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**

## REPLY BRIEF FOR PETITIONER


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## I. THE PETITION IS NOT PREMATURE

1. Respondents argue that review is premature because the Navajo tribal court has not yet affirmatively ruled that it has jurisdiction. Respondents have never before raised this argument, and have therefore waived it. More importantly, the argument is flawed because it erroneously treats this issue as if it were – or should be – an appeal from a Navajo tribal court's ruling. *See* Opp. 10 (suggesting that the Court should engage in "federal judicial review [of] a tribal court assert[ion of] jurisdiction over a non-member"), 24. The Court's role, however, is not to review the tribal court's ruling for error; it is to assess whether the lack of jurisdiction is plain under federal law. This can be assessed from the pleadings. *See Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (suit may be dismissed for lack of jurisdiction where federal claim alleged is either wholly insubstantial and frivolous or clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction). Here, Petitioner is asking the Court to assess whether the tribal court does or does not have authority to order Petitioner to submit to a lengthy and expensive evidentiary hearing that Petitioner maintains is an improper and wasteful exercise.

Prior cases reaching this Court might have raised the jurisdictional issue after a tribal court ruling, Opp. 12, but contrary to Respondents' intimation, no federal court has ever held that the plainly lacking exception can *only* be raised after the tribal court has already ruled on jurisdiction.[1] Such a holding would defeat the

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[1] In fact, federal courts (including the lower courts here) have decided the issue before tribal courts have ruled, without questioning, or being questioned on, the propriety of doing so. *See, e.g., Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736

purpose of the plainly lacking exception – that is, to avoid the delay and expense of tribal court proceedings when it is plain that no federal grant provides for tribal governance of nonmembers' conduct. *Strate v. A-1 Contractors*, 520 U.S. 438, 459, n. 14 (1997).

This case is a prime example. The pleadings evidence the tribal court's plain lack of jurisdiction because they establish (a) the nature of the claims, which clearly do not implicate the tribe's right to govern its own members; (b) Petitioner's non-member status; (c) that the employees' claims do not involve any private, consensual relationship with the tribe; and (d) that the employees' claims clearly do not "imperil the subsistence" of the tribal community. Also undisputed is the fact that every employee signed an employment contract with the District agreeing to abide by federal and Arizona law. Because the tribal court plainly lacks jurisdiction, it plainly lacks jurisdiction before the tribal court rules as well as after.

The fact that the tribal court has ordered Petitioner to participate in a lengthy and expensive evidentiary hearing demonstrates why the Court is not being asked to issue an "advisory" opinion, as Respondents assert. Opp. 12. Whether the tribal court does or does not have such authority is a present, live controversy, not a hypothetical or abstract question of law. *Hall v. Beals*, 396 U.S. 45, 48 (1969).

2. Respondents also err in arguing that the petition is premature until we obtain the Navajo court's

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F.3d 1298 (9th Cir. 2013) (finding tribal jurisdiction plainly lacking); *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 WL 1144331 (N. D. Cal. 2012) (finding tribal jurisdiction not plainly lacking); *Martinez v. Martinez*, 2008 WL 5262793 (W.D. Wash. 2008) (finding tribal jurisdiction plainly lacking).

thinking on the jurisdictional issue. Opp. 14. The Navajo Supreme Court expressed its thinking, unequivocally, in *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm'n*, 7 Am. Tribal Law 579, 2007 WL 5909897 (Navajo Nov. 21, 2007). There, the court held the tribal court had jurisdiction to adjudicate state school district employees' employment claims against their state school district employers operating on leased tribal land. Even after the federal district court subsequently ruled to the contrary in the districts' declaratory judgment action, *see Red Mesa Unified Sch. Dist., et al. v. Yellowhair*, *et al.*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010) (based on *Montana*, "the Court concludes as a matter of law that the Navajo Nation has no regulatory or adjudicative jurisdiction over Red Mesa and Cedar's employment-related decisions") – a decision Respondents failed to appeal – the Navajo Supreme Court refused to grant the parties' resulting tribal court stipulation to dismiss the pending jurisdictional appeal as moot. Indeed, the court went so far as to suggest it would find a way to not follow the federal district court's ruling. *Hasgood v. Cedar Unified Sch. Dist.*, 9 Am. Tribal Law 492, 2011 WL 1792762 (Navajo May 9, 2011) ("we believe the federal district court may be persuaded in the future to reconsider its short-sighted reasoning in this decision. . . . This Court will entertain future challenges of the federal district court's rationale based on grounds not previously argued . . . ."). The Navajo court's clear disagreement with *Yellowhair*, coupled with its pointed explanation of its reasoning, disposes of Respondents' argument

that the petition is premature until we obtain the tribal court's thinking.[2]

3. Tellingly, the school districts' 2007 federal court success in *Yellowhair* did not prevent re-litigation of the issue here. This is exactly why a definitive ruling from this Court is needed now. For the last eleven years, school districts operating on the Navajo reservation have been forced to spend endless time and money re-litigating this same jurisdictional issue. This is why Petitioner opted out of the year-or-more delay that would have accompanied Ninth Circuit en banc review, *see* https://www.ca9.uscourts.gov/enbanc (listing time from order taking en banc review to date opinion issued). *See* Opp. 21. The facts are undisputed. The 26-page panel decision and 31-page panel dissent lay out each side's analyses.[3] More interim review adds nothing but needless delay. After eleven years, Petitioner and similar state school districts operating on reservations across the nation need a definitive ruling regarding who has jurisdiction over their employment claims.

4. Respondents also err in suggesting that review is premature because jurisdictional inquiries are fact-intensive. Opp. 14. Even if jurisdictional issues are fact-intensive, here the salient facts are both clear from the pleadings and undisputed. The membership

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[2] As Respondents correctly note, Petitioner has not argued that the tribal court's result is a foregone conclusion, Opp. 13, n.4, because the point is not necessary to the plainly lacking exception. But the Navajos' *Cedar Unified* case certainly makes the outcome of any tribal court proceeding predictable.

[3] That the majority and dissent interpreted some of the circuit's cases differently establishes only a difference in interpretation, not a difference in holdings or an intracircuit conflict, as Respondents argue. Opp. 21.

status of the party being haled into tribal court (the primary jurisdictional fact, *Nevada v. Hicks*, 533 U.S. 353, 381 (2001)) is undisputed. The nature of the claims is undisputed. The federal requirement for compulsory education is undisputed. The Navajos' agreement to that compulsory education (and its enforcement) is undisputed. And the absence of any connection between the employees' claims and tribal land or the tribe's ability to govern itself is undisputed. The record is as complete as it needs to be to answer the question presented.

Respondents next argue that we need to probe the Navajos' understanding of the Treaty of 1868 because it is "unique." Opp. 15. Not so.[4] The Treaty is not even determinative here, because it operates to prevent (a) states' attempts to assert broad authority over tribal lands, and (b) states' interference with the tribe's retained power to regulate its own internal and social relations, *Williams v. Lee*, 358 U.S. 217, 221-22 (1959), and this case involves neither.[5] In any event, this Court has many times addressed the right-to-exclude language of this and other Treaties, sometimes by examining historical records, but

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[4] Interestingly, Respondents claimed the opposite below – that the Treaty's right-to-exclude language was "virtually identical" to that in the Crow Nation's treaty. Ninth Cir. Doc. 12-1, p. 33.

[5] Indeed, the Treaty is relevant only in that it required the Navajos to accept compulsory government education, after which Congress (1) required the new state of Arizona to provide a public school system for all children, and (2) authorized state officials to enter the reservation to enforce compulsory school attendance (to which the Navajos consented). Respondents cannot now use the Treaty to nullify these later Congressional acts, to render illusory the Navajos' consent, or to turn compulsory school attendance into optional school attendance – that is, "compulsory unless the Navajos choose to exclude the districts."

without the evidentiary record Respondents insist is needed. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 173 (1973); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *S. Dakota v. Bourland*, 508 U.S. 679, 687 (1993).[6]

The Court likewise does not need evidence regarding the nature of Petitioner's relationship to the State, to the tribe, or to the federal government, as Respondents assert. Opp. 16. Petitioner's relationship to the State and tribe is established by statute.[7] These statutes foreclose any supposed confusion about "the authority under which Window Rock signed the lease," Opp. 16, for no school superintendent or district

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[6] Incidentally, the *Hicks* Court did not state that "a treaty like the Navajo Nation's might have affected the jurisdictional inquiry," as Respondents assert. Opp. 18. In explaining the history of federal-Indian relations, the Court said it had "long ago departed from" the old view in *Worcester v. Georgia*, 31 U.S. 515 (1832), that reservations were completely independent sovereign entities on which state law could have no force. *Hicks*, 533 U.S. at 361. In footnote 4, which Respondents cite, the Court noted that *Worcester* "had to be considered in light of the Cherokee Nation treaty guaranteeing that Indians would never be subjected to the jurisdiction of any state." This was no surprise, because *Worcester* struck down a Georgia state statute that had attempted to prevent the Cherokees from governing themselves, in violation of that treaty. The *Hicks* footnote's mention of the treaty had nothing to do with *Hicks*' analysis or outcome, for *Hicks* did not involve a state statutory attempt to regulate Indians. Nor does this case.

[7] A.R.S. § 15-101(22) (school district is a "political subdivision of this state"); A.R.S. § 15-341 (district has only those powers granted to it by the Arizona Legislature); A.R.S. § 15-341(A)(1) (district policies and procedures must comply with state law).

has authority to "act as an arm of the state" or enter into a state-tribal compact. Indeed, when the Legislature authorizes Arizona to enter into a compact with a tribe, another state, or the federal government, it requires the signature of the Governor on behalf of the State. *See, e.g.*, A.R.S. §§ 5-601 (tribal-state gambling compacts); 41-101.02 (reciprocal aid agreements).

Petitioner's relationship to the federal government (Respondents mention educational programming and federal Impact Aid, Opp. 16) is also irrelevant. The NNLC acknowledged as much by ultimately, on reconsideration, omitting these specific areas from the evidentiary hearing it ordered. Ninth Cir. Doc. 12-4, p. 48. Again, the record is as complete as it needs to be to answer the question presented.

## II. THIS CASE IS THE PROPER VEHICLE FOR THE COURT'S REVIEW

1. The issue is ripe and it presents an actual controversy. *Nevada v. Hicks* establishes that *Montana*'s rule applies to non-member activity on tribal land, at least "when . . . state interests outside the reservation are implicated." Petitioner maintains that its employment decisions made under state law plainly implicate state interests outside the reservation. The Ninth Circuit majority rejected this position. Pet. App. 11a. But the majority then said it did not know "what state interests might be sufficient to preclude tribal jurisdiction" under *Hicks*. Pet. App. 11a-12a. This is a reason to grant certiorari, not deny it. Opp. 18. Only this Court can definitively declare what it meant by "state interests outside the reservation." The tribal court cannot definitively declare it, and an evidentiary hearing will not decide it. Petitioner and similarly-situated school districts should not have to wait yet another few years for the Ninth Circuit to expound on

what it thinks this Court meant. The legal issue of whether Petitioner's state law employment decisions implicate state interests within the meaning of *Nevada v. Hicks* is squarely presented, making this the right vehicle for review.

2. The question presented is also an important one of national interest. The Navajo Treaty is not "too unique" to answer the *Hicks* question, as Respondents argue. Opp. 18. Putting aside that Respondents suggested otherwise below and that the Treaty is not even determinative, the power-to-exclude language in the Treaty of 1868 is unexceptional. *See Williams v. Lee*, 358 U.S. 217, 221 (1959) (correlating the Navajos' Treaty to the Cherokees' Treaty; "No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171 n. 39 (1982) (correlating the right to exclude in the Treaties with the Choctaw and Chickasaw and with the Creeks and Seminoles). Likewise, the fact that this case happens to arise from Arizona school district employees' claims against their employer does not make the question presented – whether the tribal court does or does not have jurisdiction – unique to Arizona. Opp. 19. The result and analysis are important to, and will inform, the actions of school districts on reservations nationally. *See* NSBA amicus brief.

3. Finally, the circuit conflict is not illusory, as Respondents argue. Opp. 19. The Ninth Circuit said that aside from the law enforcement context, *Montana* does not plainly apply to civil cases involving non-member conduct on tribal land. Pet. App. 18a. This directly conflicts with *Hicks* itself, which said land status is only one factor to consider when assessing the

*Montana* exceptions. 533 U.S. at 360, 375. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 331 (2008) ("The status of the land is relevant 'insofar as it bears on the application of ... *Montana*'s exceptions to [this] case.'"). The Ninth Circuit's decision also conflicts with the cases from other circuits that, in compliance with *Hicks*, applied *Montana* to non-law enforcement state conduct on tribal land. Pet. at 17-19. Most notable among these cases are the Eighth Circuit cases applying *Montana* to school district conduct on tribal land.[8] There are no "significant factual differences" between these cases and the one at bar, as Respondents posit. Opp. 20.[9] *Belcourt* involved tribal land, contrary to Respondents' assertion. *Id*. The land was "federally owned," but federal trust land is considered to be tribal land, *Montana v. U.S.*, 450 U.S. 544, 557 (1981), not non-member fee land. In *Fort Yates*, it was unclear how much property was tribal, Opp. 20, but that does not matter; the court said "even if the Tribe owned all of the land and facilities relevant to this case . . . *Montana* would still apply." While both cases did note that a state-tribal agreement, if existent, could confer jurisdiction on the tribe, Opp. 20, the point is irrelevant. This case does not involve the state, or any state-tribal agreement.

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[8] *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, 671 (8th Cir. 2015).

[9] Respondents do not mention any "significant factual differences" with *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), and thus apparently concede that it conflicts with the Ninth Circuit's decision.

Finally, in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014), a tribal land case, the parties did "assume" that *Montana* applied, as Respondents note, Opp. 21, but not because no one raised the issue. The tribe did argue that *Montana* should not apply, but ultimately dropped the argument after this Court issued *Plains Commerce Bank*. *See Dolgen Corp. v. The Mississippi Band of Choctaw Indians*, 2008 WL 5381906, at *2, n.1 (S.D. Miss. Dec. 19, 2008).

The Ninth Circuit thus stands alone in its refusal to follow *Hicks*' rule that land status does not eliminate the *Montana* analysis, but merely informs the determination of whether a *Montana* exception applies. That the Ninth Circuit causes a "lopsided" split on this point, Opp. 21, only reinforces the need for this Court to bring the Ninth Circuit's outlier analysis into line with *Hicks* and the other circuits.

## III. THE PRACTICAL CONCERNS ARE GENUINE AND TROUBLING

The petition outlined the constitutional crisis that would accompany the assertion of tribal court jurisdiction over school district employment claims. Pet. 5. This is not just a matter of having multiple sovereigns "share authority over an educational system." Opp. 22. Arizona's Constitution requires the public school system to be uniform. School districts are statutorily required to follow state law. District employees are required by law to follow state mandated administrative remedies. The assertion of tribal jurisdiction would upend school districts' abilities to comply with all of these requirements, and would result in unequal treatment among school districts and their employees. The possibility that each school board could waive application of the NPEA for any one individual, Opp.

23, does not begin to answer these questions. Nor is this a policy matter for Congress. *Id*. Whether jurisdiction exists is an issue of federal law for the Court. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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