

No. 17-447

IN THE
Supreme Court of the United States

WINDOW ROCK UNIFIED SCHOOL DISTRICT
Petitioner,

v.

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

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

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

Francisco M. Negrón, Jr. Rachel Bruner-

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

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

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

Counsel of record for all parties have received timely notice of *Amici*’s intent to file the attached brief as required under Supreme Court Rule 37.2(a). Petitioner and the Navajo Nation Labor Commission

Respondents have consented to the filing of the brief. The remaining Respondents,

local school districts serving more than 50 million public school students, or approximately 90 percent of the elementary and secondary students in the nation, including the vast majority of American Indian and Alaska Native students.

ASBA is one of the state members of NSBA. ASBA is a non-profit corporation providing assistance to the more than 240 Arizona school boards, including Petitioner, that are its members. ASBA serves 90 percent of Arizona’s public school districts, and those districts serve over 1.2 million children, including

more than 60,000 American Indian and Alaska

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

Respectfully submitted,

Rachel Bruner-Kaufman	Francisco M. Negrón, Jr.
<i>Counsel of Record*</i>	National School Boards
Pearce Durick PLLC	Association
314 E. Thayer Avenue	1680 Duke Street, FL2
Bismarck, ND 58501	Alexandria, VA 22314
(703) 223-2890	(703) 838-6722
<u>rbk@pearce-durick.com</u>	<u>fnegron@nsba.org</u>

**Admission Effective October 30, 2017*

October 25, 2017

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
QUESTION PRESENTED	1
INTEREST S OF AMIC I CURIAE	2
SUMMARY OF THE ARGUMENT	2
I. THE NINTH CIRCUIT'S DECISION IGNORES THE LEGAL STATUS OF PUBLIC SCHOOL DISTRICTS AS STATE POLITICAL SUBDIVISIONS BOUND BY FEDERAL AND STATE EMPLOYMENT LAW AND PROCEDURES	4
A. Concurrent Tribal Court Jurisdiction Over Federal and State Employment Claims Brought Against a Public School District Will Lead to a Confusing Disarray of Conflicting Laws that Govern the Employment of School District Staff	7
B. Concurrent State and Tribal Court Jurisdiction Over Public School Employment Claims Will Result in Judicial Inefficiency, Significant Time and Costs, and Lack of Finality	12

II.	THE NINTH CIRCUIT'S DECISION ERODES THE ESTABLISHED AUTHORITY OF STATE AND FEDERAL LAW TO REGULATE PUBLIC EDUCATION ON TRIBAL LANDS AND LEADS TO UNCERTAINTY THAT WILL DESTABILIZE SCHOOL DISTRICT OPERATIONS	18
	CONCLUSION	21

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
Belcourt Pub. Sch. Dist. v. Davis, 786 F.3d 653 (8th Cir. 2015).....	5, 14, 15
Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998)	11
Fort Yates Pub. Sch. Dist. #4 v. Murphy , ex rel C.M.B., 786 F.3d 662 (8th Cir. 2015)	16, 21
Glacier Cnty. Sch. Dist. No. 50 v. Galbreath, 47 F. Supp. 2d 1167 (D. Mont. 1997).....	5, 13, 19, 20
Hartbarger v. Frank Paxton Co., 857 P.2d 776 (N.M.1993)	11
MacArthur v. San Juan Cnty., 497 F.3d 1057 (10th Cir. 2007)	11
Montana v. United States, 450 U.S. 544 (1981)	passim
Strate v. A- 1 Contractors, 520 U.S. 438 (1997)	6, 12, 20
Nevada v. Hicks, 533 U.S. 353 (2001)	passim

Tomlinson v. NCR Corp., 345 P.3d 523 (Utah 2014)	11
---	----

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980)	7
--	---

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997)	20
--	----

Wisconsin v. Yoder, 406 U.S. 205 (1972)	19
--	----

Statutes and Regulations

20 U.S.C. § 1400 et seq.	19
-------------------------------	----

ALASKA STAT. § 37.23.900 (2017).....	4
ARIZ. REV. STAT. § 15-101 (23) (2017)	4
ARIZ. REV. STAT. § 23-1501 (2017)	11
ARIZ. REV. STAT. § 41-1463 (2017)	10
GA. CODE ANN. § 36-69A-3 (2017)	4
IDAHO CODE ANN. § 6-902 (2017).....	4
IOWA CODE § 23.71 (2017).....	4
MICH. COMP. LAWS § 37.251 (2017)	4
MINN. STAT. § 13.02 (2017)	4
MISS. CODE ANN. § 57-64-7 (2017).....	4
N.M. STAT. ANN. § 5-7-6.7 (2017).....	4
N.D. CENT. CODE § 26.1-21-01 (2017).....	4
N.D. CENT. CODE § 32-12-1-03 (2017)	21
TENN. CODE ANN. § 4-3-5525 (2017).....	4
WASH. REV. CODE § 28A.315.005 (2017).....	4-5

N.Y. CONST. ART. XI, § 1.....	14
OHIO CONST. ART. VI, § 3	14
OKLA. CONST. ART. XIII, § 1	14
OR. CONST. ART. VIII, § 3	14
PA. CONST. ART. III, § 14	14
R.I. CONST. ART. XII, § 1.....	14
S.C. CONST. ART. XI, § 3	14
S.D. CONST. ART. VIII, § 1	14
TENN. CONST. ART. XI, § 12	14
TEX. CONST. ART. VII, § 1	14
UTAH CONST. ART. X, § 1	14
VA. CONST. ART. VIII, § 1	14
VT. CONST. CH. 2, § 68	14
WASH. CONST. ART. IX, § 1	14
W.VA. CONST. ART. XII, § 1	14
WIS. CONST. ART. X, § 3.....	14
WYO. CONST. ART. VII, § 1	14

Other Authorities

1986 Ariz. Op. Atty. Gen 18, No. I86 -019, 1986 WL
81322 10

1988 Ariz. Op. Atty. Gen. 102, No. I88 -076, 1988 WL
249667 10

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

National Congress of American Indians, Policy Issues—Education, available at http://www.ncai.org/policy-issues/education-health- human-services/education	2
The Navajo Preference in Employment Act (NPEA), available at http://navajobs.org/uploads/files/NPEA.pdf	10

QUESTION PRESENTED

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

INTERESTS OF AMICI CURIAE ¹

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

SUMMARY OF THE ARGUMENT

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

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

² National Congress of American Indians v. Chertoff, 404 F.3d 1163, 1170 (9th Cir. 2008).

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

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

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

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

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

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

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

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

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

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

In keeping with this principle, this Court earlier determined that the states’ interest in collecting state cigarette tax was enough for the state to regulate the activities of

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

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

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

reduces legally compliant policy decisions and employment practices to no more than a guessing game with potentially serious consequences no matter which law is chosen by school officials. If left intact, the Ninth Circuit's decision will thrust school districts operating schools on tribal lands into just

Dawavendewa v. Salt River Project Agric.

However, those states are in the Tenth Circuit where
the court of appeals in *MacArthur v. San Juan Cnty.* ,

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

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

⁷ See ARIZ. CONST. ART. 1, § 11 (requiring the establishment and maintenance of a general and uniform public school system); ARIZ. CONST. ART. 1, § 12 (requiring the establishment and maintenance of a general and uniform public school system).

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

The Ninth Circuit's premise for plausible tribal court jurisdiction raises questions that could make jurisdictional authority turn on factors other than tribal interests in self-government. If the critical on.plac

10.8c-9.1(s

school districts who serve Native students at different locations—for example, an elementary school may be situated on tribal land but the high school is not. Under the Ninth Circuit's decision, tribal court jurisdiction would be plausible for school staff at the elementary school but not for t

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

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

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

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

This Court's review is imperative to establish whether the state or tribe has jurisdiction not only over employment matters but also over curriculum, transportation, budgeting, and all other public school operations that occur on tribal lands. P

that states have a substantial interest in the operation and administration of their schools: "There is no doubt as to the power of a State, having a high

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

The process established under the law of the State of Montana for the operation and administration of a public school system is available to all students within that system. Once enrolled in the State of Montana's public school system, tribal members must comply with the

In another context , the Eighth Circuit Court of Appeals, applying *Montana*, determined that the

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

Respectfully submitted,

Rachel Bruner -Kaufman	Francisco M. Negrón, Jr.
Counsel of Record*	National School Boards
Pearce Durick PLLC	Association
314 E. Thayer Avenue	1680 Duke Street, FL2
Bismarck, ND 58501	Alexandria, VA 22314
(703) 223-2890	(703) 838-6722
rbk@pearce-durick.com	fnegron@nsba.org

*Admission Effective October 30 , 2017

October 25, 2017