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

MOTION FOR LEAVE TO FILE AND AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AND ARIZONA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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**Admission Effective October 30, 2017*

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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION AND ARIZONA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

The National School Boards Association ("NSBA") and the Arizona School Boards Association ("ASBA") move this Court pursuant to Supreme Court Rule 37.2(a) for leave to participate as *amici curiae* herein for the purpose of filing the attached brief.

In support of their motion, *Amici* state the following:

Counsel of record for all parties have received timely notice of *Amici*'s intent to file the attached brief as required under Supreme Court Rule 37.2(a). Petitioner and the Navajo Nation Labor Commission Respondents have consented to the filing of the brief. The remaining Respondents have given no answer to *Amici*'s request for consent.

NSBA through its state associations of school boards represents the nation's 95,000 school board members who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students, or approximately 90 percent of the elementary and secondary students in the nation, including the vast majority of American Indian and Alaska Native students.

ASBA is one of the state members of NSBA. It is a non-profit corporation providing assistance to the more than 240 Arizona school boards, including Petitioner, that are its members. ASBA serves 98 percent of Arizona's public school districts, and those districts serve over 1.2 million children, including

more than 60,000 American Indian and Alaska Native students.

In keeping with their longstanding commitment to provide public education in an efficient and effective manner in compliance with federal and state requirements, *Amici* frequently engage in advocacy before this Court and other federal and state courts, legislatures, and agencies. *Amici* seek to ensure that the governmental entities that make, interpret and administer the law and policies that affect the ability of school leaders to carry out their responsibility to provide education to all children understand the special mission and concerns of public education officials. Because of the expertise their members bring to bear on issues concerning the management of public school employees consistent with federal and state law, *Amici* are well qualified to advise the Court of the exceptional importance of granting the petition in this case. *Amici* consider this Court's review of the Ninth Circuit's decision to be of the utmost urgency to preserve the ability of public schools to adopt employment policies and make decisions that comply with applicable legal requirements without the disruption that would accompany concurrent tribal court jurisdiction over claims made by public school employees who happen to work on tribal lands.

For these reasons, NSBA and ASBA respectfully urge this Court to grant this motion and allow them to provide additional information that will assist the Court in determining the need to review this case.

Respectfully submitted,

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QUESTION PRESENTED

Whether a tribal court has jurisdiction to adjudicate employment claims by Arizona school district employees against their Arizona school district employer that operates on the Navajo reservation pursuant to a state constitutional mandate to provide a general and uniform public education to all Arizona children.

INTERESTS OF *AMICI CURIAE*[1]

In accordance with Supreme Court Rule 37, *Amici Curiae* National School Boards Association (NSBA) and Arizona School Boards Association (ASBA) respectfully submit this brief in support of the Petitioner. The identities and interests of the *amici* are more fully set forth in the Motion for Leave to File that accompanies this brief.

SUMMARY OF THE ARGUMENT

More than 90% of the approximately 700,000 Native students in the United States attend public schools on or near tribal lands.[2] More than 700 schools serving 115,000 Native students are located on Indian lands.[3] These public schools provide

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[1] *Amici* attest that all parties were provided the ten-day notice of *Amici*'s intent to file as required by Rule 37.2(a). Petitioner and the Navajo Labor Commission respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court. Because not all respondents consented, this brief is submitted on motion for leave to file under Rule 37.2(b). In accordance with Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] National Congress of American Indians, Policy Issues—Education, *available at* http://www.ncai.org/policy-issues/education-health-human-services/education. Eight percent attend schools administered by the federal Bureau of Indian Education or tribally controlled schools.

[3] National Congress of American Indians, A CALL TO HONOR THE PROMISES TO TRIBAL NATIONS IN THE FEDERAL BUDGET 6 (April 19, 2013), *available at*

education to Native students pursuant to state constitutional mandates to educate all children within their boundaries. To accomplish this mission, public schools must employ thousands of administrative, instructional and support workers subject to a vast array of federal and state employment laws, regulations, local ordinances and district policies.

For the reasons more fully set forth below, *Amici* urge this Court to accept review of the Ninth Circuit decision that threatens to create havoc for school districts by permitting tribal courts to exercise concurrent jurisdiction over employment claims asserted by district employees working on Indian reservations. Such jurisdictional authority has the potential to create monumental confusion as public schools struggle to reconcile their responsibilities toward employees when tribal employment rules conflict with the federal and state requirements that school districts, as governmental entities, are bound to follow. Concurrent jurisdiction also threatens the finality of court rulings and allows disgruntled plaintiffs to forum shop and re-litigate claims, causing unnecessary and increased expenditure of already scarce resources on legal proceedings rather than serving the educational needs of Native students. In addition, the premise of the Ninth Circuit's finding of plausible jurisdiction opens the door to tribal court authority over innumerable claims

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http://www.ncai.org/resources/ncai_publications/honor-the-promises-the-tribal-nations-in-the-federal-budget.

that could arise in connection with the operation of public schools on Native lands, creating legal uncertainties that interfere with the delivery of educational services to the children who attend these schools. *Amici* view the issues at stake here to be of exceptional importance and beseech the Court to grant review to avert the harmful consequences that will flow from the Ninth Circuit's decision if left intact.

I. THE NINTH CIRCUIT'S DECISION IGNORES THE LEGAL STATUS OF PUBLIC SCHOOL DISTRICTS AS STATE POLITICAL SUBDIVISIONS BOUND BY FEDERAL AND STATE EMPLOYMENT LAW AND PROCEDURES.

Public school districts across the country operate as political subdivisions of the States. *See* ARIZ. REV. STAT. § 15-101(23) (2017) (defining "School district" in Arizona as "a political subdivision of this state with geographic boundaries organized for the purpose of the administration, support and maintenance of the public schools or an accommodation school"). *Accord* ALASKA STAT. § 37.23.900. (2017); GA. CODE ANN. § 36-69A-3 (2017); IDAHO CODE ANN. § 6-902 (2017); IOWA CODE § 23.71 (2017); MICH. COMP LAWS § 37.251 (2017); MINN. STAT. § 13.02 (2017); MISS. CODE ANN. § 57-64-7 (2017); N.M. STAT. ANN. § 5-7-6.7 (2017); N.D. CENT. CODE § 26.1-21-01 (2017); TENN. CODE ANN. § 4-3-5525 (2017); WASH. REV. CODE § 28A.315.005

(2017).[4] This political status has been acknowledged by courts faced with questions of tribal court jurisdiction over school district matters. *E.g.*, *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 656 (8th Cir. 2015) (noting that the Belcourt Public School District is a political subdivision of the State of North Dakota that operates within the boundaries of the Turtle Mountain Indian Reservation); *Glacier Cnty. Sch. Dist. No. 50 v. Galbreath*, 47 F. Supp. 2d 1167, 1169 (D. Mont. 1997) (noting that Glacier County School District is a political subdivision of the State of Montana that operates a school within the boundaries of the Blackfeet Indian Reservation). Pursuant to mandates under state constitutions, public school districts operate public schools within the geographic boundaries of Indian reservations. Pet. Cert. 7; *see also Belcourt Pub. Sch. Dist.*, 786 F.3d at 656 ("The Constitution of North Dakota requires that the School District provide education to all children in North Dakota, including children who are Indians or reside on Indian reservations."). As political subdivisions, local school districts typically only have the powers granted to them by the state and receive a portion of their funding from state coffers. They are bound to operate in conformance with all applicable state and federal laws.

By virtue of their status as state political subdivisions, public school districts are not members

[4] These statutes are a sample of the provisions making local school districts political subdivisions of the state that appear in virtually every state code.

of any tribe. In the "pathmarking" case, *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court made it clear that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *See also Strate v. A-1 Contractors*, 520 U.S. 438, 445, 453 (1997) (applying *Montana's* framework, which was originally applied as a measure of a tribe's civil regulatory jurisdiction, to a tribe's civil adjudicatory jurisdiction). *Montana's* rule applies even when the activities of nonmembers occur on land owned by the tribe. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Ninth Circuit Court of Appeals refused to apply *Montana*, causing a circuit split wherein the Ninth Circuit is the only circuit that has found tribal jurisdiction "plausible any time nonmember conduct occurs on tribal land unless state criminal law enforcement interests are implicated." Pet. Cert. 12. The Ninth Circuit's decision authorizing tribal jurisdiction over a broad range of claims will lead to a confusing disarray of conflicting laws that govern the employment of school employees; public school districts will experience judicial inefficiency, will expend significant time and human and financial resources, and will lose finality in employment proceedings.

A. Concurrent Tribal Court Jurisdiction Over Federal and State Employment Claims Brought Against a Public School District Will Lead to a Confusing Disarray of Conflicting Laws that Govern the Employment of School District Staff

1. While Native tribes have the right to make their own laws and be governed by them, that right "does not exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 361. Instead, it is clear that "an Indian reservation is considered part of the territory of the State." *Id.* at 361-62 (internal citations omitted). This Court in *Hicks* further clarified that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers," and land ownership "is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Id.* at 362. Where the "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Id.*

In keeping with this principle, this Court earlier determined that the states' interest in collecting state cigarette tax was enough for the state to regulate the activities of tribal members on tribal land. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151 (1980). In *Hicks*, the Court determined that the state has a "considerable"

interest in execution of process and imposing its off-reservation poaching law on the reservation. *Hicks*, 533 U.S. at 364. It should follow that the states have a considerable, if not more significant, interest in abiding by the state constitutional requirements to offer all children a uniform education in compliance with state and federal law.

The Ninth Circuit failed to consider this substantial interest in determining that tribal court jurisdiction over employment claims of school employees is at least plausible. Nor did the appeals court even attempt to show why the tribe's authority to adjudicate school district employment disputes is essential to tribal self-government or internal relations. Moreover, tribal court jurisdiction could not have been based on tribal financial support of the public schools located on Native lands. In Arizona, tribes do not contribute funds to the operation of public schools on reservations.

2. If tribal courts were to exercise some jurisdiction over school employment matters, they could choose to apply provisions of their own tribal employments regulations, usually referred to as Tribal Employment Rights Ordinances (TERO). TEROs differ from tribe to tribe, but frequently contain some provisions that directly conflict with federal and state law. Thus, a school district that has acted in conformance with its federal and state employment obligations, could still be found by a tribal court to be liable for violating contrary TERO provisions, or vice versa. This lack of certainty

reduces legally compliant policy decisions and employment practices to no more than a guessing game with potentially serious consequences no matter which law is chosen by school officials. If left intact, the Ninth Circuit's decision will thrust school districts operating schools on tribal lands into just such a conundrum. This quandary affects every aspect of the district's management and training of school employees, including the development and implementation of policies; hiring, termination, and promotion decisions; discipline and grievance procedures; and collective bargaining, to name just a few.

For example, if the school grants tribal preference when making employment decisions, it is likely violating the state and federal discrimination laws. If the school district has to layoff or reduce some of its teaching staff, does it follow the tribe's rules as to layoff or the state's reduction-in-force nonrenewal provisions? Does it depend on whether the teacher is a tribal member, and if so, how would that preference affect staff morale? What about a bus driver applicant who does not have a state bus license—should that person still be hired if they have a tribal license? Would the public school district lose state transportation aid as a result? If the district were to deny employment to someone with a tribal but no state driver's license, could that applicant sue in tribal court? School districts cannot operate under such uncertainties. They must be able to perform

their educational mission within a clear legal framework.

The difficulties faced when such uncertainties prevail is demonstrated by the divergent responsibilities to which Petitioners here may be bound if the Ninth Circuit's decision is allowed to stand. The Navajo Preference in Employment Act (NPEA)[5] does not specifically exclude federal or state governments and their agencies and political subdivisions from its definition of "employer".[6] The NPEA requires employers to give preference in employment to Navajos and provides for termination only upon good cause. If an Arizona school district were to follow the NPEA's Navajo preference provision, it would violate state and federal discrimination laws. *See* ARIZ. REV. STAT. § 41-1463 (2017) (discrimination in employment statute);

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[5] http://navajohs.org/uploads/files/NPEA.pdf, pp. 3-4. Section 4 of the NPEA requires employment preference to Navajos. Section 4, paragraph 4, notes that when contracting with federal or state government entities, the Navajo preference applies. When contracting with federal agencies, the NPEA allows "Indian" preference to be substituted for Navajo preference, but contains no such allowance with respect to state entities such as public school districts.

[6] In determining whether the NPEA applied to Arizona public school districts, the Arizona Attorney General concluded "that the public school districts are state government entities, governed by Arizona law, and are not subject to regulation pursuant to the Navajo Tribal preference laws." 1986 Ariz. Op. Atty. Gen. 18, No. I86-019, 1986 WL 81322. A similar opinion was reached with reference to the Apache Tribal Employment Rights Ordinance. 1988 Ariz. Op. Atty. Gen. 102, No. I88-076, 1988 WL 249667.

Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120, 1124 (9th Cir. 1998) (holding that "discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII" and that Title VII's Indian Preferences exemption does not permit employer to discriminate on basis of tribal affiliation). Similarly, while Arizona is an at-will employment state and has no general requirement that employers only terminate for cause, the NPEA requires "just cause" in order to terminate or "take any adverse action against any Navajo employee." ARIZ. REV. STAT. § 23-1501 (2017); NPEA, http://navajobs.org/uploads/files/NPEA.pdf, p. 4. If taken to its natural conclusion, the Ninth Circuit's ruling could allow tribal rules to usurp longstanding state policies concerning labor relations as determined by state constitutions and legislatures as well as agreements reached between government employers and their workers. Such preemption is operationally untenable and legally disconcerting.

Because the Navajo Nation reservation crosses state lines into Utah and New Mexico, the NPEA may also conflict with employment laws in those jurisdictions. For example, the general rule in these states, as in Arizona, is employment at will. *See Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 779 (N.M. 1993) (noting New Mexico's general rule that employment is terminable at the will of either party); *Tomlinson v. NCR Corp.*, 345 P.3d 523 (Utah 2014) (noting Utah's presumption of at-will employment).

However, those states are in the Tenth Circuit where the court of appeals in *MacArthur v. San Juan Cnty.*, 497 F.3d 1057 (10th Cir. 2007), applied the *Montana* framework to find no tribal jurisdiction over employment claims against a state health services district, a political subdivision of the State of Utah. This means school districts on Navajo lands in Utah and New Mexico are likely not subject to tribal court jurisdiction, while those in Arizona would be subject to tribal court jurisdiction if the Ninth Circuit's decision stands.

B. Concurrent State and Tribal Court Jurisdiction Over Public School Employment Claims Will Result in Judicial Inefficiency, Significant Time and Costs, and Lack of Finality

1. It is undisputed that public school districts must abide by an extensive array of state and federal employment laws regarding employment contracts, labor relations, termination, hiring, teacher tenure, discrimination, wage and hour rules, etc. They are generally subject to the jurisdiction of state and federal courts when disputes involving these laws arise. The fact that a school district operates on or near an Indian reservation should not invoke tribal court jurisdiction over the same disputes that should be resolved through state or federal legal process.

Tribal courts are *not* courts of "general jurisdiction." *Hicks*, 533 U.S. at 367. Because, as explained above, tribal employment laws do not or

should not apply to public school districts as tribes lack authority to regulate the activities of public school district employment decisions, tribes cannot adjudicate disputes arising out of school districts' employment decisions. *See Hicks*, 533 U.S. at 357-58 (quoting *Strate,* 520 U.S. at 453 ("As to nonmembers … a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction…")); *see also Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d. at 1171-72 (pre-dating *Hicks* but using a similar rationale, holding that tribal members must comply with the procedures established by state law to resolve issues relating to the operation and administration of the school).

Ignoring this Court's precedent, the Ninth Circuit made the location of the school district building on tribal land the dispositive factor of whether tribal court jurisdiction over a public school district is "plausible or colorable." Under this reasoning, public school districts become subject to tribal court jurisdiction simply by abiding by their constitutional duty to provide all children in the state with the opportunity to receive an education – both children residing on and off a reservation located within state boundaries.[7] Satisfying that educational

[7] *See* ARIZ. CONST. ART. XI, § 1 (requiring "the establishment and maintenance of a general and uniform public school system"). *Accord* ALA. CONST. ART. XIV, § 256; ALASKA CONST. ART. VII, § 1; ARK. CONST. ART. XIV, § 1; CAL. CONST. ART. IX, § 1; COLO. CONST. ART. IX, § 2; CONN. CONST. ART. VIII, § 1; DEL. CONST. ART. X, § 1; FLA. CONST. ART. IX, § 1; GA. CONST. ART. VIII, § 1, ¶ 1; HAW. CONST. ART. X, § 1; IDAHO CONST. ART. IX, § 1; ILL. CONST. ART. X, § 1; IND. CONST. ART. VIII, § 1; IOWA CONST. ART. IX, 2D, § 3; KAN. CONST. ART. VI, § 1; KY. CONST. § 183; LA. CONST. ART. VIII, § 1; ME. CONST. ART. VIII, PT. 1, § 1; MD. CONST. ART.

mandate is a far cry from the decision of a private, for-profit business choosing to operate on a reservation and voluntarily subjecting itself to potential tribal court jurisdiction. By placing schools on tribal lands, school districts are fulfilling a legal duty and should not be subjected to tribal court jurisdiction on that basis.

The Ninth Circuit's premise for plausible tribal court jurisdiction raises questions that could make jurisdictional authority turn on factors other than tribal interests in self-government. If the critical inquiry is where the employment decision actually occurred, then what prevents a school district from operating an administrative building on non-tribal land and making all employment-related decisions at that building? Or if the key question is where the actual school building itself is located, then divergent determinations of jurisdiction might arise for many

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VIII, § 1; MASS. CONST. PT. 2, CH. 5, § 2; MICH. CONST. ART. VIII, § 2; MINN. CONST. ART. XIII, § 1; MO. CONST. ART. IX, § 1(a); MONT. CONST. ART. X, § 1; NEB. CONST. ART. VII, § 1; NEV. CONST. ART. XI, § 2; N.H. CONST. PT. 2, ART. LXXXIII; N.J. CONST. ART. VIII, § 4, ¶ 1; N.M. CONST. ART. XII, § 1; N.Y. CONST. ART. XI, § 1; N.C. CONST. ART. IX, § 2; N.D. CONST. ART. VIII, § 1; OHIO CONST. ART. VI, § 3; OKLA. CONST. ART. XIII, § 1; OR. CONST. ART. VIII, § 3; PA. CONST. ART. III, § 14; R.I. CONST. ART. XII, § 1; S.C. CONST. ART. XI, § 3; S.D. CONST. ART. VIII, § 1; TENN. CONST. ART. XI, § 12; TEX. CONST. ART. VII, § 1; UTAH CONST. ART. X, § 1; VT. CONST. CH. 2, § 68; VA. CONST. ART. VIII, § 1; WASH. CONST. ART. IX, § 1; W.VA. CONST. ART. XII, § 1; WIS. CONST. ART. X, § 3; WYO. CONST. ART. VII, § 1. That obligation extends to children living on an Indian reservation. *See, e.g., Belcourt Pub. Sch. Dist.*, 786 F.3d at 656 ("The Constitution of North Dakota requires that the School District provide education to all children in North Dakota, including children who are Indians or reside on Indian reservations.").

school districts who serve Native students at different locations—for example, an elementary school may be situated on tribal land but the high school is not. Under the Ninth Circuit's decision, tribal court jurisdiction would be plausible for school staff at the elementary school but not for the employees at the high school. What if the building is located off the reservation but the school district provides busing to students living on the reservation – is that enough for plausible or colorable jurisdiction in the Ninth Circuit? These questions point to the weakness and unworkability of the Ninth Circuit's jurisdictional premise and the need for this Court's review.

2. Concurrent tribal court jurisdiction over federal and state employment claims would result in judicial inefficiency and prolonged litigation, unnecessarily expending the resources of all involved. In *Belcourt Pub. Sch. Dist. v. Davis*, the Davis summons was filed in January 2007 in tribal court. The tribal court determined it did not have jurisdiction over the school district or its employees acting in their official capacities, and dismissed the case in June 2010. The Turtle Mountain Tribal Court of Appeals reversed the tribal court in February 2012. The school district then brought an action for declaratory and injunctive relief in federal district court, claiming the tribal court did not have jurisdiction over the public school district and its employees acting in their official capacity. The matter was finally resolved when the Eighth Circuit Court of Appeals issued its decision in May 2015. That case took five years to exhaust tribal court remedies and another three years in federal court to

get a final decision that the tribal court lacked jurisdiction over the public school district. In sum, the public school district was forced to spend significant time and resources to exhaust tribal court remedies in that matter.

Similarly, in *Fort Yates Pub. Sch. Dist. #4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (8th Cir. 2015), a parent filed a complaint in tribal court on behalf of their child, alleging tort claims against the public school district. The tribal court denied the school district's motion to dismiss, finding that it had jurisdiction. *Id.* at 666. The school district filed an action in federal court, alleging the tribal court did not have jurisdiction over the parent's claims, and seeking declaratory and injunctive relief. Applying *Montana*, the Eighth Circuit Court of Appeals determined that neither exception applied and held that the tribal court lacked jurisdiction over the parent's tort claims against the public school district. *Id.* at 670. The Eighth Circuit further held that exhaustion of tribal remedies was not required because it would "serve no purpose other than delay" to require the school district to appeal the tribal court's jurisdictional determination to the tribe's supreme court. *Id.* at 672. Under the Ninth Circuit's decision here, the school district would have been required to exhaust all administrative remedies before bringing a declaratory action in federal court. The entire process could have been drawn out for several more years at significant cost to the school district.

If the Ninth Circuit's decision is left unreviewed, school district employees who work on tribal lands will be able to forum shop and to circumvent the well- established and extensive body of state and federal statutes, regulations, administrative decisions and judicial decisions that govern their public employment whenever they choose. This would be the case not only where the employee initially files a claim in tribal court but also where he or she first appeals through the state due process procedures and is unsuccessful, as was the case here. Under the Ninth Circuit's decision, the employee could then bring a subsequent claim in tribal court to re-try the issue(s). On the flip side, if the employee succeeded in federal or state court, the Ninth Circuit's ruling would appear to allow the school district a second bite at the apple by permitting the district to bring a claim in tribal court. In many states, tribal and state courts need not give full faith and credit to the other's civil judgments, further complicating matters. Protracted litigation that lacks finality serves the interests of no one involved, including the Native students served at public schools on tribal lands.

II. THE NINTH CIRCUIT'S DECISION ERODES THE ESTABLISHED AUTHORITY OF STATE AND FEDERAL LAW TO REGULATE PUBLIC EDUCATION ON TRIBAL LANDS AND LEADS TO UNCERTAINTY THAT WILL DESTABILIZE SCHOOL DISTRICT OPERATIONS

This Court's review is imperative to establish whether the state or tribe has jurisdiction not only over employment matters but also over curriculum, transportation, budgeting, and all other public school operations that occur on tribal lands. Public school districts providing services to Native children on or near a reservation in the Ninth Circuit need reassurance that they may continue operating in compliance with state and federal law free from tribal court authority.

The broad premise on which the Ninth Circuit rested its conclusion of plausible tribal court jurisdiction opens the tribal court door to many types of challenges to school districts' governmental functions– not just employment – that could affect state and federal laws on curriculum, school safety, education records, teacher quality, tenure, student discipline, compulsory attendance, and all other aspects of education.[8] This Court has acknowledged

[8] Of particular concern is special education which is governed by a tightly knit framework of due process rights afforded to special needs students and their parents under the Individuals with

that states have a substantial interest in the operation and administration of their schools: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (internal citation omitted). Despite the paramount governmental interest in providing public education, the Ninth Circuit's decision threatens the legal foundations underpinning public school operations by allowing challenges clearly within the subject matter jurisdiction of federal and state courts in the Ninth Circuit to be brought before a tribal court.

Similar to the harms in the employment context, *supra*, Part I, concurrent jurisdiction invites uncertainty, confusion and delay with respect to virtually every governmental decision made in the delivery of public education. For example, states have procedures and laws that govern students' due process rights applicable in disciplinary matters such as suspension and expulsion from school. If a student is expelled pursuant to the state expulsion procedure, should the student be able to allege in tribal court that the state's process is invalid? No, according to the federal district court in Montana. In *Glacier Cnty.*

Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. (2017) and state special education laws. Under the Ninth Circuit's rationale, these longstanding rights could be suppressed by an alternative tribal decision that ignores federal court rulings under the IDEA.

v. Galbreath, a student's guardians filed an action in tribal court, challenging their child's expulsion from school and seeking an order compelling the public school district to readmit the student. The tribal court determined it had jurisdiction and the school district filed an action in federal court, seeking declaratory and injunctive relief. The federal district court, applying *Montana*, held:

> The process established under the law of the State of Montana for the operation and administration of a public school system is available to all students within that system. Once enrolled in the State of Montana's public school system, tribal members must comply with the procedures established by state law to resolve any resulting grievance or dispute. Opening the Tribal Court for the optional use of tribal members unhappy with the substance or pace of the proceedings mandated by Montana law is not, despite defendants' argument to the contrary, necessary to protect tribal self government.

Glacier Cnty. Sch. Dist., 47 F. Supp. 2d at 1171–72 (citing *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (citing *Strate,* 520 U.S. 438)). Under the Ninth Circuit's decision at issue in this case, the door is open for students to bring these types of claims in tribal court.

In another context, the Eighth Circuit Court of Appeals, applying *Montana*, determined that the tribal court lacked jurisdiction over the parent's tort claims against the public school district. *Fort Yates Pub. Sch. Dist.,* 786 F.3d at 670. The circuit court held that exhaustion of tribal remedies was not required since it would "serve no purpose other than delay" to require the school district to appeal the tribal court's jurisdictional determination to the tribe's supreme court. *Id.* at 672. That case occurred in North Dakota, where the state limits the amount of monetary damages that can be awarded against state political subdivisions including school districts. N.D. CENT. CODE § 32-12.1-03 (2017). Had the Eighth Circuit determined that the tribal court did have jurisdiction over the tort law claims against the school district in *Fort Yates*, the tribal court would not necessarily have been required to adhere to that state law damages cap. This lack of predictability in defending tort claims will lead to higher insurance costs for school districts subject to tribal court jurisdiction, or even make school districts on reservations uninsurable.

CONCLUSION

Based on the foregoing, and the reasons set forth in the Window Rock Unified School District's Petition, *Amici* urge the Court to review the Ninth Circuit's rationale and decision that departs from the majority view of other circuits' application of *Montana v. United States*. Such review is critical to the ability of local school districts to fulfill their state

constitutional mandate to provide a system of free education for all students, including those children residing on Native lands.

Respectfully submitted,

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