No. 17-___

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

PETITION FOR A WRIT OF CERTIORARI

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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.

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INTRODUCTION

Indian tribes have lost "the right of governing . . . person[s] within their limits except themselves."[1] As such, tribes generally have no inherent sovereign powers over the activities of non-members of a tribe. *Montana v. United States*, 450 U.S. 544, 563-65 (1981).[2]

Montana's rule applies regardless of whether the non-member activity occurs on tribal land or non-tribal land, at least "when . . . state interests outside the reservation are implicated." *Nevada v. Hicks*, 533 U.S. 353, 360, 362 (2001). *See also id*. at 375-76 (Souter, J., concurring) (land status is relevant only to whether one of the *Montana* exceptions applies); and *id*. at 388 (O'Connor, J., concurring in part and concurring in judgment) ("the majority is quite right that *Montana* should govern our analysis of a tribe's

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[1] *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008), citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978).

[2] There are two limited exceptions to *Montana*'s "no tribal jurisdiction over non-members" rule. A tribe may regulate: (1) "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 564. This refers to a "private consensual relationship," not official actions. *Nevada v. Hicks*, 533 U.S. 353, 359 n.3 (2001); and (2) non-Indian conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The non-member's conduct must "imperil the subsistence" of the tribal community. *Plains Commerce Bank*, 554 U.S. at 341. State school district employment decisions over its employees do not implicate either exception, *see Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL 3855183 (D. Ariz. 2010), so *Montana*'s general rule of no jurisdiction over non-members applies.

civil jurisdiction over nonmembers both on and off tribal land").[3] *Nevada v. Hicks* applied the *Montana* rule to find no tribal jurisdiction over a tribal member's suit against state game wardens who searched the member's home (on tribal land) regarding an off-reservation crime. The Court reasoned that the state's interest in executing process was considerable, and tribal regulation of the game wardens was not essential to tribal self-government or internal relations. *Id*. at 358. In fact, the Court held the lack of tribal jurisdiction so plain that the wardens need not have exhausted their tribal remedies. *Id*. at 369. Concurring, Justice Souter (joined by Justices Kennedy and Thomas) agreed there was no tribal jurisdiction because under *Montana*, an Indian tribe's inherent sovereign powers do not extend to the activities of nonmembers. *Id*. at 375. Tribal adjudicative jurisdiction "depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. . . . It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." *Id*. at 381.

The foregoing principles apply with force to claims by Arizona school district employees against their Arizona school district employer challenging the District's employment decisions made pursuant to state law. Because the *Montana* framework applies

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[3] *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 339 (2008) (land status might impact one or both of the *Montana* exceptions); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659-60 (2001) (*Montana*'s "general proposition is . . .the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe.") (Souter, J., concurring).

regardless of land ownership, and the District's non-member status is the primary jurisdictional fact, the location where the decisions were made (within the reservation's boundaries) should not have dictated either the jurisdictional analysis or the jurisdictional outcome. That is especially true here, where the state's interest in fulfilling its constitutional mandate – to operate a general and uniform public school system pursuant to state law – is *at least* as considerable as the *Hicks* game wardens' interest in executing process on the reservation for an off-reservation crime. School districts' decisions over its employees pursuant to state law are not essential, or even relevant, to tribal self-government or internal relations.

The Ninth Circuit nevertheless held that tribal jurisdiction over these claims is plausible, stating that (a) *Montana*'s analysis did not even apply because the conduct occurred on tribal land, App. 10a-11a;[4] (b) *Hicks* did not apply because the claims here "implicate no state criminal law enforcement interests," *Id.*; and (c) the Navajos have the right to exclude the Districts from the reservation. App. 21a, citing the Treaty of 1868. *See* App. 81a-82a.[5]

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[4] In so holding, the circuit court reverted to the analysis *it* had used in *Hicks* and which this Court reversed. *See State v. Hicks*, 196 F.3d 1020, 1028 (9th Cir. 1999), *as amended* (Jan. 24, 2000) (*Montana* presumption against tribal court jurisdiction did not apply because the wardens' conduct occurred on tribal land).

[5] Tribal jurisdiction over nonmembers is limited to the *Montana* exceptions "absent express authorization by federal statute or treaty." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The Treaty of 1868 does not provide such "express authorization" here. It does reserve to the Navajos a general right to exclude others from tribal property. But it does not give the Navajos the right to exclude state school districts from the reservation, because the Navajos specifically agreed in the Treaty

The Ninth Circuit's decision directly contravenes *Hicks*' direction to apply the *Montana* analysis to non-member conduct even on tribal land (at least where state interests are significant). It is at odds with the Court's declaration that the membership status of the un-consenting party, not the title to the soil, is the primary jurisdictional factor. And it conflicts with the Fifth, Sixth, Seventh, Eighth and Tenth Circuits' cases holding the *Montana* analysis applies to non-member conduct on tribal land. *See* citations *infra*.

More importantly, authorizing tribal jurisdiction over these types of claims would wreak practical havoc. There are nearly two dozen Indian reservations in Arizona covering 12 of the state's 15 counties. 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.[6]

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to the presence of government schools on the reservation. The Treaty compels Navajo children to attend those schools; and it allows federal agents (Arizona was not yet a state) to enter the reservation for that purpose. App. 82a. Subsequently, the federal New Mexico-Arizona Enabling Act required Arizona to not only provide schools for all children as a condition of becoming a state, but also mandated that such schools "shall forever remain under the exclusive control of the said State." App. 82a-83a. Arizona's constitution consequently requires the state to provide a "general and uniform" public school system throughout the state. App. 84a. In 1946, Congress authorized state officials to enter tribal land to enforce compulsory school attendance laws, and the Navajos consented to such entry. *See* Act of Aug. 9, 1946, ch. 930, 60 Stat. 962; 10 N.N.C. § 503. App. 83a. In light of the foregoing, it cannot be said that the Navajos have the right to exclude the school districts from the reservation. App. 44a-45a (Christen, dissenting). The Treaty therefore does not forestall the application of *Montana*'s general rule.

[6] West Comprehensive Center at WestEd. (2014), "Indian education in Arizona, Nevada, and Utah: A Review of State and

The assertion of "plausible tribal jurisdiction" over employment claims against these districts will force districts operating on reservations into a constitutional crisis by displacing the State's due process system with a tribal court process that permits an employee to bypass the mandatory state administrative remedies[7] and avoid the state-imposed burden of proof.[8] Arizona school district employees working inside the reservation would be treated differently from Arizona school district employees working outside the reservation. These consequences would seriously impair the State's ability to fulfill its constitutional mandate to provide a "general and uniform" public education system in the manner the Arizona Legislature has determined will best achieve that goal. And because the Navajo reservation spans across Arizona, New Mexico, and Utah – states within both the Ninth and Tenth Circuits – school district employees on the reservation might bring similar claims against neighboring school districts, yet face different jurisdictional analyses and potentially different outcomes depending on the circuit in which the particular school district operates.

The assertion of plausible tribal jurisdiction over these claims also threatens the finality of district employment decisions that have been appropriately

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National Law, Board Rules, and Policy Decisions," available at www.WestEd.org/resources.

[7] *See* Ariz. Rev. Stat. § 12-901 (requiring exhaustion of administrative remedies).

[8] Compare *Guard v. County of Maricopa*, 14 Ariz. App. 187, 188-89,481 P.2d 873, 874-75 (1971) (in an appeal to superior court from a termination decision, the employee has the burden of proving the board erred); with 15 Navajo Nation Code ("N.N.C.") § 611(B) (in an NNLC action by an employee alleging his or her discharge violated the NPEA, the employer has the burden of proving the discharge complied with the NPEA).

tested through state due process procedures. This is evident in the case of the Individual Respondents who are trying to challenge the "Proposition 301" decision in tribal court after having lost their challenge in state court. *See* Statement of the Case, ¶ 2a, *infra*. Once an employment decision is made pursuant to state due process procedures, that decision must remain effective, binding, and not subject to further litigation and a potentially conflicting tribal court ruling. Nor should the District have to spend the time, energy, or money re-litigating issues already decided in the state forum. Concern for these very real consequences, as much as the more intricate legal issues, kindle this petition and necessitate this Court's attention and resolution.

Finally, the Ninth Circuit majority thought tribal jurisdiction was plausible "because our caselaw leaves open the question of what state interests might be sufficient to preclude tribal jurisdiction over disputes arising on tribal land." App. 11a-12a. Public school district entities and their representatives who perform constitutionally-mandated official – but non-law enforcement – duties within the boundaries of Indian reservations need the Court to definitively answer that question, to clarify the applicability of *Hicks* and the *Montana* rule to their official conduct on Indian reservations, and to conform the law among the circuits on this important issue.

OPINIONS BELOW

The Ninth Circuit's amended opinion is published at *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017). App. 1a. The district court's decision, which is unpublished, can be found at *Window Rock Unified Sch. Dist. v. Reeves*, 2013 WL 1149706 (D. Ariz. Mar. 19, 2013). App. 60a.

JURISDICTION

The Ninth Circuit filed its decision on June 28, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Reproduced in the appendix to this brief are: The Treaty of 1868, 15 Stat. 667, 669, Art. 2 and Art. 6 (App. 81a-82a); Arizona's federal Enabling Act, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, §§ 20, 26 (App. 82a-83a); 10 N.N.C. § 503 (App. 84a); and Arizona Constitution, Art. 11 (App. 84a).

STATEMENT OF THE CASE

1. Petitioner's statutory and constitutional mandate

Petitioner Window Rock Unified School District is a political subdivision of the State of Arizona, organized under and governed by Arizona law. Ariz. Rev. Stat. § 15-101(21). The District is federally directed and constitutionally mandated to provide a general and uniform education to all Arizona children at state expense. The federal Enabling Act that authorized creation of the State of Arizona required, as a condition of Arizona's admission to the United States, the State's adoption of a constitution providing for "the establishment and maintenance of a system of public schools which shall be open to all the children of said State." Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 570. Section 26 of that Act required "That the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State." *Id*., § 26; App. 82a. Arizona's Constitution, Article 11, § 1(A), fulfills the promise of

the Enabling Act by mandating that the legislature shall provide for the establishment and maintenance of a "general and uniform" public school system. App. 84a.

Pursuant to the foregoing mandates, Petitioner Window Rock Unified School District operates within the geographical boundaries of the Navajo reservation on land leased from the Navajos. [C.A. Dkt. No. 12-4 at 34, ¶ 1.] While the lease states that the lessee (district) agrees to abide by Navajo laws, it also states that the lessee shall not forfeit the rights it enjoys under federal law, and that the lease shall not "affect the rights and obligations of Lessee as an Arizona public school district under applicable laws of the State of Arizona." [C.A. Dkt. No. 12-4 at 45, 53.]

All six of the Individual Respondents (current or former school district employees) signed employment contracts with the District agreeing to abide by the applicable laws of the United States and the State of Arizona, as well as the State Board of Education's policies, rules, and regulations. One of those contracts even specified that "Arizona State and federal courts shall exercise exclusive jurisdiction over any and all matter arising out of this contract." App. 27a.

2. Tribal court proceedings.

a. The Individuals' various complaints.

The Individual Respondent school district employees were dissatisfied with Window Rock USD's employment decisions. Four of the Individual Respondents were staff members (not certified teachers) who challenged the District's decision that staff members were not entitled to state "Proposition 301" money

(merit pay for teachers).[9] [C.A. Dkt. 12-4 at 34.] These four individuals sued Window Rock USD in state court, and lost in the trial court and court of appeals.[10] Rather than seek review with the Arizona Supreme Court, they filed complaints in the Navajo tribal court attempting to obtain a contrary ruling. [*Id*.]

The other two Individual Respondents were not hired for district positions for which they applied. [*Id*. at 36-38.] Both individuals failed to either utilize or complete the state-mandated appeal process for their employment decisions. [*Id.*] Instead, these employees filed complaints with the Navajo Nation Labor Commission ("NNLC"),[11] alleging that Window Rock USD's employment decisions violated the Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. § 601. In pertinent part, the NPEA requires employers to give preference in employment to Navajos and provides for termination only upon good cause.[12]

b. Window Rock USD moves to dismiss.

Window Rock USD moved to dismiss each of the Individuals' cases for lack of tribal jurisdiction, citing *Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL

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[9] Two individuals are Navajos, one is a member of the Lovelock Paiute Tribe, and the fourth is not a tribal member.

[10] *Reeves v. Barlow*, 227 Ariz. 38, 251 P.3d 417 (Ct. App. 2011).

[11] The NNLC is a fact-finding body and presides over trials. 15 N.N.C. § 304. Appeals are taken to the Navajo Supreme Court. *See* 15 N.N.C. § 613; Rule 17, NNLC Rules of Procedure.

[12] A third individual, Barbara Beall, was a party to this case but she passed away during its pendency. She had been terminated from her position with the Pinon Unified School District for just cause, and had sued the Pinon USD in tribal court. Because the tribal court has dismissed her claim, neither she nor Pinon USD is a party to this petition.

3855183 (D. Ariz. Sept. 28, 2010) (as a matter of law, Navajo Nation has no regulatory or adjudicative jurisdiction over Arizona school districts' employment-related decisions). Rather than rule on the motions to dismiss, the NNLC consolidated all of the foregoing cases for purpose of holding an evidentiary hearing. The NNLC indicated it wanted to take evidence on such things as whether school districts' leases with the Navajo Nation are "government to government compacts" between sovereigns, and the ethnic composition of the school district. [C.A. Dkt. 12-4 at 66.]

3. Federal district court proceedings.

Window Rock USD filed this complaint for declaratory and injunctive relief against the NNLC and the Individual Respondents. [D.C. Dkt. 1.] The District alleged that it need not exhaust its tribal remedies because tribal jurisdiction was "plainly lacking." *Strate v. A-1 Contractors*, 520 U.S. 438, 459, n. 14 (1997) (exhaustion not required "when . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule . . . .").

The NNLC and Individual Respondents moved to dismiss for the District's failure to exhaust its tribal remedies, arguing that tribal jurisdiction was plausible. [D.C. Dkt. 12, 19.] The District responded and cross-moved for summary judgment, arguing that tribal jurisdiction was not only "not plausible," but was plainly lacking as a matter of law. [D.C. Dkt. 26-29.] No party controverted the school district's facts.

The district court, Hon. Paul Rosenblatt, denied the NNLC's and Individual Respondents' motion to dismiss and granted the District summary judgment, concluding that tribal jurisdiction was plainly lacking.

[C.A. Dkt. 12-3 at 3-22.] The court ruled that "the Navajo Nation has no regulatory or adjudicative jurisdiction over the plaintiff school district's employment-related decisions underlying this action." [*Id*. at 20.] The NNLC and Individual Respondents appealed.

4. Ninth Circuit proceedings.

The Ninth Circuit reversed in a two-to-one opinion. The majority ruled that tribal jurisdiction over the school district employees' claims was plausible because even though the District is a nonmember, "the claims arise from conduct on tribal land and implicate no state criminal law enforcement interests." App. 6a. It refused to apply the *Montana* framework, as *Nevada v. Hicks* directs, reading *Hicks* to apply very narrowly to its specific facts – that is, only when state law enforcement officers are on the reservation executing process related to an off-reservation criminal violation. App. 11a. Rather than analyzing whether the employment decisions of state school districts operating on the reservation pursuant to federal and state constitutional mandate similarly implicate "state interests outside the reservation," the majority instead concluded that tribal jurisdiction was plausible because "our caselaw leaves open the question of what state interests might be sufficient to preclude tribal jurisdiction over disputes arising on tribal land." App. 11a-12a.[13]

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[13] The dissent commented:

> If a State's interest in executing legal process to enforce its criminal laws was sufficient in *Nevada v. Hicks*, 533 U.S. 353, 364 (2001), it is hard to imagine how a State's interest in complying with a statutory and constitutional directive to provide a uniform

The dissenting judge disagreed with the majority's narrow reading of *Hicks*, noting that the Ninth Circuit's narrow reading "has been criticized." App. 40a. The dissent also noted that the majority decision "creates a circuit split" that "puts our court at odds with every other circuit that has addressed tribal jurisdiction over nonmembers after *Hicks*," App. 27a, 48a; and that the majority gave "short shrift to the school districts' obligation to operate public schools within the Navajo Reservation's boundaries, treating Window Rock and Pinon Unified School Districts as private parties engaged in private-sector, contractual relationships on the Navajo Reservation." App. 28a. The dissent found tribal jurisdiction neither colorable nor plausible here because, "at least where there are competing state interests, tribes generally *lack* jurisdiction over the conduct of non-tribal members within the boundaries of a reservation, regardless of the status of the land on which nonmember conduct occurs." App. 33a (emphasis in original). The dissent believed the majority's announcement of a rule "that tribal jurisdiction is plausible any time nonmember conduct occurs on tribal land unless state criminal law enforcement interests are implicated" disregarded two important precepts: first, the general rule that an Indian tribe's inherent sovereign powers do not extend to the activities of nonmembers (apart from the two *Montana* exceptions), App. 37a; and second, this Court's pronouncement in *Hicks* that the ownership status of the land is not dispositive of the jurisdictional question. App. 41a. The dissent concluded:

> system of public education to all the State's children would be insufficient.

App. 48a, n.24.

> Arizona has a compelling interest in ensuring that Navajo children have access to public education on the Navajo Reservation, and *Montana v. United States*, 450 U.S. 544 (1981), is the applicable framework. Because I would hold that jurisdiction is not colorable or plausible under *Montana*, I respectfully dissent.

App. 59a.

REASONS TO GRANT THE PETITION

1. The Ninth Circuit's refusal to apply *Montana* on the ground that the District's employment decisions were made on tribal land conflicts with this Court's direction in *Nevada v. Hicks* to apply the *Montana* analysis even when non-member conduct occurs on tribal land – at least where significant state interests are implicated. The *Hicks* majority held so, 533 U.S. at 370 ("tribal ownership is a factor in the *Montana* analysis"); Justice Souter agreed, *id*. at 375 (indicating he would "go right to *Montana*'s rule" rather than emphasizing the state's interest in executing process); and Justice O'Connor's concurrence also agreed. *Id*. at 387:

> The Court of Appeals concluded that *Montana* did not apply in this case because the events in question occurred on tribal land. . . . Because *Montana* is our best source of 'coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians,' . . . the majority is quite right that *Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land.

No Justice believed that *Montana*'s rule and analysis was *inapplicable* where non-member conduct occurs on tribal land.

The Ninth Circuit premised its refusal to apply *Montana* on the notion that there are "two distinct frameworks" for determining whether there is tribal jurisdiction: (a) the "right to exclude," which applies to non-member conduct on *tribal* land, and (b) *Montana*, which applies to non-member conduct on *non-tribal* land. App. 3a-4a. As is noted above, this premise is faulty, as *Nevada v. Hicks* itself applied *Montana* where state officials' conduct occurred on tribal land. The Ninth Circuit majority avoided this point by stating that *Hicks* applies only to "state officers [enforcing] state criminal laws for crimes that occurred off the reservation," citing *Hicks*' footnote 2 for the proposition. App. 11a.[14] But footnote 2 does not explicitly limit *Hicks*' holding to state law enforcement officers. The footnote states:

> Our holding in this case is limited to the question of tribal-court jurisdiction over *state officers enforcing state law*. We leave open the question of tribal-court jurisdiction over *nonmember defendants in general*.

533 U.S. at 358, n.2 (emphasis added). Elsewhere in its opinion, *Hicks* described its holding this way: "tribal courts lack jurisdiction over *state officials for causes of action relating to their performance of official duties*." *Id*. at 369 (emphasis added; explaining why

[14] Otherwise, said the court, "tribes retain adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude." *Id*.

exhaustion of tribal remedies would serve no purpose other than delay, and was therefore unnecessary).

Claims against school district officials for employment decisions made pursuant to state law are certainly claims against "state officials . . . relating to their performance of official duties." In addition, Petitioner maintains that when its officials make these employment decisions within the scope of their official duties, pursuant to state law, they are effectively "state officers enforcing state law" within the meaning of *Hicks*' footnote 2. If so, then *Hicks* (and thus *Montana*) apply, especially because (a) employment decisions are completely divorced from tribal internal relations or tribal land, and (b) this implicates a significant state interest (*i.e.*, operating a school system that is general and uniform across the state). Certainly the District and its officials are not "nonmember defendants in general," nor are they "state officials engaged on tribal land in a venture or frolic of their own" – circumstances to which *Hicks* might not apply according to the majority and concurring Justice Ginsburg. 533 U.S. at 386.

School districts operating on Indian reservations need the Court to resolve the question whether *Hicks* is limited to law enforcement officers executing process on tribal land, as the Ninth Circuit said, or whether *Hicks*' reasoning – and outcome – apply to public entity officials engaged in official conduct they are constitutionally obligated to perform on reservations, and which have no impact on tribal internal relations, land, or resources. These state school districts and their officials also need the Court to conform the law among the circuits regarding the correct jurisdictional analysis to apply to their employment decisions: is it *Montana*'s presumption of

"no tribal jurisdiction over non-members even on tribal land," as *Hicks* held? Or is it, as the Ninth Circuit majority stated, a "right to exclude" analysis that presumes the opposite – that tribal jurisdiction exists over all conduct on tribal land, because *Montana* applies only to non-tribal land (and *Hicks* applies only to law enforcement officers)?

2. The Ninth Circuit's refusal to apply *Montana* also conflicts with other circuits' cases. The Fifth, Seventh, and Eighth Circuits have recognized that *Montana* applies to determine whether there is tribal jurisdiction over cases involving non-member conduct on tribal land. Indeed, the Eighth Circuit has specifically held there was no tribal jurisdiction over members' tort claims against school districts operating on the reservation. *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; *Fort Yates*, 786 F.3d at 670.[15]

In another case involving state officials' conduct on a reservation, the Tenth Circuit found no tribal jurisdiction over employment claims by the employees of a state health services district against the district, which was operating on fee land within the boundaries of the Navajo Nation. *MacArthur v. San Juan Cty.*,

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[15] The *Fort Yates* court further held that because tribal jurisdiction was plainly lacking, the district court properly held that the school district need not exhaust its tribal remedies. 786 F.3d at 672.

497 F.3d 1057 (10th Cir. 2007). Though that case involved non-member conduct on fee land, the court nevertheless acknowledged that *Montana*'s applicability does not turn on the ownership of the land on which the activity occurred. That notion, said the court, "was finally put to rest in *Hicks*." *Id*. at 1069. The court also ruled that exhaustion of tribal remedies was unnecessary. *Id*. at 1065.

The cases from the Fifth and Seventh Circuits involved claims against private non-member entities on tribal land. In the Fifth Circuit, *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (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), involved a tribal member's tort case against a non-member private corporation engaged in a consensual business relationship with the tribe on tribal land. The Fifth Circuit applied *Montana* to find tribal jurisdiction. The dissent agreed that *Montana* applied (but disagreed with the majority's application of *Montana*), and commented that the Ninth Circuit's refusal to apply *Montana* to conduct occurring on tribal land "does not acknowledge that *Montana*'s general rule applies to non-Indian conduct on reservation trust land." 746 F.3d at 180, n.8, citing *Hicks* and *Plains Commerce Bank*.

Finally, the Seventh Circuit case, *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), involved a dispute between tribal entities on one hand and non-member financial institutions on the other. The tribe issued bonds to finance a resort operation, ultimately repudiated its repayment obligations, and became involved in lawsuits with the financial

institutions. The Seventh Circuit applied *Montana* to determine whether tribal jurisdiction existed over the dispute, specifically rejecting the tribes' argument that *Montana* applies only to non-member conduct on non-Indian fee land. *Id*. at 206-7. The court noted that the Ninth Circuit's position – limiting *Montana*'s application to non-Indian land and narrowly circumscribing *Hicks*' application – could not "be reconciled with the language that the Court employed in *Hicks* and *Plains Commerce Bank*." *Id*. at 207, n.60.[16]

As is noted above, the law among the circuits needs to be conformed on this important issue. More specifically, because the Navajo reservation spans three states in two federal circuits that diverge in their analyses, the Court's involvement is necessary to bring the Ninth Circuit's "outlier" analysis into line with the analysis of the other federal circuits that have addressed the issue.

3. This case presents an issue of national importance that this Court should settle. Not since *Nevada v. Hicks* has this Court addressed the issue of tribal jurisdiction over state officers acting within the scope of their duties within the boundaries of an Indian reservation. State school board officials need to know whether tribes have or do not have adjudicatory jurisdiction over claims relating to their employment decisions, and they need to know whether their decisions will be tested under state due process procedures, as they are in all other Arizona school districts, or conflicting tribal court procedures. They

[16] In addition, although it was not an adjudication case, the Sixth Circuit applied *Montana* in *Soaring Eagle Casino & Resort v. N.L.R.B*., 791 F.3d 648, 665 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016), to determine whether the NLRA applied to an Indian casino operating on tribal trust land.

also need to be able to rest assured that their decisions, once tested in the proper state forum, will not be subject to challenge anew in a different forum. School district resources are much better spent in the classroom than unnecessarily re-litigating lawsuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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