Case No. 16-2011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Appealed From the United States District Court for New Mexico
District Court No. 15-CV-604-KG/WPL
District Court Judge: Kenneth J. Gonzales]

BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS,

Plaintiff-Appellant,

v.

HENRY HENDERSON, ELEANOR SHIRLEY, FORMER MEMBERS OF THE NAVAJO NATION SUPREME COURT, RICHIE NEZ, CASEY WATCHMAN, BEN SMITH, BLAINE WILSON, FORMER MEMBERS OF THE NAVAJO NATION LABOR COMMISSION, EUGENE KIRK, REYNOLD R. LEE, FORMER MEMBERS OF THE OFFICE OF NAVAJO LABOR RELATIONS, AND JOHN AND JANE DOES

Defendants-Appellees

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF JURISDICTION

Plaintiff/Appellant Board of Education for the Gallup-McKinley County Schools (the "School District") filed its Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of New Mexico on July 10, 2015. Aplt. App. 7-63. On August 18, 2015, Defendants/Appellants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss). Aplt. App. 67-73. On September 15, 2015, the School District filed a Motion and Memorandum Brief for Leave of Court to File First Amended Complaint ("Motion to Amend"). Aplt. App. 91-116.

The Memorandum Opinion and Order ("Order") entered on December 16, 2015 granted the Motion to Dismiss and denied the Motion to Amend. Aplt. App. 142-148. On December 16, 2015, the District Court entered a Final Order of Dismissal dismissing the action without prejudice. Aplt. App. 149. Pursuant to Fed. R. App. 4(a)(1)(A), the School District timely filed its Notice of Appeal (Aplt. App. 150-151) on January 14, 2016.

INTRODUCTION

The School District is a political subdivision of the State of New Mexico organized under State law for the purpose of operating and maintaining an educational program for the school age children residing within its boundaries. *See* N.M. Stat. Ann. § 22-1-2(R)(2003); N.M. Stat. Ann. § 22-5-4 (2003). As part of

New Mexico's Federal Enabling Act and New Mexico's Constitution, the School District is mandated to provide a general and uniform public education for all New Mexico citizens, including to those on portions of the Navajo reservation within the State. *See* Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310, § 2; N.M. Const. Art. XII, §§ 1 and 3; N.M. Const. Art. XXI, § 4; N.M. Stat. Ann. § 22-1-4(A) (2003); *see also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973). The School District operates, in part, within the boundaries of the Navajo Nation on leased land on which the School District has constructed schools to meet its obligations to provide education.

In the course of fulfilling those obligations, the School District made employment decisions regarding its former employee Defendant/Appellant Henry Henderson ("Henderson"), who is Navajo. The named Defendants/Appellants other than Henderson (collectively, "Navajo Nation Defendants/Appellants") include former members of the Office of Navajo Labor Relations ("ONLR"), former members of the Navajo Nation Labor Commission ("NNLC"), and former members of the Navajo Nation Supreme Court ("NNSC"). Henderson took exception to the School District's employment decisions and pursued his tribal remedies,[1] during which process the School District repeatedly contested the

[1] Exhaustion of tribal remedies in this litigation began when Henderson filed a complaint with the ONLR, a department within the Division of Human Resources

Navajo Nation's tribal jurisdiction over the School District's employment decisions. Following the NNSC's ruling that it had jurisdiction over the School District, the School District filed its action in the District Court seeking a declaratory judgment and injunctive relief. As discussed below, the School District respectfully submits that the District Court erred in dismissing the School District's action.

STATEMENT OF THE ISSUES

1. Did the District Court err in applying the standards of the "case or controversy" requirement of a federal court's jurisdiction as described by Article III of the United States Constitution?

2. Did the District Court err by making factual determinations that the repeated past assertion of jurisdiction over New Mexico public schools performing state functions on tribal land by the Navajo Nation's agencies and courts enforcing tribal law against New Mexico public schools was not a real threat of injury in the future?

3. Did the District Court err by making factual determinations that the land

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of the Navajo Nation charged with, *inter alia*, monitoring and enforcing the Navajo Preference in Employment Act ("NPEA"). *See* 15 N.N.C. § 202. Henderson subsequently filed a complaint with the NNLC, a fact-finding agency that acts as the administrative hearing body under the NPEA. *See* 15 N.N.C. § 302. Henderson appealed the NNLC's dismissal of his charge to the NNSC, which is "the Court of last resort" on the Navajo Nation. 7 N.N.C. § 302.

leases for public schools built within the Navajo Nation, which may or may not address waivers of jurisdiction that affect the standing of the School District, are speculative of a real threat of injury in the future?

4. Did the District Court err by determining that the Navajo Supreme Court's final judgment rendered the School District without standing because there was no longer an immediate and real threat of injury and only a hypothetical legal disagreement existed to support the issuance of a declaratory judgment?

5. Did the District Court err by noting that other federal courts have determined that the Navajo Nation lacks jurisdiction of state public schools in cases similar to the one at bar but finding a lack of standing on the part of the School District?

STATEMENT OF THE CASE

The action in the District Court below was for declaratory judgment and injunctive relief regarding the Navajo Nation's exercise of jurisdiction over an employment matter between the School District and its former employee Henderson. The School District sought (a) a declaratory judgment declaring that Defendants/Appellants lack jurisdiction over a New Mexico public school district's employment decisions and practices conducted on the lands of the Navajo Nation when such public school districts are fulfilling their State responsibilities, duties, and functions to provide a public education for all children of the State of New Mexico; and (b) injunctive relief to bar further prosecution of any such matters

before the agencies or courts of the Navajo Nation because of their lack of jurisdiction. Aplt. App. 7-17.

The School District exhausted its tribal remedies when the NNSC issued a Memorandum Decision holding that the Navajo Nation has personal jurisdiction over the School District and subject matter jurisdiction over State of New Mexico employment matters involving Henderson and the School District. *See* Aplt. App. 58-62. The final judgment was entered by the NNSC on June 15, 2015. Aplt. App. 63. The NNSC ruled that Henderson's claim was untimely filed with the Navajo Nation administrative agency below (*i.e.*, the ONLR) and dismissed his claim, but held that the NNSC and the agencies of the Navajo Nation had personal and subject matter jurisdiction over the School District under tribal law set forth in the Navajo Preference in Employment Act. Aplt. App. 58-62.

The School District filed a Motion to Amend the Complaint to bring additional allegations that the ONLR was asserting regulatory and adjudicatory jurisdiction and control over the School District's State governmental functions in the matter entitled *Emma H. Benallie v. Gallup-McKinley County Schools (Crownpoint High School)*, No. CPIC15-048. *See* Aplt. App. 91-116. In addition, the Motion to Amend sought to bring in as a party plaintiff the Central Consolidated Schools ("Central Schools"), which is also a New Mexico public school district that has public schools and facilities located on the Navajo Nation.

Aplt. App. 91-116. The Central Schools have been subject to asserted tribal jurisdiction of the NNLC in which the Navajo Nation asserts authority and jurisdiction over the Central Schools in the matter entitled *Greg Bigman v. Central Consolidated School District No. 22*, No. NNLC-2014-056. Aplt. App. 91-116. These administrative cases involve alleged violations of the NPEA, 15 N.N.C. §§ 601-619, the Navajo tribal statute that provides preference for Navajo employees and job applicants.

The Navajo Defendants/Appellants filed a Motion to Dismiss challenging the subject matter jurisdiction of the Court to address the issue of whether the administrative agencies and courts of the Navajo Nation can assert jurisdiction over a New Mexico public school district performing its governmental functions as a political subdivision of the State of New Mexico for lack of standing. Aplt. App. 67-73. The Navajo Defendants/Appellants asserted that the same lack of standing rendered the Motion to Amend futile for lack of subject matter jurisdiction of the District Court. Aplt. App. 67-73.

The District Court granted the Navajo Nation Defendants'/Appellants' Motion to Dismiss and denied the School District's Motion to Amend, holding that the School District lacks standing to seek prospective or declaratory relief depriving the District Court of subject matter jurisdiction. Aplt. App. 142-149.

STATEMENT OF FACTS

Henderson was employed by the School District as the Principal of Navajo Pine High School from July 1, 2008 to June 30, 2009, pursuant to a public school administrator contract signed by Henderson and the School District's Superintendent of Schools ("Superintendent"). Aplt. App. 10, 18-19. Under New Mexico law, the School District is only authorized to issue contracts to public school administrators such as Henderson pursuant to the School District's personnel policies that are consistent with state law. *See* Aplt. App. 11; *see also Swinney v. Deming Bd. of Educ.*, 117 N.M. 492, 494, 873 P.2d 238, 240 (N.M. 1994).

Henderson's contract was a form contract conforming to New Mexico law that provided in pertinent part, "This contract and parties hereto are and shall continue to be subject to applicable laws of the State of New Mexico and the rules and regulations of the Public Education Department as they may exist." Aplt. App. 11, 18; N.M. Stat. Ann. § 22-10A-21 (2003). The School District's personnel policies, at G-2150, conformed to New Mexico law and specifically stated that a person employed pursuant to an administrator contract does not have a legitimate expectancy of reemployment, and that "no contract entered into pursuant to this section shall be construed as an implied promise of continued employment." Aplt. App. 11-12, 20.

The School District's Superintendent decides before the beginning of each school year whether to renew an employee's contact under N.M. Stat. Ann. § 22-5-14(B)(3) (2003). Aplt. App. 12. On or about March 30, 2009, the School District notified Henderson that his contract would not be renewed for the 2009-10 school year. *See* Aplt. App. 12, 22-23. Henderson advised the School District that he intended to submit a letter of resignation, which he did, in fact, submit. *See* Aplt. App. 12, 24. The School District rescinded the Notice of Termination. *See* Aplt. App. 12, 25. Henderson requested that he be allowed to work through May 1, 2009, and then be placed on administrative leave with pay through June 30, 2009. *See* Aplt. App. 12. The School District granted Henderson's request. *See* Aplt. App. 12.

Despite having affirmatively resigned his employment, Henderson filed a charge with the ONLR claiming that the School District had violated the NPEA. *See* Aplt. App. 12, 26-28. The ONLR noted that Henderson's Charge "was not filed within the time limit prescribed by Section 10.)B.)(6.) of the [NPEA]." *See* Aplt. App. 12. Henderson then filed a Complaint with the NNLC on or about September 10, 2010. *See* Aplt. App. 12.

On October 18, 2010, the School District moved to dismiss Henderson's Complaint with the NNLC on the grounds that: "A) the Navajo Nation does not have jurisdiction over actions taken by [the School District] in its governmental

capacity; B) [Henderson's] Individual Charge was not filed within the time limits prescribed by [the NPEA]; and C) [the School District] took no adverse action against Henderson." *See* Aplt. App. 12-13, 29-38. On June 23, 2011, the NNLC issued its Order of Dismissal granting the School District's Motion to Dismiss "on the ground that [Henderson] affirmatively resigned his employment and Henderson fulfilled its contractual obligation up to the end of the contract term." *See* Aplt. App. 13. 39-41. The Commission did not, however, address the School District's argument that it did not have jurisdiction over the School District in the first instance. *See* Aplt. App. 13, 39-41.

On July 11, 2011, Henderson appealed the NNLC's Order of Dismissal to the NNSC. Aplt. App. 13. He argued that the NNLC had misunderstood his claim, which was not one of adverse action but rather of unlawful intimidation and harassment. Aplt. App. 13. On December 2, 2011, the School District filed its answer brief arguing that the NNLC correctly found there was no adverse or disciplinary action taken against Henderson and that Henderson had voluntarily resigned. Aplt. App. 13, 42-57. The School District also argued that Henderson's ONLR Charge was not timely filed and that the Navajo Nation lacks jurisdiction over acts taken by School District in its governmental capacity. *See* Aplt. App. 13, 42-57.

On June 12, 2014, the NNSC heard oral argument from the School District and Henderson. Aplt. App. 13. At oral argument, the School District reasserted its position that the Navajo Nation lacked jurisdiction over the action and over the School District. *See* Aplt. App. 13. On May 18, 2015, the NNSC issued a Memorandum Decision holding that the Navajo Nation has jurisdiction over state school districts located within its territorial boundaries, but dismissing Henderson's appeal as untimely. *See* Aplt. App. 13-15, 58-62.

On July 10, 2015, the School District filed its Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of New Mexico. Aplt. App. 7-63. On August 18, 2015, Henderson and the other Navajo Nation Defendants/Appellants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Aplt. App. 67-73. On September 15, 2015, the School District sought leave of court to file a First Amended Complaint. Aplt. App. 91-116. Briefing on both motions was completed, and on December 16, 2015, the District Court issued a Memorandum Opinion and Order as well as a Final Order of Dismissal dismissing the lawsuit without prejudice and denying leave to file a First Amended Complaint. Aplt. App. 142-149.

SUMMARY OF ARGUMENTS

Although the School District is a state entity constitutionally mandated to provide educational services to students on the Navajo Nation, the Navajo Nation

lacks jurisdiction over the School District's employment decisions involving the School District's own employees. The School District is not subject to the NPEA, which is inconsistent with the New Mexico Human Rights Act, as well as with Title VII of the Civil Rights Act of 1964. The School District has standing to bring an action for declaratory and injunctive relief because the threat of inconsistent rulings by two separate sovereigns subjects the School District to real and immediate injury. The District Court's findings, predicated on a lease that was never before the court or in the record, lack factual support; the Order dismissing the case and denying leave to amend should be reversed; and this case should be remanded to the District Court for further proceedings.

ARGUMENT

I. Standard of Review

The U.S. Court of Appeals for the Tenth Circuit reviews a district court's dismissal for failure to state a claim *de novo*. *MacArthur v. San Juan County*, 497 F.3d 1057, 1064 (10th Cir. 2007), *citing Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 898 (10th Cir. 2006). This Court also reviews issues of standing *de novo*. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004). Finally, "[a]lthough we generally review for abuse of discretion a district court's denial of leave to amend a complaint, when this denial is based on a determination that amendment would be futile, our review for abuse of discretion includes *de novo*

review of the legal basis for the finding of futility." *Cohen v. Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010), *cited in Barnes v. Harris*, 783 F.3d 1185, 1197 (10th Cir. 2015). Therefore, the standard of review is *de novo*.

II. The District Court Erred in Applying the Standards of the "Case or Controversy" Requirement of a Federal Court's Jurisdiction as Described by Article III of the United States Constitution

The doctrine of standing is an essential element of the "case or controversy" requirement of a federal court's jurisdiction as described by Article III of the United States Constitution. U.S. Const. Art. III, § 2, cl. 1. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662–63 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In order to show standing, the School District in bringing this case must demonstrate: first, that it has sustained an injury "in fact"; second, that there is a causal connection between the School District's injury and the conduct of the Navajo Nation Defendants/Appellants about which the School District complains; and finally, that the School District's injury is likely to be redressed by a favorable decision of the court. *See Florida General Contractors*, 508 U.S. at 662–65. The District Court correctly found that the Navajo Nation Defendants/Appellants "only argue that the [School District] has not met the injury in fact requirement." Aplt. App. 144.

To seek prospective relief, the School District must be under a real and immediate threat of being injured in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983). Past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. *Id.* at 102. Here, the School District remains under a "real and immediate threat of being injured in the future[]," persevering its standing to bring this action. *See Tandy*, 380 F.3d at 1283. The Henderson matter was not a one-of-a kind administrative matter nor was it the exercise of a seldom used discretionary function of a tribal agency or tribal official with the Navajo Nation. The Navajo agencies involved were created to enforce the NPEA. That enforcement authority is real, is not speculative or hypothetical, and has resulted in similar litigation involving state public schools in another federal court.

The District Court stated that the School District "fails to explain how being subject to Navajo Nation jurisdiction, as opposed to being subject to federal jurisdiction under the Equal Employment Opportunity Commission or to state jurisdiction under the New Mexico Human Rights Commission, constitutes a concrete and particularized injury." Aplt. App. 145-146. The resolution of the Henderson claims did not destroy the School District's standing to seek federal judicial relief where the School District is subject to jurisdiction by a governmental entity contrary to federal law. By attempting to haul the School District into tribal

court, the Navajo Nation is attempting to exercise tribal civil jurisdiction over non-tribal members – indeed, not only non-members, but political subdivisions of the State of New Mexico making employment decisions over their own employees. Neither the Navajo Nation nor any other Native American tribe can do so. *Montana v. United States*, 450 U.S. 544, 563-65 (1981) (Indian tribes have no inherent sovereign powers over the activities of non-members); *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329–30 (2008) (the sovereign powers of an Indian tribe do not extend to nonmembers of the tribe); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011) (same). Furthermore, when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Nevada v. Hicks*, 533 U.S. 353, 362 (2001).

Here, although the employment decisions took place on leased land, the State of New Mexico, by and through its local school districts as political subdivisions of the State, has a considerable interest (in fact, a constitutional mandate) to provide a general and uniform public education on the reservation. *See* N.M. Const. Art. XII, § 1 ("A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained"); Art. XII, § 3 ("The schools . . . provided for by this constitution shall forever remain under the exclusive control of the state"); and Art.

XXI, § 4 ("Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control . . . ."). Equally important is the state interest in ensuring that the School District's employment decisions remain effective, binding, and not subject to potentially conflicting tribal court rulings. *See, e.g.*, *MacArthur*, 497 F.3d at 1060-61 (after political subdivision employees were terminated, Navajo district court ordered employees reinstated with back pay; this Court subsequently held no tribal jurisdiction).

The ONLR is a department within the Division of Human Resources of the Navajo Nation originally established under 15 N.N.C. § 201, to "monitor and enforce the Navajo Preference in Employment Act"; "to act as an administrative agency for matters relating to the enforcement of employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment"; and "to gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation, and working conditions." 15 N.N.C. § 202. The NNLC was established to "act as the administrative hearing body under the [NPEA]," and to "conduct and hold administrative hearings in accordance with Navajo Nation laws concerning Navajo employment preference." 15 N.N.C. § 302. As such, another employee of the School District, who believes the NPEA applies to him or her, could seek a remedy

within the tribal administrative agencies now that the NNSC has held that the Navajo Nation has jurisdiction over state public schools located within its boundaries. *See* Aplt. App. 58-62. Thus, the NNSC's assertion of jurisdiction over the School District, as to employee claims under the NPEA against a political subdivision of the State of New Mexico, violates the School District's rights, privileges, and immunities guaranteed to the School District by the Constitution, treaties, and laws of the United States and the State of New Mexico. *See MacArthur*, 497 F.3d at 1073-74.

In *MacArthur*, this Court held that the Navajo Nation did not possess regulatory authority over employment related claims by terminated employees of a special health services district that was a political subdivision of the State of Utah. *Id.* *See Red Mesa Unified School Dist., et al., v. Yellowhair, et al.*, 2010 WL 3855183, at *3 (D. Ariz. September 28, 2010) (the district court determined that the Navajo Nation had no regulatory or adjudicative jurisdiction over state public school districts to enforce employment claims under the NPEA); *see also Window Rock Unified Sch. Dist. v. Reeves*, 2013 WL 1149706, at *5 (D. Ariz. March 19, 2013) (the district court holds that the NNLC has no regulatory and adjudicative authority to review personnel decisions made by state public school districts, finding that "[t]he dispositive factor is instead the fact that the state's considerable interest, arising from outside of the reservation, in providing for a general and

uniform public education is very much implicated."). Thus, the School District has satisfied the "injury in fact" requirement and the requirement that there is a connection between the Navajo Nation Defendants'/Appellants' enforcement of their laws and the prospective injury to the School District necessary for standing before a federal district court.

III. The District Court Erred by Making Factual Determinations that the Repeated Past Assertion of Jurisdiction Over New Mexico Public Schools Performing State Functions on Tribal Land by the Navajo Nation's Agencies and Courts Enforcing Tribal Law Against New Mexico Public Schools Was Not a Real Threat of Future Injury

The District Court's Order states in part that although the School District "has demonstrated that the Navajo Nation has in the past exercised jurisdiction over state public school board employment decisions," the School District "does not describe how the future imposition of Navajo Nation jurisdiction" on the School District "is not merely speculative when one considers how specific individual trust land leases may impact the issue of tribal jurisdiction." Aplt. App. 146. As this Court has explained, however, "[p]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," and "[t]he 'injury in fact' requirement is satisfied differently depending on whether the plaintiff seeks prospective or retrospective relief." *Tandy*, 380 F.3d at 1283, *citing Lyons*, 461 U.S. at 101-02. The fact that the *Henderson* case has been dismissed by the NNSC and the assertion that the NNLC and ONLR have dismissed or

declined jurisdiction over the *Benallie* case does not alter the standing of the School District to prospective relief. *See* Aplt. App. 15-17. The threat of being injured in the future establishing standing under *Tandy* is not confined to only the reassertion of jurisdiction by the Navajo Nation in the case of *Henderson*, it applies to the Navajo Nation's future enforcement of its own statutes based on employment claims brought from former or current school employees. The District Court has misapplied the law.

The School District is subject to the same injury in the future, because the unlawful assertion of administrative and regulatory jurisdiction by the Navajo Nation itself constitutes an injury. *See New Mexico v. Dep't of the Interior*, 126 F. Supp. 3d 1201, 1207 (D.N.M. 2014), *citing Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 579–80 (1985). "Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights. Thus, as the Supreme Court has explained, "'Congress may enact statutes creating legal rights, the invasion of which creates [constitutional] standing, even though no injury would exist without the statute.'" *Robey v. Shapiro, Marianos & Cejeda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006), *quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). Moreover, by extension, the New Mexico Legislature may enact statutes creating legal rights, the invasion of which creates constitutional standing. *See, e.g., Bear Lake Educ.*

Ass'n, By & through Belnap v. Bd. of Trustees of Bear Lake Sch. Dist. No. 33, 116 Idaho 443, 448-49, 776 P.2d 452, 457-58 (Id. 1989) (local teachers' union has standing because school district was statutorily required to enter into negotiation agreements with local union under Idaho state law); *In re Petition for Declaratory Ruling re SDCL 62-1-1(6),* 2016 S.D. 21, ¶ 16, 877 N.W. 2d 340, 349 (S.D. 2016) ("injury and standing may be shown 'solely by the invasion of a legal right' that the [state] legislative branch created"), *quoting Golan v. Veritas Entm't, LLC,* 788 F.3d 814, 819 (8th Cir. 2015) (internal citation omitted).

Here, under federal and state statutes, the School District is required to provide equal employment opportunities to applicants and employees without regard to their membership in any protected classes, including but not limited to race, national origin, and ethnicity. *See, e.g.*, 42 U.S.C. 2000e *et seq.*; N.M. Stat. Ann. § 28-1-7(A) (2004). Furthermore, under the New Mexico Human Rights Act, employees must exhaust their administrative remedies with the New Mexico Department of Workforce Solutions and/or the United States Equal Employment Opportunity Commission prior to filing an employment lawsuit. N.M. Stat. Ann. § § 28-1-10 (2005). Supplanting New Mexico's due process system with a process that permits an employee to bypass his or her administrative remedies and requires the School District to violate federal and state non-discrimination laws constitutes a real and immediate threat of injury to the School District. The District Court

does not address at all the repeat assertion of the jurisdiction over the state school districts in the future by the NNSC, NNLC and ONLR and also the Navajo Nation's enforcement of the provisions of the NPEA when another employee of the School District asserts an employment claim under tribal law. *See* Aplt. App. 142-148.

As the case law provides, "a plaintiff may demonstrate that an injury is likely to recur[2] by showing that the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotation marks and citation omitted). "Where the harm alleged is directly traceable to a written policy [such as a tribal statute] there is an implicit likelihood of its repetition in the immediate future." *Id.* Here, the Navajo Nation maintains the NPEA sets forth employment obligations on all employers located on the Navajo Nation and has repeatedly acted to enforced and regulate the School District under its provision by and through its administrative agencies. This injury of the assertion of unlawful jurisdiction over the School District and the Central Schools stems directly from this tribal statute and, as a consequence, is likely to recur. *See id.*

[2] The legal standard is that the School District must establish that each is "suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Tandy*, 380 F.3d at 1283, *quoted in Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1257 (D.N.M. 2011).

In evaluating the likelihood of a claimed threat of enforcement of a statute, the District Court was required to consider the following three factors: (1) whether the School District has articulated a "concrete plan" to violate the tribal law in question; (2) whether the prosecuting tribal authorities have communicated a specific warning or threats to initiate proceedings against the School District; and (3) the history of past prosecution or enforcement under the challenged regulation. *See Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F. Supp. 2d 1191, 1202 (D. Nev. 2009), *citing Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (*citing San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996)). In cases in which constitutional rights are potentially at risk, "plaintiffs need not suffer or risk suffering prosecution under a statute to demonstrate injury from it." *Wright*, 597 F. Supp. 2d at 1201, *quoting S.O.C., Inc. v. County of Clark*, 481 F.Supp.2d 1122, 1126 (D.Nev. 2007) (*citing Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617–18 (9th Cir. 1999)). "Instead, plaintiffs can meet the standing requirement "even if a prosecution is remotely possible." *Wright*, 597 F.Supp.2d at 12010, *quoting Culinary Workers Union*, 200 F.3d at 618. Here, applying these three factors, the District Court should have concluded that School District has demonstrated a genuine threat of prosecution sufficient to satisfy the "injury-in-fact" component of the standing inquiry.

As to the first factor, the School District has consistently and repeatedly challenged the subject matter jurisdiction of the NNSC, NNLC and ONLR in every proceeding and case (*see, supra*) demonstrating a "concrete plan" to challenge and refuse the application of administrative and regulatory jurisdiction by the Navajo Nation over New Mexico public schools performing state governmental functions. *See MacArthur,* 497 F.3d at 1073-74; *see also Red Mesa Unified School Dist.*, 2010 WL 3855183, at *3; and *Window Rock Unified. Sch. Dist.*, 2013 WL 1149706, at *5. This plan is further demonstrated by the filing of this action seeking federal relief. As such, this factor favors the School District.

With regard to the two remaining factors, the past actions of the Navajo Nation to consistently attempt to enforce the provisions of the NPEA and the absence of any assertion here by Navajo Nation Defendants/Appellants regarding future actions to enforce the NPEA demonstrate a sufficient threat as to continued enforcement of the NPEA against state public schools. In addition, there are now numerous examples of the Navajo Nation's intent to do so, including matters in federal litigation in the State of Arizona. As such, these factors also favor standing for the School District. Thus, the cases of *Henderson, Benallie, rel. Jones, ex rel. Bailon*, *Tsosie*, *Hasgood*, and *Bigman* (*see, supra*) are subject to repetition involving the same parties as to the issue of tribal jurisdiction, and it is erroneous

for the District Court to conclude that the School District's standing is somehow extinguished by virtue of a judgment by the NNSC in *Henderson*.

With regard to the denial of the Motion to Amend, the District Court had the discretion to determine whether the Navajo Courts have had a sufficient opportunity to decide the issue of the jurisdiction of its courts and of the Navajo Nation's administrative and regulatory agencies over New Mexico public schools located on the lands of the Navajo Nation. *See* Aplt. App. 58-63. "The doctrine of tribal exhaustion is a judicially created rule, dictated by comity rather than jurisdiction concerns, which requires federal courts to defer to the tribal courts whenever federal and tribal courts have concurrent jurisdiction over a claim, in order to encourage tribal self-government." *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1221 (D.N.M. 2013); *see Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 813 (7th Cir. 1993) ("the doctrine of tribal exhaustion does not deprive a district court of subject-matter jurisdiction."); *Rosebud Sioux Tribe of S. Dakota v. Driving Hawk*, 534 F.2d 98, 101 (8th Cir. 1976) ("exhaustion of tribal remedies is not an iron-clad requirement…" when it "would be a futile gesture and would cause irreparable harm…"). "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Veeder v. Omaha Tribe of Nebraska*, 864 F. Supp. 889, 901 (N.D. Iowa 1994), *quoting Iowa Mut. Ins. Co. v. LaPlante*,

480 U.S. 9, 17 (1987). The "[p]romotion of tribal self-government and self-determination required that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction." *LaPlante*, 480 U.S. at 15-16, *quoting Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Here, the Navajo Nation's tribal courts, including the Navajo Nation's highest appellate court, have had ample opportunity to determine tribal court jurisdiction and that of the Navajo Nation over state public school districts located on Navajo Nation lands under the NPEA. And, there are facts and law common to each incident of the assertion of jurisdiction over the School District and over the Central Schools by the NNSC, NNLC and ONLR. Thus, the Motion to Amend should have been granted as the District Court had subject matter jurisdiction.

Applying the Navajo Nation Defendants'/Appellants' own argument regarding the need for a pending action before the NNLC or ONLR to have standing, the School District would be subject to an exception to the requirement to exhaust tribal remedies[3]. Under the Navajo Nation Defendants'/Appellants'

[3] The federal courts have created parameters to the tribal court exhaustion doctrine.

> There are four recognized exceptions to the requirement for exhaustion of tribal court remedies where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad

theory, exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; the Navajo Nation would simply engage in a circular argument that a pending administrative action is required for standing and then again assert the requirement for exhaustion. As such, the exception would apply. *See Brown*, 84 F. Supp. 3d at 477-78; *see also* Note 4.

More importantly, the Proposed Amended Complaint was supported by the allegations that there is no federal grant of authority for "tribal governance of nonmembers' conduct on land covered by *Montana's* main rule[4]." *See* Aplt. App.

> faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule.

Brown v. W. Sky Fin., LLC, 84 F. Supp. 3d 467, 477-78 (M.D.N.C. 2015), *quoting Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir.), *cert. denied*, — U.S. ——, 134 S.Ct. 825 (2013) (internal citations and footnote omitted).

[4] Tribal nations presumptively lack civil jurisdiction over non-Indians. *Montana*, 450 U.S. 544. Under federal common law, a tribal nation cannot exercise jurisdiction over activities or property of nonmembers of the tribal nation unless (1) the nonmembers entered "*consensual* relationships with the tribe or its members, through *commercial* dealing, contracts, leases or other arrangements," or (2) the conduct of non-Indians on fee lands within the reservation "threatens or has some direct effect upon the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66 (emphasis added). "'The burden rests on the tribe' to establish that one of the *Montana* exceptions applies." *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 658 (8th Cir. 2015); *quoting Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

109-112. Employment relationships between tribe members and a state's political subdivision are not "**private** consensual relationships … and do not fall within the first *Montana* exception." *MacArthur*, 497 F.3d at 1074 (emphasis added); *see* Aplt. App. 109-112. To satisfy the second *Montana* exception, "[t]he conduct must do more than injure the tribe, it must **imperil the subsistence** of the tribal community" such that "tribal power must be **necessary to avert catastrophic consequences**." *Belcourt*, 786 F.3d at 660 (emphasis in original) (internal quotations omitted).

Tribes lack jurisdiction over employment-related claims brought by tribe members against state-run public school districts operating schools on tribal land because (1) the public school district's relationship with the tribe is neither consensual nor commercial, but rather compulsory pursuant to the "constitutionally-imposed mandate to operate a public school within the reservation boundaries," and (2) in such employment cases, tribal jurisdiction is not necessary to avert catastrophic consequences that imperil the subsistence of the tribal community. *Id.* at 659, 661; *see also Red Mesa Unified Sch. Dist.*, 2010 WL 3855183, at *5 (holding that the Navajo Nation "has no regulatory or adjudicative jurisdiction" over employment claims brought by tribe members against two Arizona public school districts operating schools on tribal land, and barring both the former employees and the NNLC from further pursuing the claims before the

NNLC or the NNSC). Therefore, the fourth exception to exhaustion of tribal remedies applies. *See Brown*, 84 F. Supp. 3d at 477-78; *see also* Note 4. As such, the Motion to Amend should have been granted.

IV. The District Court Erred by Making Factual Determinations That the Land Leases for Public Schools Built Within the Navajo Nation, Which May or May Not Address Waivers of Jurisdiction that Affect the Standing of the School District, are Speculative of a Real Threat of Future Injury

Although the District Court's Order references the Navajo Nation Defendants'/Appellants' argument below that "[l]eases negotiated at different times may have significantly different provisions on jurisdiction" (Aplt. App. 145), the lease pertaining to the School District and the Navajo Nation here was not presented to the District Court and are not in the record of the District Court. *See* Aplt. App. 7-141. Thus, the District Court made this finding without an evidentiary basis, thereby committing reversible error. *See, e.g., Middleton v. Stephenson*, 749 F.3d 1197, 1201 (10th Cir. 2014) (court may reverse if the district court's finding lacks factual support in the record or if, after reviewing all the evidence, appellate court has "a definite and firm conviction that the district court erred"); *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1263 (10th Cir. 2008) (same).

"State sovereignty does not end at a reservation's border." *Hicks*, 533 U.S. at 361. The *Montana* case grants tribal courts the power to exercise jurisdiction over the activities of non-members who enter into consensual relationships with

the tribes or their members through commercial dealing, contracts, leases, or other arrangements. *Montana*, 450 U.S. at 565-66. Here, by contrast (and as a matter of law), the leases for the School District to operate schools on the Navajo Nation are not commercial in nature. "The [*Montana*] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Hicks*, 533 U.S. at 372. "The employment relationships at issue were entered into exclusively in [San Juan Health Services District]'s governmental capacity, and those relationships were part and parcel of [San Juan Health Services District]'s duty to provide medical services to residents . . . . [T]he employment relationships between [San Juan Health Services District] and [employee plaintiffs who were members of the Navajo Nation] were not '*private* consensual relationships' in any sense of the term and do not fall within" *Montana's* exception for non-members who enter into consensual commercial relationships with a tribe or its members. *MacArthur*, 497 F.3d at 1074 (emphasis in original). Thus, even assuming that the lease agreement between the School District and the Navajo Nation had been before the District Court – which it was not – a finding that the lease agreement somehow waived the State's jurisdiction over School District employment decisions would have been erroneous.

Furthermore, the District Court cites *Bailon v. Central Cons. School Dist. No. 22,* 8 Nav. R. 501 (Nav. Sup. Ct. 2004) for the proposition that because language in the trust land lease at issue in that case did not waive application of the NPEA, the Navajo Nation had jurisdiction over the state public school board's employment decision. Aplt. App. 145. Decisions of a tribal court are not binding upon the United States federal district courts. Indeed, if such decisions were binding upon the federal courts, *Hicks* and *MacArthur* never would have been decided in the federal appellate courts.

V. The District Court Erred by Determining that the Navajo Nation Supreme Court's Final Judgment Rendered the School District Without Standing Because There Allegedly Was No Longer an Immediate and Real Threat of Injury and Only an Allegedly Hypothetical Legal Disagreement Existed to Support the Issuance of a Declaratory Judgment

With regard to the claim for declaratory relief, the District Court "concede[d] that during the Henderson tribal litigation, the parties did have adverse legal interests regarding the issue of jurisdiction." Aplt. App. 147. The District Court ruled that "when the NNSC terminated that litigation, the legal controversy surrounding jurisdiction was no longer sufficiently immediate and real to warrant the issuance of a declaratory judgment." Aplt. App. 147. On the contrary, however, the Declaratory Judgment Act provides that a federal court may issue a declaratory judgment in "a case of actual controversy ... whether or not further

relief is sought." 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). "[T]he phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'controversies' that are justiciable under Article III." *MedImmune,* 549 U.S. at 126 (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). The test, here, is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune,* 549 U.S. at 127. An actual controversy must exist at all stages of the Court's review. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

As explained in detail above, the School District has standing to pursue its action for declaratory relief, because federal and state law currently require the School District to hire and employ staff members without regard to race or national origin, but the NPEA would require the School District to give hiring preference based upon race and/or national origin. The District Court admits that the Navajo Nation has repeatedly and consistently sought to assert jurisdiction over state public school board employment decisions (*see* Aplt. App. 144-145), invoking the NPEA. Subjecting the School District to potentially inconsistent rulings of two sovereigns demonstrates not only a substantial controversy between parties having adverse legal interests, but also sufficient immediacy and reality to warrant the

issuance of a declaratory judgment. *See MedImmune*, 549 U.S. at 127. Accordingly, the District Court erred in finding that the School District lacked standing to pursue the declaratory relief action.

VI. The District Court Erred by Noting that Other Federal Courts Have Determined that the Navajo Nation Lacks Jurisdiction over State Public Schools in Cases Similar to the One at Bar but Finding a Lack of Standing on the Part of the School District

The District Court correctly notes that "federal courts have determined that the Navajo Nation does not have jurisdiction over other state public school boards' employment decisions," citing to the cases of *Window Rock Unified School Dist.*, 2013 WL 1149706; *Red Mesa Unified School Dist.*, 2010 WL 3855183; *Belcourt Public School Dist.*, 786 F.3d at 659; and *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 669 (8th Cir. 2015). Aplt. App. 144-145. Unfortunately, however, the District Court commingles standing with jurisdiction, relying upon a non-binding Navajo Nation Supreme Court case addressing trust land lease language even though no trust land lease was before the District Court here. *See* Aplt. App. 145. Furthermore, as discussed above, the District Court erroneously ruled that once the School District, a public entity, received an adverse ruling from the NNSC, there is no more case or controversy. Under this logic, there never would have been decisions in *Hicks* or *MacArthur*.

CONCLUSION

For all of the reasons set forth herein, the School District respectfully requests that this Court reverse the Final Order of Dismissal and remand this matter to the District Court for further proceedings.

STATEMENT AS TO ORAL ARGUMENT

Because of the importance of the issues at stake for the School District and because of the detailed facts, Counsel respectfully requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the Tenth Circuit Court of Appeals using the CM/ECF system, which will send notification to the following attorney(s), and the undersigned also forwarded to the following attorney(s) a hard copy of the above-referenced Appellant's Opening Brief:

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CERTIFICATE OF COMPLIANCE WITH FED.R.APP.P. 32(a)

This brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because it contains 7,168 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii). The brief has been prepared with Microsoft Word using 14-point Times New Roman, which is a proportionally spaced typeface.

Date: September 30, 2016 */s/ Andrew M. Sanchez*
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STATEMENT OF RELATED CASES

There are no prior or related appeals.

CERTIFICATE OF DIGITAL SUBMISSION REGARDING APPELLEES' ANSWER BRIEF

I hereby certify that with regard to the Appellees' Answer Brief that was e-filed with the Court on September 30, 2016, all required privacy redactions were made, and, with the exceptions of those redactions, every document submitted in digital form or scanned PDF format was an exact copy of the written document filed with the Clerk by use of the ECF filing system. I also certify that the digital submission of Appellant's Opening Brief to the Court on September 30, 2016 was scanned for viruses with the most recent version of a commercial virus-scanning program, Sophos Endpoint virus software version 11.5.0. I further certify that, according to the commercial virus-scanning program, this digital submission was submitted to the Court free of viruses.

Date: September 30, 2016 */s/ Andrew M. Sanchez*
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