No. 17-447

IN THE

Supreme Court of the United States

WINDOW ROCK UNIFIED SCHOOL DISTRICT, ET AL.,
Petitioners,
v.

ANN REEVES, ET AL.,
Respondents.

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

BRIEF FOR RICHIE NEZ, CASEY WATCHMAN, BEN SMITH, PETERSON YAZZIE, WOODY LEE, JERRY BODIE, AND EVELYN MEADOWS IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly ruled that a Navajo Nation tribal court should have the opportunity to determine in the first instance whether it has adjudicative jurisdiction over a case involving an Arizona school district operating on leased tribal trust land.

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INTRODUCTION

Petitioner Window Rock Unified School District makes every effort to turn this case into something it is not. It portrays its petition as a challenge to the Navajo Nation court's assertion of jurisdiction—but *no* such court has yet claimed the right to adjudicate the underlying dispute. It portrays the Court of Appeals' decision as a definitive ruling on the merits regarding tribal jurisdiction—but the Court of Appeals held only that jurisdiction was not "plainly lacking." And it argues that its petition offers the Court an opportunity to issue guidance with respect

to tribal adjudicative jurisdiction generally—but the premature posture of the case, the distinct nature of the Navajo treaty, and other legal and factual peculiarities will confound any attempt to do so. What Petitioner actually seeks, therefore, is an advisory opinion on a fact-bound question of tribal jurisdiction as yet undecided by the tribal court or the court below.

Certiorari should be denied.

STATEMENT

1. The Navajo Nation is a sovereign Indian tribe. In the late 1800s, the Navajo were forced to march over 300 miles to the east of their ancestral homeland to Bosque Redondo, in what is now New Mexico, where they were "forced by the United States to live crowded together on a small piece of land." *Williams* v. *Lee*, 358 U.S. 217, 221 (1959).

Hostilities between the two sovereigns were resolved by the Treaty of 1868, in which the Nation "pledge[d] their honor to keep" the peace. 15 Stat. 667, 667 (1868). In exchange, "the United States agree[d] that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." Pet. App. 81a. The 1868 Treaty thus "'set apart' * * * a portion of what had been [the Nation's] native country, and provided that no one, except United States Government personnel, was to enter the reserved area." *Williams*, 358 U.S. at 221 (quoting 15 Stat. at 668). This Court has

repeatedly recognized that the 1868 Treaty preserves an unusually broad degree of authority to the Nation. *See Nevada* v. *Hicks*, 533 U.S. 353, 361 n.4 (2001) (citing *Williams*, 358 U.S. at 221-222) (explaining that the broad powers ascribed to the Cherokee in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) rested in part on their treaty, and recognizing that the Navajo Nation's treaty is similarly expansive).

In the treaty, the Nation also agreed to a system of compulsory education. Pet. App. 82a. The United States agreed to facilitate this system by providing, for every thirty students, a schoolhouse and a teacher, "who [would] reside among said Indians[.]" *Ibid.* The treaty does not provide for the entry of teachers—or any other official, for that matter—sent by a state or territorial government. *See ibid.*

When, decades later, the time came for Arizona to join the Union, Congress passed the New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, ch. 310, 36 Stat. 557 (1910), which set a variety of conditions that the prospective states would have to meet before achieving statehood. Many were ultimately incorporated into Arizona's state constitution. One requirement was that Arizona "forever disclaim all right and title to * * * all lands lying within [its] boundaries owned or held by any Indian or Indian tribes[.]" *Id.* at 569. Another was that it make "provisions * * * for the establishment and maintenance of a system of public schools which shall be open to all the children of said State[.]" Pet. App. 82a. The Act required that these schools "forever remain under the exclusive control of the said State, and no part of the proceeds * * * shall be used for the

support of any sectarian or denominational school[.]" *Id.* at 82a-83a.

The Enabling Act did not address the relationship between Arizona's school districts and Indian reservations within Arizona's borders. Congress took up that issue in a limited fashion in a later Act, which, as amended in 1946, authorizes the "Secretary of the Interior, under such rules and regulations as he may prescribe, [to] permit the agents and employees of any State to enter upon Indian tribal lands * * * to enforce the penalties of State compulsory school attendance laws against Indian[s][.]" *Id.* at 83a. Neither that law, nor any other, abrogates the Nation's treaty right to exclude other state educational officials.

2. Window Rock Unified School District purports to be a political subdivision of Arizona that operates "public schools within that portion of the Navajo Reservation located within the State of Arizona." *Id.* at 61a. To locate its schools on the Nation's trust land, the District had to lease that land from the Tribe, which required the concurrence of the Tribe and the federal Bureau of Indian Affairs. *See* 25 U.S.C. § 415(a).

Window Rock's lease with the Nation, signed in 1985, includes a provision entitled "Agreement to Abide by Navajo Laws." Pet. App. 74a n.11. In that provision, Window Rock agreed that it would "abide by all laws, regulations, and ordinances of the Navajo Tribal Council now in force and effect or may be

hereafter in force and effect as long as those laws * * * do not conflict with state or federal law." *Ibid.*[1]

3. This case began when several current and former school district employees filed suit before the Navajo Nation Labor Commission alleging that the school district violated various provisions of the Navajo Preference in Employment Act (NPEA), a Navajo employment-discrimination law. *See* 15 Navajo Nation Code Ann. § 601 *et seq*. The Commission adjudicates alleged violations of NPEA in the first instance. *See id.* § 611. It has five members, and conducts hearings with a full panoply of procedural protections. *See id.* §§ 303, 611. Parties may appeal the Commission's decisions to the Navajo Nation Supreme Court, a full-time appellate court with justices appointed by the Navajo Nation President and confirmed by the Navajo Nation Council. *See id.* § 613; 7 Navajo Nation Code Ann. §§ 354(B), 355(A).

In the complaints filed before the Commission, the employees allege various NPEA violations, including "retaliation, * * * failure to be hired as the most qualified Navajo applicant for a job opening, * * * workplace harassment, and * * * termination without just cause." Pet. App. 61a-62a n.4.[2]

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[1] The decision below also addresses another school district, Pinon. The case against Pinon was mooted when the lone plaintiff bringing suit against that district passed away.

[2] Both the Petition (at 8-9) and the Ninth Circuit dissent (Pet. App. 29a) wrongly suggest that the employees also seek to relitigate their entitlement to merit pay under Arizona law, which they had already sought and been denied in state court. The employees clarified that they were *not* seeking merit pay; they were alleging that Window Rock had retaliated against

Window Rock moved to dismiss, arguing that the Commission lacked subject-matter jurisdiction. *Id.* at 7a. The Commission held a preliminary hearing on the motion, and determined that "additional discovery on the relationship between the Nation and the District[ ]" would be necessary to resolve the jurisdictional question. *Ibid.* The Commission ordered an evidentiary hearing on that issue. *Ibid.*

4. Before the Commission could hold the hearing, however, Window Rock filed suit in federal district court, seeking an injunction to prevent the Commission from even deciding whether it *had* jurisdiction. *Ibid*.

Relying heavily on its own (unpublished and unappealed) decision in another case, the District Court granted that injunction without conducting any additional discovery. *Id.* at 62a n.5. The District Court acknowledged that "[u]nlike in this case, the plaintiffs in [the earlier case] had sufficiently exhausted their tribal court remedies relating to the issue of tribal jurisdiction before filing their federal action." *Ibid.* But it failed to attach any significance to that fact. *Ibid.* The District Court therefore enjoined the Commission from "any further adjudication," *id.* at 80a, preventing the Commission from rendering even an initial jurisdictional determination.

5. The Court of Appeals reversed. The court began with the principle that "[a] tribal adjudicative body

them for having filed that unsuccessful state-court suit. *See* D. Ct. Dkt. 28-1 at 38-39. To the extent their complaints suggested otherwise, the Commission dismissed the relevant counts. *Ibid.*

generally must have the first opportunity to evaluate its jurisdiction over a matter pending before it." *Id.* at 9a. That exhaustion requirement is demanding: A litigant may avoid the need to exhaust its tribal remedies only if it can demonstrate that jurisdiction is "plainly lacking." Applying that standard, the Court of Appeals asked "whether tribal jurisdiction in this case is colorable or plausible." *Id.* at 10a.

The court first looked to the Treaty of 1868, which "makes clear that the Navajo Nation has the right to exclude nonmembers from the land on which the District['s] schools are now located." *Id.* at 21a. Examining the treaty clause regarding schools, the court held that the "provision * * * says nothing about the Navajo Nation's authority to exclude *state* officials." *Id.* at 22a. And "[a]bsent explicit congressional action to modify or eliminate" the rights to exclude granted by the treaty, "those rights remain." *Id.* at 23a.

The court then examined whether any subsequent congressional action modified or eliminated the Nation's broad right to exclude. It began with the 1910 New Mexico-Arizona Enabling Act. Recognizing that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *Id.* at 24a (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014)), the court found that "nothing in the Enabling Act specifically addresses state schools on tribal land." *Ibid.* Moreover, since the Enabling Act also "required Arizona, as a condition of admission, to disclaim any right to tribal land within its boundaries," the court determined that "there are at least colorable arguments on both sides of the question whether the Enabling Act eliminated the Nation's right to

exclude." *Ibid*. The court reached the same conclusion regarding the federal compulsory education law, observing that it does not authorize state officials' entry onto tribal land for purposes "beyond * * * enforcing truancy laws." *Id.* at 25a.

The Court next examined Window Rock's lease, and found that it too was "ambiguous as to [its] effect on tribal jurisdiction." *Ibid.* The lease did not " 'expressly waive[] in unmistakable terms' tribal jurisdiction." *Ibid.* (quoting *Grand Canyon Skywalk Dev., LLC* v. *'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013)). In fact, "Window Rock's lease *requires* the school district to abide by Navajo laws, to the extent that they do not conflict with Arizona or federal law, and it further provides that the agreement to abide by Navajo laws does not forfeit any rights under state or federal laws." *Ibid.* (emphasis added).

Because no federal law unequivocally abrogated the Nation's treaty-conferred right to exclude, nor was there an explicit waiver in the lease, the Court held tribal jurisdiction was not plainly lacking. *Id.* at 21a.

The court also considered whether the jurisdictional framework set out in *Montana* v. *United States*, 450 U.S. 544 (1981), and *Nevada* v. *Hicks*, 533 U.S. 353 (2001), might be applicable. *See* Pet. App. 21a. Reviewing this Court's precedent, the Ninth Circuit identified one case in which this Court applied the *Montana* framework to a suit arising from an incident on tribal trust land: *Hicks*, which involved state law enforcement officers serving process. *Id.* at 18a (quoting 533 U.S. at 358 n.2). But because the only question in this case is whether jurisdiction was "plainly lacking," the court declined to decide at this

early stage "whether *Hicks* could be expanded to cover state interests other than those in criminal law enforcement." *Id.* at 21a.

Nowhere in its analysis did the Ninth Circuit hold that the tribal court actually *has* jurisdiction to entertain the employees' claims against Window Rock. *See id.* at 26a. The court's holding was instead limited to the finding "that tribal jurisdiction is at least colorable or plausible and that exhaustion in the tribal forum is therefore required." *Id.* at 27a.

Judge Christen filed a dissent. Petitioner sought certiorari.

ARGUMENT

I. PETITIONER'S REQUEST FOR REVIEW IS PREMATURE.

Petitioner asks this Court "[w]hether 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[.]" Pet. i. But neither the Commission nor any other tribal court has yet *asserted* jurisdiction over the claims. Petitioner sought federal court review before the Commission could hold an evidentiary hearing to determine its jurisdiction. Pet. App. 7a.

Petitioner cites no case from this Court reviewing a question of tribal adjudicative jurisdiction at this preliminary stage. And for good reason: Article III prevents federal courts from issuing advisory opinions on whether a defendant's hypothetical future course of conduct *would* be legal *if* taken. Yet Petitioner asks this Court to decide whether the Commission's hypothetical assertion of jurisdiction *would*

be unlawful *if* it occurs. Even if Petitioner could somehow surmount this fundamental obstacle, this Court would still face tremendous practical difficulties in passing on the prospect of tribal jurisdiction before the tribal court has even developed a record.

1. Window Rock portrays its petition for certiorari as a straightforward request for this Court's review of a question of tribal adjudicative jurisdiction. But this case is meaningfully distinct from every case in which this Court has decided such a question: Each, without exception, involved federal judicial review *after* a tribal court asserted jurisdiction over a nonmember. *See, e.g.*, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 323 (2008) (reviewing jurisdiction after tribal court of appeals affirmed jury verdict against nonmembers); *Hicks*, 533 U.S. at 357 (reviewing jurisdiction after tribal court of appeals affirmed jurisdiction); *Strate* v. *A-1 Contractors*, 520 U.S. 438, 444 (1997) (same); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978) (reviewing jurisdiction after criminal defendant arraigned and charged in tribal court); *cf. Dollar Gen. Corp.* v. *Miss. Band of Choctaw Indians*, 135 S. Ct. 2833 (2015) (granting certiorari where tribal Supreme Court had affirmed assertion of adjudicative jurisdiction, *see Dolgencorp, Inc.* v. *Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014)), *aff'd by an equally divided Court*, 136 S. Ct. 2159; *see also Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 12 n.1, 19 (1987) (requiring exhaustion of tribal appeals where tribal court had summarily denied motions to dismiss for lack of jurisdiction); *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 847,

856-857 (1985) (requiring exhaustion where tribal court had entered default judgment).[3]

Nor did any of the lower-court cases Petitioner identified consider tribal jurisdiction *before* a tribal court had so much as asserted its authority to decide the underlying claims. *See Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 192 (7th Cir. 2015) (tribal court denied motions to dismiss for lack of jurisdiction); *Fort Yates Pub. Sch. Dist. No. 4* v. *Murphy ex rel. C.M.B.*, 786 F.3d 662, 666 (8th Cir. 2015) (tribal court concluded it had jurisdiction); *Belcourt Pub. Sch. Dist.* v. *Davis*, 786 F.3d 653, 656 (8th Cir. 2015) (tribal appellate court found jurisdiction); *MacArthur* v. *San Juan Cty.*, 497 F.3d 1057, 1062 (10th Cir. 2007) (tribal court issued preliminary injunction); *Red Mesa Unified Sch. Dist.* v. *Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183, at *1 (D. Ariz. Sept. 28, 2010) (plaintiff exhausted tribal court remedies on the jurisdictional question).

That is no coincidence. This Court has long held that, as a general rule, *no* federal court should review an assertion of tribal jurisdiction until a defendant has fully exhausted his tribal court reme-

[3] In *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999), this Court permitted tribal court defendants to proceed straight to federal court, but only because of the express preemption and removal provisions of the federal law under which those tribal plaintiffs brought suit. The Court was careful to observe that permitting the federal injunction against further tribal proceedings was not predicated on the absence of tribal jurisdiction; it was instead intended to "give the same result as a removal" that would have occurred had the suit been brought in state court. *Id.* at 485.

dies. *See Iowa Mut.*, 480 U.S. at 15-16; *Nat'l Farmers*, 471 U.S. at 856. A limited exception to that rule exists where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct" and the "exhaustion requirement * * * would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14. But that exception merely allows defendants to dispense with further tribal proceedings once a tribal court has already asserted jurisdiction; this Court has never invoked it to permit federal-court intervention *before* that happens. *See id.* at 444 (applying exception to excuse need for further tribal review after tribal court had "ruled that it had authority to adjudicate [the] case"); *Hicks*, 533 U.S. at 357 (applying exception when tribal court had "held that it had jurisdiction over the claims, a holding affirmed by the Tribal Appeals Court").

That makes sense: Deciding the lawfulness of a tribal court's assertion of jurisdiction before that assertion has occurred violates Article III's limits on the federal judiciary. It "is well known the federal courts * * * do not render advisory opinions." *United Pub. Workers of Am. (C.I.O.)* v. *Mitchell*, 330 U.S. 75, 89 (1947). And "[i]t goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983). "A hypothetical threat is not enough." *United Pub. Workers*, 330 U.S. at 89-90; *accord Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 71 (1961).

The injury that Petitioner complains of is a tribal court's assertion of "jurisdiction to adjudicate" employment claims by state school district employees.

Pet. i. But because Petitioner filed its federal complaint before *any* tribal body asserted jurisdiction over it, its injury remains no more than "hypothetical." *Lyons*, 461 U.S. at 102. All that can be gleaned from the federal complaint is that the Commission seeks to determine whether it has jurisdiction at all—an effort Petitioner's federal suit stopped mid-course.[4] Pet. App. 7a. Unless and until the assertion of tribal court jurisdiction becomes a reality, Window Rock's request that this Court decide that its rights *will* be violated *if* jurisdiction is asserted is a paradigmatic call for an advisory opinion. The petition can be denied on that basis alone.

2. Even if Petitioner could overcome this Article III barrier, its difficulties are only beginning. It is a bedrock principle of judicial administration that "the forum whose jurisdiction is being challenged" should be given "the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers*, 471 U.S. at 856; *see also Chicot Cty. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 377 (1940). *Cf. Fed. Power Comm'n* v. *La. Power & Light Co.*, 406 U.S. 621, 647 (1972) (acknowledging, in the administrative context, "the primary authority of an agency to determine its own jurisdiction"). At a minimum,

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[4] Petitioner has never contended that the result of the Commission's evidentiary hearing was foreordained. Indeed, the Ninth Circuit recognizes a separate futility exception to the rule of tribal exhaustion. *See Grand Canyon Skywalk Dev.*, 715 F.3d at 1203. Window Rock has never argued that it applies. *See* D. Ct. Dkt. Nos. 26, 27. And, in any event, the very fact that the Commission called for an evidentiary hearing on the topic demonstrates that its assertion of jurisdiction was not a foregone conclusion.

that principle dictates that a federal court should not consider a complex question of tribal adjudicative jurisdiction before the tribal courts have done so. That is particularly so given Congress' long commitment "to a policy of supporting tribal self-government and self-determination." *Nat'l Farmers*, 471 U.S. at 856.

Withholding federal-court review until after the tribal courts have asserted jurisdiction also has significant practical advantages. *See id.* at 856-857. It "encourage[s] tribal courts to explain to the parties the precise basis for accepting jurisdiction." *Id.* at 857. It also gives federal courts "the benefit of [the tribal court's] expertise" in matters such as treaties and tribal law—matters squarely implicated in this case. *Ibid.* And it promotes "the orderly administration of justice * * * by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id*. at 856.

Finally, this Court's precedents make clear that determining a tribe's jurisdiction over a nonmember is a heavily fact-intensive inquiry. It typically depends in the first instance on the status of the land on which the underlying dispute occurred, the scope of the tribe's treaty rights, and the nature of any competing state interests. *Montana*, 450 U.S. at 557-566; *Hicks*, 533 U.S. at 359-360. Even when no treaty controls and the dispute does not arise on tribal trust land, *Montana* requires a court to perform a factbound analysis: It must decide whether a tribe's assertion of jurisdiction is based on a "consensual relationship[ ]" between the tribe and the nonmember or whether the case involves a threat to "the political integrity, the economic security, or the

health or welfare of the tribe." *Montana*, 450 U.S. at 565-566. A court's ability to perform these jurisdictional inquiries is badly handicapped where it cannot rely on an evidentiary record from the tribal court.

3. This very case demonstrates the problem. If this Court grants review, its analysis of the jurisdictional question would be confounded by the exceedingly thin record. A few examples are illustrative:

First, the Navajo Nation has a unique treaty with the United States that grants the tribe a broad right to exclude. Pet. App. 22a; *cf. Warren Trading Post Co.* v. *Ariz. State Tax Comm'n*, 380 U.S. 685, 690 (1965) ("Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities."). The scope of a tribe's treaty rights often plays an essential role in determining the extent of tribal adjudicatory authority. *See Nat'l Farmers*, 471 U.S. at 854-855. Indeed, in *Montana* itself, the Court recognized that a treaty may definitively establish tribal jurisdiction. *Montana*, 450 U.S. at 557. Yet Petitioner asks this Court to grant review without the Tribe's perspective on the interpretation and application of its own treaty. That is perhaps why Window Rock buries any mention of the treaty in a lengthy footnote, Pet. 3-4 n.5, but the difficulty cannot be ignored. Tribal treaties are to be "construed in the sense in which naturally the Indians would understand them," *United States* v. *Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 116 (1938), and no proceeding in this case has yet probed that understanding.

Second, Petitioner has rested much of its case on the assertion that the School District's affairs are uniquely the concern of the State. Pet. 3. But because the District Court short-circuited the tribal court's efforts to develop a record, there is very little evidence regarding the nature of the State's, the Tribe's and the federal government's relationship to the District. And what little information there is suggests that the State's interest is far from exclusive. For example, if the school receives certain forms of federal aid, federal law requires that tribal representatives be consulted on educational programming. *See, e.g.*, 20 U.S.C. § 7424(b) (formula grants to local educational agencies require consultation on "a comprehensive program for meeting the needs of Indian children"); *id*. § 7704(a) (Impact Aid requires consultation with parents and tribes on a variety of issues). And as the dissent below recognized, there is evidence that this case involves "all-Navajo school boards." Pet. App. 47a. The key premise underlying the District's argument thus remains an open question.

Third, there is a dearth of evidence about the implications of Window Rock's lease. That lease contains a provision requiring the school district to abide by the Nation's law. *See id*. at 74a-75a n.11. But at this early stage, the record is not even clear about the authority under which Window Rock signed the lease, whether it was acting as an arm of the state when it did so,[5] and how the parties understood the provision regarding the Nation's law.

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[5] Below, Petitioner argued that it was *not* acting as an arm of the state in signing the lease. *See* C.A. Ans. Br. 11 n.5. This

Without a complete factual record on these and other issues, it is premature for this Court to take up the propriety of the Nation's jurisdiction over Window Rock, much less school districts in general. *See* Pet. 15 (broadly urging this Court to "conform the law among the circuits regarding the correct jurisdictional analysis to apply to [state school district] employment decisions"). The Court of Appeals properly insisted that these issues first be ventilated before the tribal court. Indeed, it was on precisely these issues that the tribal court proposed to hold an evidentiary hearing. *See* Pet. App. 7a. There is no reason for this Court to expend its valuable resources until Window Rock has exhausted its tribal remedies—assuming it still has something to complain about after this occurs.

II. THERE IS NO REASON FOR THE COURT TO GRANT REVIEW IN ANY EVENT.

Despite these profound obstacles to review, Petitioner claims that certiorari should be granted to decide an important question and to resolve conflict in the circuits. Petitioner is wrong on both counts.

1. Petitioner asserts that this Court should grant review in order "to clarify the applicability of *Hicks* and the *Montana* rule" to school districts on Indian reservations. Pet. 6. This would be an exceedingly poor vehicle to provide guidance on that issue. Setting aside the Article III issue and the meager evidentiary record, this Court's review would be confounded by the fact that the court below did not

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argument only deepens the confusion about whether Arizona in fact has "exclusive control" over the school districts.

offer any affirmative pronouncement about the appropriate application of *Hicks* and *Montana*. *See* Pet. App. 21a. Instead, applying the "plainly lacking" standard, the court expressly reserved the question whether *Hicks* might eventually be extended to make *Montana*'s rule applicable to this case. *Ibid.* The same "plainly lacking" standard would govern this Court's review, impeding its ability to offer definitive guidance. *Hicks*, 533 U.S. at 369.

Review is further impeded by the unique nature of the Nation's treaty, which sharply curtails the potential for generally applicable pronouncements about tribal jurisdiction. This Court has consistently held that relevant provisions of a tribe's treaty must be considered in the jurisdictional analysis and may, in some cases, be dispositive. *See Montana*, 450 U.S. at 557 (recognizing that a treaty can confer tribal jurisdiction and conducting a detailed analysis of the Crow tribe's treaty); *Hicks*, 533 U.S. at 358. The Ninth Circuit accordingly recognized that the Nation's treaty right to exclude nonmembers bears heavily on the jurisdictional inquiry here. Pet. App. 21a ("The 1868 treaty that established the Navajo Reservation makes clear that the Navajo Nation has the right to exclude nonmembers from the land on which the Districts' schools are now located."). And the Treaty of 1868 accords the Nation significantly more power to exclude state officials than many other treaties. *See Hicks*, 533 U.S. at 361 n.4. Indeed, the *Hicks* Court itself recognized that a treaty like the Navajo Nation's might have affected the jurisdictional inquiry. *Ibid.* This Court should not broadly consider an important question of tribal jurisdiction in a case where the jurisdictional analy-

sis may be heavily influenced, if not decided, by a single tribal nation's treaty.

2. Petitioner also suggests that review is warranted to resolve conflict in the circuits, but the alleged conflict is illusory.

As a preliminary matter, the petition is somewhat unclear about what alleged conflict Petitioner wishes this Court to resolve. The Question Presented asks the Court to decide whether a tribe "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." Pet. i (emphases added). Petitioner points to no disagreement in the courts of appeals on that Arizona-specific question. Nor would such a fact-bound issue merit this Court's review.

Within the petition, however, Window Rock claims a circuit split on two broader issues. First, it suggests that the circuits disagree about whether tribes have jurisdiction over disputes involving school districts located on tribal land. *Id*. at 16. Second, it gestures towards an even more general dispute about the application of *Montana*'s rule on tribal trust land. *Ibid*. Both splits prove ephemeral.

As to the school district question: Petitioner points to only one other circuit that has addressed the issue. In a pair of cases decided on the same day by the same panel, the Eighth Circuit found that two tribes lacked adjudicative jurisdiction over school districts. But both cases are readily distinguishable. Among other things, the decisions were issued *after* at least one tribal court had asserted jurisdiction,

and no one pointed to a treaty relevant to the jurisdictional analysis. *See Fort Yates*, 786 F.3d at 666; *Belcourt*, 786 F.3d at 657. Further, neither Eighth Circuit case involved land owned by the tribe, much less a lease explicitly agreeing to abide by tribal law. Rather, in *Belcourt*, it was "unclear in the record what, if any, of [the school] facilities or the land on which the facilities are located belong to the Tribe * * * * however, it [wa]s clear that some but not all of the property used by" one of the high schools was "federally owned." 786 F.3d at 656 n.1 (internal quotation marks omitted). The status of the land in *Fort Yates* was similarly "unclear," although the court determined that "at least some of the property [wa]s not Tribal[.]" 786 F.3d at 665 n.2. Both cases carefully noted that they did not involve "an agreement that expressly provides for [tribal] jurisdiction" and consequently refused to "rul[e] out the possibility that a state and a tribe could enter into an agreement that confers jurisdiction upon the tribe." *Belcourt*, 786 F.3d at 659 n.4; *Fort Yates*, 786 F.3d at 669 n.5.

Given these significant factual differences, it is impossible to assume that the Eighth Circuit would have reached a different conclusion from the Ninth Circuit when considering this case, particularly given the "plainly lacking" standard under which this case was litigated and decided.

Petitioner's other alleged split—regarding the applicability of *Montana*'s general rule on tribal trust land—fares no better. To begin, because of this case's procedural posture, the court below did not need to (and did not) take a firm position on the issue. Thus, any existing split is not implicated by this petition. *See supra* p. 10.

Petitioner also mischaracterizes two of the cases that (in its view) make up the split. The Fifth Circuit in *Dolgencorp* did not hold that *Montana* always applies on tribal land; it assumed *Montana*'s applicability because the tribe did not dispute the issue. *See* 746 F.3d at 169. And, while Petitioner cites a Tenth Circuit case, *MacArthur*, for the proposition that *Montana* governs "state officials' conduct on a reservation," Pet. 16, the *MacArthur* court expressly *disclaimed* any "opinion regarding the ability of the tribes to exercise regulatory authority over States qua States when the regulated activity occurs on Indian land." *MacArthur*, 497 F.3d at 1074 n.10.

3. Finally, both of Petitioner's alleged splits are lopsided, with only the Ninth Circuit on one side. And, as both the majority and the dissent below acknowledged, there is tension within the Ninth Circuit itself regarding these questions. For example, the majority conceded that its articulation of *Montana*'s applicability was "arguably" in tension with two other Ninth Circuit cases: *Smith* v. *Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc) and *Philip Morris USA, Inc.* v. *King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009). Pet. App. 19a n.9. The dissent, too, contended that the panel's decision brought the court into conflict with itself. *Id*. at 46a n.23.

In keeping with its penchant to jump the gun, however, Petitioner skipped en banc review, depriving the full Ninth Circuit of the opportunity to resolve this potential intracircuit conflict. Until the Ninth Circuit clarifies its position, it is too soon to say whether its position is or is not in conflict with that of any other court of appeals.

III. PETITIONER'S CONCERNS ABOUT THE PRACTICAL CONSEQUENCES OF THE PANEL'S DECISION ARE OVERBLOWN.

1. Finally, Window Rock unnecessarily frets that the Court of Appeals' decision will "wreak practical havoc." Pet. 4. First, Window Rock expresses concern about the consequences of multiple sovereigns sharing authority over an educational system. But on this limited record, it appears that may well already be true. *See* 20 U.S.C. § 7424(b); Pet. App. 47a (Christen, J., dissenting). The dramatic consequences Petitioner fears have not ensued. Moreover, as this Court has recognized, problems of overlapping authority are routinely solved through intergovernmental bargaining. *Bay Mills*, 134 S. Ct. at 2035. Indeed, that is precisely the approach reflected in the lease Window Rock signed, agreeing to abide by tribal law. Pet. App. 6a.

Window Rock next warns that the decision below "threatens the finality of district employment decisions that have been appropriately tested through state due process procedures." Pet. 5-6. To begin, the petition does not argue that any part of this case turns on the law of preclusion. Window Rock's concerns are therefore beside the point. They are also wholly unfounded. The tribal court here dismissed the employees' potentially duplicative merit-pay claims after confirming that they did not intend to relitigate that issue. *See* D. Ct. Dkt. No. 28-1 at 38-39. More generally, Navajo Nation courts recognize principles of preclusion, obviating concerns that they will seek to reopen claims that have already been settled in other tribunals. *See Peabody W. Coal Co.* v. *Navajo Nation Labor Comm'n*, 8 Nav R. 313,

318-320 (Nav. Sup. Ct. 2003) (recognizing res judicata as an affirmative defense and finding that NPEA claims before the Commission were barred by earlier arbitration proceedings).

Window Rock next raises the specter that the NPEA will impose a different set of employment regulations on schools operating on tribal land versus schools off-reservation. Pet. 5. This argument overlooks the fact that, under the Nation's law, school districts can waive Navajo preference through an action of the school board. 10 Navajo Nation Code Ann. § 124(C).[6]

In any event, Petitioner directs its policy concerns to the wrong branch of government. Congress, in consultation with the Navajo Nation and the State, ultimately has the power to decide how to appropriately balance tribal, state, and federal authority in the education context. *See Bay Mills*, 134 S. Ct. at 2030. Moreover, the Treaty of 1868 bears a congressional imprimatur. *See* 15 Stat. 667. To the extent Window Rock is unsatisfied with the scope of the Nation's sovereign powers, its grievances must be addressed to Congress.

2. Even more to the point, all of Petitioner's dire predictions rest on a distorted view of the Ninth

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[6] Petitioner also exaggerates the difference between Navajo Nation and state law. As one example, Window Rock suggests (at 5 n.8) that the burden of proof is on the employer, rather than the employee, under Nation law. In fact, the NPEA burden of proof is on the employee, after an amendment made by the Navajo Nation Council in 2016. Navajo Nation Council Resolution No. CMA-13-16 § 2 (March 23, 2016) (amending 15 Navajo Nation Code Ann. § 611(B)), *available at* http://www.navajocourts.org/Resolutions/CMA-13-16.pdf.

Circuit's holding. *No* court has yet decided that the Nation's courts actually have adjudicative authority over Respondents' claims. *See* Pet. App. 21a. If and when the Commission and the Nation's courts determine that they have jurisdiction, and if Petitioner remains unsatisfied after it has exhausted its tribal remedies, it may present the jurisdictional question to this Court with an actual record behind it.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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