency. This disparity is not justified by tribal sovereignty, and it undermines critical state interests.

In *Montana*, this Court addressed whether the Crow Tribal Council had jurisdiction to regulate nonmember hunting and fishing on non-Indian land located within the Crow reservation. It determined that "the general principles of retained inherent sovereignty" that are also consistent with tribal sovereignty "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The Court noted that two exceptions applied to the general rule of no tribal court jurisdiction over nonmembers: (1) "A tribe may regulate, through taxation, licensing, or other means, the activities of

nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;" and (2) "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

In *Hicks*, 533 U.S. at 356, the Court addressed whether "a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." The Court rejected the argument that "since Hicks's home and yard *are* on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry." *Id.* at 359. Instead, it found that "existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id.* at 360. The Court then held that because "tribal courts lack jurisdiction over *state officials for causes of action relating to their performance of official duties*," requiring tribal exhaustion was unnecessary, as it would serve no purpose other than delay. *Id*. at 369 (emphasis added).

The claims at issue in this case—claims against a school district for employment decisions—are certainly claims against "state officials . . . relating to their performance of official duties." *Id.* Consequently *Hicks* and *Montana* squarely apply. Indeed, such disputes fall within *Montana's* rule limiting tribal court civil

jurisdiction because they do not meet either *Montana* exception: they do not involve tribal self-government or internal relations and they implicate a significant state interest (*i.e.*, operating a school system that is uniform across the State).

The Ninth Circuit's ruling, however, confines *Hicks* to its facts and circumvents *Montana*. Again, Arizona's circumstances illustrate the significant consequences of this approach. Nearly 25% of Arizona's land is Indian land within the jurisdiction of twenty-two different tribes—with twenty-two different adjudicative systems of varying degrees of efficiency and resources. Arizona is required to operate public schools throughout its territory, including on Indian land. Other States in the Ninth Circuit have public schools on Indian land and may be subject to multiple tribal jurisdictions as a result of the Ninth Circuit's decision. At a minimum, States need to know whether *Hicks* is limited to law enforcement officers executing process on Indian land, as the Ninth Circuit said, or whether *Hicks*'s reasoning and outcome apply to public-entity officials engaged in official conduct that they are obligated to perform on reservations, and which has no impact on tribal internal relations, land, or resources.

II. The Ninth Circuit's Conclusion that the *Montana* Framework Does Not Apply on Indian Land Is Contrary to Every Other Circuit's Determination of the Same Issue.

The panel concluded that tribal court jurisdiction is plausible in this case because the right-to-exclude framework applies to nonmember conduct on *tribal land* and the *Montana* framework only applies to nonmember conduct on *non-tribal land*. Pet. App. 10a-

11a, 21a. In contrast, the Fifth, Seventh, Eighth, and Tenth Circuits have applied *Montana* to determine whether there is tribal court jurisdiction over cases involving nonmember conduct on Indian land. Unless this Court resolves the circuit split, neighboring school districts, operating within the same reservation, will be subjected to different forums for the same types of disputes. For example, the Navajo Nation spans three states—Arizona, New Mexico, and Utah—and two circuits—the Ninth and Tenth.

The Tenth Circuit held that there was no tribal court jurisdiction over employment claims by employees of a state health services district, despite the district operating on fee land held in trust for and within the boundaries of the Navajo Nation. *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1077 (10th Cir. 2007). In reaching its conclusion, the court stated that "[t]he notion that *Montana*'s applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks*." *Id.* at 1069. And, although the court recognized that the nature of the property is one factor to be considered, it concluded that "the only relevant characteristic for purposes of determining *Montana*'s applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority." *Id.* at 1070.

Like Arizona's Enabling Act, New Mexico's Enabling Act, which Congress passed at the same time, provides for a public school system "open to all children of [the] State" and "under the exclusive control of the [ ] State." Act of June 20, 1910, ch. 310, §§ 2, 8, 36 Stat. 557, 559, 563. Yet, under *MacArthur*, a New Mexico

public school district—which is in the Tenth Circuit—would have employment, tort, or contract claims against it adjudicated in a state or federal court, while a school district in Arizona would be required to submit to tribal court jurisdiction for the same dispute.

Similarly, two Eighth Circuit decisions are squarely at odds with the Ninth Circuit's decision in this case. *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015); *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (8th Cir. 2015). In those cases, like this one, a state constitutional mandate required the State to educate all children, including those on the reservation. In both cases, the Eighth Circuit, applying *Montana*, held that the tribal court lacked jurisdiction over tribal members' claims against the school districts. *Belcourt*, 786 F.3d at 658-61; *Fort Yates*, 786 F.3d at 666-70.

The conflict is deepened further by cases from the Fifth and Seventh Circuits, which correctly applied *Montana* and its exceptions in order to evaluate the propriety of the exercise of tribal court jurisdiction over claims against private non-member entities on Indian land. *See Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 180 n.8 (5th Cir. 2014), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (applying *Montana* to find consent to tribal jurisdiction to a dispute involving conduct occurring on Indian land); *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 206-07 (7th Cir. 2015) (applying *Montana* to determine whether tribal jurisdiction existed over a dispute between a tribe and financial institutions involved with

the financing of a resort project on Indian land). These cases further demonstrate that the Ninth Circuit panel's determination that *Montana* does not apply is an outlier decision.

The Ninth Circuit decision in this case will have far-reaching effects for the States governed by its erroneous application of core Indian-law principles. This Court has never suggested that the States and their governmental entities and employees should be subject to tribal court jurisdiction while fulfilling core governmental functions.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 25th day of October, 2017.

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