No. 05-10357

IN THE

Supreme Court of the United States

JAMES SMITH,
Petitioner,

v.

SALISH KOOTENAI COLLEGE, A MONTANA CORPORATION, AND THE COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

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

PETITIONER'S REPLY BRIEF

REX PALMER *
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, Montana 59802
(406) 728-4514

LON J. DALE
MILODRAGOVICH, DALE
STEINBRENNER & BINNEY, P.C.
PO Box 4947
Missoula, MT 59806-4947
(406) 728-1455

* Counsel of Record

Counsel for Petitioner James Smith

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Respondents' briefs in opposition confirm the need for review by this Court. First, respondents' arguments demonstrate the considerable confusion among courts and litigants alike regarding Indian civil subject-matter jurisdiction over a tribal non-member. Respondents' briefs do not defend the new rule adopted by the Ninth Circuit. They do not attempt to present a coherent theory as to how an aggrieved nonmember Plaintiff could ever satisfy this Court's mandate to exhaust tribal remedies without thereby creating subject-matter jurisdiction under the new Ninth Circuit rule. They do not attempt to reconcile the new Ninth Circuit rule with the well-established principle that the absence of subject-matter jurisdiction cannot be waived. They do not attempt to deny or justify the inevitable splitting of claims arising out of a one-vehicle traffic accident. Instead, respondents assert *Williams* as a jurisdictional doctrine separate from *Montana* and repeat the inexplicable claim that Smith had "full control of the forum in which he prosecutes his claims against SKC."[1] In short, Respondents' briefs confirm rather than dispel the doctrinal tension.

Second, respondents' briefs illustrate the split between the circuits. Respondents argue that the Ninth Circuit's law on tribal court exhaustion "falls right in line" with the Eighth and Tenth Circuits. But, both the Eighth and Tenth Circuits permit a nonmember plaintiff to seek redress in federal court after exhausting tribal court remedies. Not so in the Ninth Circuit where the nonmember "by the act of filing his claims, enters into a 'consensual

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[1] Respondent Tribal Court of Appeals' Brief in Opposition, pg 5-6.

relationship with the tribe within the meaning of *Montana*[1] and thereby creates subject-matter jurisdiction. This Court should grant the petition to address the important issue presented therein.

I. RESPONDENTS' BRIEFS DEMONSTRATE CONSIDERABLE CONFUSION ABOUT THE PROPER STANDARDS TO APPLY IN DETERMINING TRIBAL CIVIL SUBJECT-MATTER JURISDICTION OVER A TRIBAL NONMEMBER

Perhaps most telling in respondents' briefs is what they do not do: defend the court of appeals' decision on its own terms. The court of appeals adopted a blanket rule for any nonmember filing claims in tribal court against a tribal member.[2] Respondents' attempt to nuance this rule by hinting that it does not apply to those who file first in federal court. court of appeals' rule is not so limited. As the petition pointed out, the Ninth Circuit rule is both theoretically flawed and creates practical problems in the application of controlling precedent. Respondents' failure to defend the rationale of the decision below is a sign that certiorari is warranted.

If the Ninth Circuit rule could be read as not applying to those who file first in federal court, it would still be fatally flawed. It would create an incentive for litigants to dishonor this Court's mandate to first exhaust tribal remedies. Any incentive for an intermediate step before exhaustion of tribal remedies undermines the purpose of exhaustion (comity) while at the same time increasing expense, creating delay and needlessly consuming federal

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[1] See Petition at 6

judicial resources.

Equally significant, respondents make almost no attempt to fit this case within the framework set forth in *Montana*, *Strate* and *Hicks* for dealing with assertions of tribal authority over nonmembers. Those cases recognized a relatively narrow exception permitting tribal jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements."[3] However, the *en banc* panel has already found, "Any consensual relationship Smith had with SKC as a result of his student status is too remote from his cause of action to serve as the basis for the tribes' civil jurisdiction."[4] Respondents never address this critical finding, although their briefs devote much space inferring that Smith's student status might somehow justify the tribes' civil jurisdiction. They do this, perhaps, to camouflage the blanket nature of the appeals court ruling. Indeed, any of the multitude of tribal nonmembers driving on the thousands of miles of public highway within Indian reservations could find themselves in the same position as Smith.

Specifically, after a traffic accident, two injured tribal members sued Smith and the vehicle owner in tribal court. Next, the vehicle owner cross-claimed against him. On these facts there is no dispute that the Ninth Circuit and the federal district court require exhaustion of tribal remedies before the federal court will consider the merits of claims

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Montana 450 U.S. at 565

App. 5a.

arising out of the traffic accident.[5] *See Stock West* (9th Cir. 1992)[6] and *Allstate Indemnity* (9th Cir. 1999).[7] Respondent tribal appellate court concedes that, "Under the exhaustion doctrine, Smith would indeed have been required to exhaust his tribal court remedies if he had initially challenged the jurisdiction of the tribal court, . . ."[8] Consequently, it would have been futile for Smith to file in federal court before exhaustion of his tribal remedies.[9]

Respondents fault Smith for proceeding to trial, but exhaustion could not occur without a trial on the merits. The tribal trial court believed it had jurisdiction and the tribal code does not permit interlocutory appeal of this issue.[10] Under these circumstances, trial on the merits in a court that may not have jurisdiction is inevitable. It is the unavoidable result of mandatory exhaustion of tribal court remedies in a jurisdiction which does not permit interlocutory appeal. Smith had no choice but to file his cross-claims in tribal court. The tort statute of limitation was running on his claims. He could protect his claims against SKC only by filing in tribal court.

Having chosen the only option available to preserve his claims, Smith is now told he

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[6] *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (*en banc*).

Allstate Indemnity Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999).

[8] Respondent Tribal Court of Appeals' Brief in Opposition pg 10.

[9] As noted by the appeals court, the district court declined to rule on the question of tribal subject-matter jurisdiction until after ruling by the tribal appeals court. See App. 7a footnote 1.

[10] App. 170a, available at http://www.cskt.org/documents/laws-codified.pdf

"had full control of the forum in which he prosecutes his claims against SKC."[11]

Respondents argue that "Smith never actually faced the exhaustion dilemma"[12] described in the petition. But Respondents fail to explain how Smith could avoid the dilemma. They fail to explain how Smith could exhaust tribal remedies without filing his cross-claim in tribal court. They never explain how Smith could file his cross-claim except "knowingly," thereby falling within the new Ninth Circuit rule. Under the Ninth Circuit rule, Smith had no way to avoid the exhaustion dilemma. The rule, on its face, creates tribal court subject-matter jurisdiction over any nonmember plaintiff who complies with the requisite exhaustion of tribal remedies.

Respondents punctuate their failure to fit this case within the *Montana* framework by confusing the "consensual relationships" first exception with the filing of a cross-claim. Respondents offer no authority to refute Judge Gould's observation that "a party seeking to invoke tribal court jurisdiction must point not to a 'consensual' court proceeding, but to 'another *private consensual* relationship.' *Hicks*, 533 U.S. at 359 n.3."[13]

Propelled by their confusion over the requisite consensual relationship to establish tribal court jurisdiction, respondents run head-long into the well-established rule that parties

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[11] Respondent Tribal Court of Appeals' Brief in Opposition pg 5-6.

[12] SKC Brief in Opposition pg 14

[3] See Petition at 6.

cannot expand the subject-matter jurisdiction of a court.[14] In an effort to avoid this collision, respondents argue that if a party can waive immunity by consent then a party can consent to expand the subject-matter jurisdiction of the tribal court.[15] This ignores the fact that immunity and subject-matter jurisdiction care two entirely different matters. Good authority exists that immunity can be waived by consent. Subject-matter jurisdiction cannot be waived without a wholesale redefinition of this legal doctrine. The present action provides no justification for such a transformation of the foundational concept of subject-matter jurisdiction.

Respondents note that this Court has "never held that a tribal court had jurisdiction over a nonmember defendant."[16] This bolsters Smith's observation that the new Ninth Circuit rule will result in splitting of claims arising out of a single vehicle accident. Respondents do not deny that such splitting will occur. Likewise, they do not deny or attempt to justify the inevitable uncertainty and potential for conflicting results and confusion which naturally flow from such splitting of claims.

Respondents seek support for their approach in *Williams v. Lee* (1959)[17] as a jurisdictional doctrine entirely separate from *Montana*. The district court opinion

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[14] See Petition at 25 n. 56.

[15] Respondent Tribal Court's Brief in Opposition pg 8 n. 1

[16] SKC Brief in Opposition at 5, quoting *Hicks*

Williams v. Lee, 358 U.S. 217 1959)

exemplifies this error.

> The case law makes it clear the *Montana* rule and its exceptions are to be applied only in consideration of the conduct of a nonmember defendant. . . [citations omitted] . . .
>
> As succinctly stated by the Supreme Court, even before the *Montana* rule and its exceptions existed, "[i]t is immaterial that [the plaintiff] is not an Indian." *Williams*, at 223, 79 S. Ct. at 272. Accordingly, the Court concludes the Montana rule and its exceptions are inapplicable to a case where the defendant is a tribal entity and the plaintiff is not a member of the tribe. The *Montana* rule and its exceptions simply are not applied to consider the conduct of a nonmember plaintiff since the plaintiff's conduct is not at issue.[18]

This error is the natural offshoot of the Ninth Circuit's failure to recognize *Williams* as an example of a *Montana* first exception, not an independent jurisdictional doctrine. This case thus presents this Court with the opportunity to clarify that *Williams* is not a separate line of authority in determining the scope of tribal authority over nonmembers. This clarification will help prevent the error propagated by the decision in *McDonald v. Means* (9th Cir. 2005),[19] and may prevent similar error in *Ford v. Todecheene* (9th Cir. 2005)[20] which is pending on petition for rehearing.

This Court has never reached the important issue presented in the petition – whether a party can expand Indian tribe subject-matter jurisdiction by filing a cross-claim after being named as a defendant in a tort action. Petitioner believes that the resolution of this issue is

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[18] App. 61a-62a (emphasis in original).

[19] *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) Petition pg 27-29, 32.

[20] *Ford v. Todecheene* 394 F.3d 70 (9th Cir. 2005). Petition pg 30, 32.

governed by the straight-forward analysis of *Montana*, *Strate* and *Hicks*, but the Ninth Circuit and respondents read some language in this Court's opinions more broadly to conclude otherwise. The petition should be granted to clarify the controlling nature of *Montana* and the proper reading of *Williams*.

II. RESPONDENTS' BRIEFS HIGHLIGHT THE CONFLICT AMONG THE CIRCUITS

Respondents insist that the new Ninth Circuit rule "falls right in line" with the Eighth and Tenth Circuits.[21] Respondents rely on two Ninth Circuit decisions to support their claim: *Stock West* (9th Cir. 1992)[22] and *Allstate Indemnity* (9th Cir. 1999).[23] *Allstate* is inapposite because the defendant was the party objecting to tribal jurisdiction. The new Ninth Circuit rule only affects plaintiffs.

Stock West is another matter. There is no reason to believe that the Ninth Circuit new rule would not apply to the *Stock West* plaintiff. The *Stock West* plaintiff filed tort claims in federal court. The federal district court dismissed the action and required plaintiff, *Stock West*, to exhaust its tribal remedy. The Ninth Circuit affirmed "because colorable questions are presented in this civil action regarding whether the Colville Tribal Courts have concurrent jurisdiction over alleged tortious conduct that may have commenced on the

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[21] Tribal brief at 10.

[22] *Stock W. Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992).

Allstate Indemnity Co. v. Stump, 91 F.3d 107 (9th Cir. 1999).

reservation."[24] After dismissal in federal court, Stock West could only proceed with its tort claim by filing in tribal court. Presumably any such filing would be done "knowingly." Such filing would fall within the new Ninth Circuit rule and would create subject-matter jurisdiction in the Colville Tribal Court.

This unprecedented rule provides no exception for those who file first in federal court. Consequently, those who honor this Court's mandate to first exhaust tribal remedies face the same result as those who dishonor that mandate by first filing in federal court; both create tribal subject-matter jurisdiction by the mere act of filing claims in tribal court. This result would not occur in the Eighth and Tenth Circuits which do not consider the filing of a claim in tribal court to create subject-matter jurisdiction.

Thus, the Ninth Circuit is in irreconcilable conflict with the Eighth and Tenth Circuits. Respondents argue that all three circuits honor mandatory tribal exhaustion. But, this argument misses the import of the new Ninth Circuit rule which creates tribal subject-matter jurisdiction out of the exhaustion process. This result creates the conflict which calls for granting of the petition.

CONCLUSION

For the reasons stated above, and in the petition, this Court should grant the petition for writ of certiorari.

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[24] *Stock West* at 920, ¶ 58.

Respectfully submitted this 7th day of June, 2006.

REX PALMER *
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, Montana 59802
(406) 728-4514
* Counsel of Record

LON J. DALE
MILODRAGOVICH, DALE
STEINBRENNER & BINNEY, P.C.
PO Box 4947
Missoula, MT 59806-4947
(406) 728-1455