

19-131

No. 19-

JUL 23 2019

IN THE  
Supreme Court of the United States

DUANNA KNIGHTON,

*Petitioner,*

*v.*

CEDARVILLE RANCHERIA OF NORTHERN PAIUTE  
INDIANS; CEDARVILLE RANCHERIA TRIBAL  
COURT; PATRICIA R. LENZI, IN HER CAPACITY  
AS CHIEF JUDGE OF THE CEDARVILLE  
RANCHERIA TRIBAL COURT,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

“[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1981). The *Montana* Court recognized two limited narrow exceptions to that rule. But the Court has never resolved the question of whether tribal courts may ever exercise civil tort jurisdiction over nonmembers. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) and in *Dollar General Corporation and Dolgencorp, LLC v. The Mississippi Band of Choctaw Indians, et. al.* 136 S.Ct. 2159 (2016) the issue was brought before this Court, but unanswered. This case presents the issue of: Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers?

Further this case presents the issue of: If the Indian tribal courts have jurisdiction to adjudicate civil tort claims over nonmembers, what is the prerequisite notice of any such authority, what is the prerequisite consent thereto by a nonmember, and what is the viable scope of such jurisdiction so as to satisfy the Due Process rights of a nonmember?

## **PARTIES TO THE PROCEEDINGS**

The petitioner is Duanna Knighton.

Respondents are Cedarville Rancheria of Northern Paiute Indians; Cedarville Rancheria Tribal Court, and Patricia R. Lenzi, in her capacity as Chief Judge of the Cedarville Rancheria Tribal Court.

## RELATED CASES

*Duanna Knighton v. Cedarville Rancheria of Northern Paiute Indians, et. al.*, Ninth Circuit Court of Appeals, Case 17-15515 (April 24, 2019)

*Duanna Knighton v. Cedarville Rancheria of Northern Paiute Indians, et. al.*, Eastern District Court of California, Case No. 2:16-cv-02438-WHO (February 15, 2017)

*Cedarville Rancheria of Northern Paiute Indians, et. al. v. Duanna Knighton, et. al.*, Court of Appeals for the Cedarville Rancheria, Case No.: CED-CI-2014-0002 (March 7, 2016)

*Cedarville Rancheria of Northern Paiute Indians, et. al. v. Duanna Knighton, et. al.*, Cedarville Rancheria of Northern Paiute Indians Tribal Court, Case No.: CED-CI-2014-00002 (March 11, 2015)

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Duanna Knighton, respectfully petitions for a writ of *certiorari* to review the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

## **OPINIONS BELOW**

The order and opinion of the United States Court of Appeals for the Ninth Circuit (App. A) is reported at 922 F.3d 892. The order of the district court (App. B) is reported at 234 F.Supp. 3d 1042.

The opinion of the Court of Appeals For The Cedarville Rancheria (App. C) is unpublished. The order of the Cedarville Rancheria of Northern Paiute Tribal Court (App. D) is unpublished.

## **JURISDICTION**

The order and opinion of the court of appeals was entered on April 24, 2019. (App. A) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

Fifth Amendment to the United States Constitution, “No person shall... be deprived of life, liberty or property, without due process of law...”

Fourteenth Amendment, Section 1, to the United States Constitution, “...nor shall any State deprive any person of life, liberty, or property, without due process of law.”

Indian Civil Rights Act, 25 U.S.C § 1302(a)(8), “No Indian tribe in exercising powers of self-government shall – deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;”

### STATEMENT OF THE CASE

Petitioner Duanna Knighton is a nonmember being haled into a tribal court which should not have any jurisdiction over her. No Cedarville Rancheria judicial code nor a Cedarville Rancheria tribal court existed during Ms. Knighton’s employment with the Cedarville Rancheria. *After* Ms. Knighton’s employment with the Cedarville Rancheria ceased, its twelve adult members created, for the first time, a judicial code and tribal court. Respondents seek to apply this judicial code and Tribal Court *ex post facto* upon Ms. Knighton without Due Process. The Tribal Court process denies Ms. Knighton a jury. The Tribal Court process is completely confidential. The Tribal Court process permits application of unknown and unwritten tribal laws of any tribe. The Cedarville Rancheria seeks over a million dollars in compensatory damages and it further seeks punitive damages. Ms. Knighton challenged tribal court jurisdiction within the tribal court through a motion to dismiss, which was denied. Petitioner’s appeal thereof to the tribal appellate division was denied. Having exhausted tribal court remedies, Ms. Knighton subsequently sought relief within the federal court. The district court granted the Respondents’ motion to dismiss, finding tribal court jurisdiction. The Ninth Circuit upheld tribal court jurisdiction, greatly expanding tribal court jurisdiction in direct conflict to *Montana*.

## I. Legal Background

The issue of tribal court jurisdiction was recently argued on December 7, 2015, and a *per curiam* opinion was issued on June 23, 2016, in the matter of *Dollar General Corporation v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016). Following oral argument, Justice Scalia passed away, resulting in an equally divided court. It was anticipated that this Court's decision in *Dollar General* would have greatly defined tribal court jurisdiction. The issue presented in *Dollar General*, is strikingly similar to the issue in this case, *to wit.*, the narrow scope of tribal court jurisdiction.

Tribal court jurisdiction is not expansive; it is very narrow. This Court held that “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana v. United States*, 450 U.S. 544, 564 (1981). This Court has further stated, “[T]he Indian tribes have lost any right of governing every person within their limits except themselves.” *Id.* at 565. The tribes thus have restrictions upon the right of “self-government” and “to control internal relations” over tribal members; and even further restriction over nonmembers. Additionally, the Court draws a further distinction between a tribe's legislative power for rules covering nonmembers conduct on tribal land and the tribe's adjudicative authority to enforce those rules against nonmembers in tribal court.

### A. The Scope of Tribes' Legislative Authority

It has been clearly defined by this Court that, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565; see also *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (tribal court jurisdiction over nonmember conduct exists in only limited circumstances.) The Court held that tribes cannot apply their criminal laws to nonmembers. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, (1978); See also *Duro v. Reina*, 495 U.S. 676 (1990). Similarly, the Court has generally prohibited civil jurisdiction over nonmembers as well. *Montana*, 450 U.S. at 565. The Court in *Montana* established two narrow exceptions:

First, a “tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” *Id.* at 565.

Second, a “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566. This exception permits tribes to regulate nonmember activities in the absence of consent only when the conduct “imperil[s] the subsistence of the tribal community.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).



### **B. The Scope of a Tribes' Adjudicative Jurisdiction**

The *Montana* exceptions describe the scope of a tribe's legislative or regulatory authority; the power to levy taxes or issue rules governing nonmember conduct on a reservation. *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). This Court held that whether tribes may enforce those rules against nonmembers in tribal court is another question. *Id.* at 357-58. *Hicks* made clear that this court “never held that a tribal court had jurisdiction over a nonmember defendant.” *Hicks*, 533 U.S. at 358 n.2. The issue remains open whether, and to what extent, a tribal court may exercise civil jurisdiction over nonmembers.

### **C. Tribal Court Jurisdiction Must Comport With Fair Play and Substantial Justice to Comply With the Requirements of Due Process.**

Jurisdiction is only found if traditional notions of fair play and substantial justice are met. *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987). This Court has required predictability in the legal system so that a defendant can reasonably anticipate being haled into court. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Similarly, this Court echoed that same need for “predictability to the legal system” in the context of tribal jurisdiction in *Plains Commerce Bank*, 554 U.S. at 337, where it held that a nonmember can only meaningfully consent to the “jurisdictional consequences” of a consensual relationship that are reasonably foreseeable.

## **II. Factual Background**

The Cedarville Rancheria of Northern Paiute Indians (“Cedarville Rancheria”) is a federally recognized Native American Indian Tribe, with its reservation, housing, travel and community centers located on trust lands in Cedarville, Modoc County, California. (App. 5a) The tribe’s administrative headquarters is located approximately 30 miles away in Alturas, California, on land owned in fee by the tribe. (App. 35a)

Ms. Knighton was employed by the Cedarville Rancheria from approximately July 1996 to March 2013 and served as Tribal Administrator at the time her employment ended. (App. 6a) She is not a member of the Cedarville Rancheria and has never resided in, nor owned, property on tribal land. Knighton is currently employed by Resources for Indian Student Education (RISE), a California not-for-profit corporation that provides education services and programs to Indian children, where she has been employed since 1995. (App. 7a)

Prior to creating a Constitution and Bylaws in 2011, and Tribal Court and Judicial Code in December 2013, the Cedarville Rancheria regulated employment matters pursuant to Articles XIII-XVIII and XX of the Cedarville Rancheria Policies (Personnel Manual). Those policies established disciplinary and grievance procedures for tribal employees and provided for Tribal Council control over disciplinary action involving the Tribal Administrator. There were no tort remedies over an employee. (App. 6-7a)

In February 2011, the Cedarville Rancheria enacted a Constitution and Bylaws, which provided for internal governance of members but did not expressly extend tribal jurisdiction to include nonmembers, nor provide a mechanism for asserting civil adjudicative authority over nonmember conduct. Pursuant to the Constitution and Bylaws, the tribe's Executive Committee (Chairperson, Vice Chairperson, and Secretary) and the tribe's Community Council (all qualified voters of the Rancheria who are 18 years of age or older), were responsible for, amongst other things, issuing and carrying out ordinances, resolutions, or other enactments, controlling membership, establishing housing and other authorities necessary to the welfare of the tribe; and vetoing any proposed transaction involving tribal lands or assets. The Tribal Chairperson was responsible for overseeing all tribal matters, "including concerns, conflicts and any other issues". (App. 9a)

In December 2013, approximately nine months after Ms. Knighton's employment ended, the Cedarville Rancheria established its Tribal Court and enacted a Judicial Code. The Tribal Court, which included a trial and appellate division, was created "for the purpose of protecting and promoting tribal sovereignty, strengthening tribal self-government, [and] providing for the judicial needs of the Cedarville Rancheria." (App. 9-10a) Tribal Court proceedings are governed by the Federal Rules of Civil Procedure and Rules of Evidence, and the Tribal Court can apply the laws of the Tribe or any other tribe, as well as state or federal law; issue orders and judgments; and award monetary damages and injunctive relief. There is no right to a jury trial and all proceedings are confidential.

The Cedarville Rancheria asserts that its Tribal Court has jurisdiction over the immediate case pursuant to Section 201 *et. seq.* of its Judicial Code. Section 201 provides that the Tribal Court has subject matter jurisdiction over “[a]ll persons outside the exterior boundaries of the Cedarville Rancheria Reservation ... within the jurisdiction of the Rancheria pursuant to federal or tribal law, including all persons whose activity on or off reservation threatens the Rancheria, government or its membership,” and to “[a]ll other persons whose actions involve or affect the Rancheria, or its members, through commercial dealings, contracts, leases or other arrangements.” The Code further provides that the Tribal Court’s judicial power extends to “[a]ll civil causes of action arising at common law including, without limitation, all contract claims (whether the contract at issue is written or oral or existing at law), all tort claims (regardless of the nature), all property claims (regardless of the nature), all insurance claims, and all claims based on commercial dealing with the Band, its agencies, sub-entities, and corporations chartered pursuant to its laws, and all nuisance claims.” (App. 9-10a)

On February 20, 2014, former Tribal Chairperson, Cherie Lash Rhoades, shot and killed four tribal members during a Tribal Court proceeding<sup>1</sup>. (App. 42a) The shooter and the victims were all linked to the instant dispute. As Tribal Chairperson, Ms. Rhoades approved each of the matters and things giving rise to the Tribe’s complaint against Ms. Knighton. The case against Ms. Knighton was the fifth confidential tribal court case.

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1. The killings occurred during a court session. The events made national news.

### III. Procedural History

On October 2, 2014, the Cedarville Rancheria filed its Complaint in Tribal Court against Ms. Knighton and RISE. The lawsuit, captioned Cedarville Rancheria of Northern Paiute Indians v. Duanna Knighton, et al., CED-CI-2014-00002, was only the fifth case to be heard by the Tribal Court. (App. 78a) The complaint asserts eight claims against Ms. Knighton: (1) fraud and deceit; (2) recovery of unauthorized and excessive pension payments; (3) recovery of unauthorized investment losses; (4) breach of fiduciary duty; (5) aiding and abetting breach of fiduciary duty; (6) unjust enrichment; (7) common count-account stated; and (8) common count-money had and received. The Cedarville Rancheria alleges that Ms. Knighton fraudulently received higher compensation and benefits than she was entitled to, made poor investments on behalf of the tribe, and breached her fiduciary duty when she involved herself in the sale of a building from RISE to the tribe. (App. 11a)

On October 1, 2014, the Tribal Court *ex parte* issued a restraining order and injunction against Ms. Knighton, RISE, and Oppenheimer Funds, Inc., a financial fund manager, freezing funds belonging to Ms. Knighton. The Tribal Court, without any briefing nor argument, *sua sponte* declared that it had jurisdiction over Ms. Knighton and the claims asserted therein. On October 28, 2014, Ms. Knighton filed a motion challenging the Tribal Court's jurisdiction, which the Tribal Court denied on March 11, 2015. (App. 12a) On February 24, 2015, RISE filed a separate motion to dismiss.

On April 21, 2015, the parties agreed to stay the lawsuit as to Ms. Knighton due to RISE's pending motion. The parties further stipulated that Ms. Knighton had fully exhausted the Tribal Court procedures for challenging tribal jurisdiction such that she could proceed with a jurisdictional challenge in federal court. On April 29, 2015, the Tribal Court stayed the case for all purposes as to Ms. Knighton until it ruled on RISE's motion to dismiss. The Tribal Court also found that denial of Knighton's motion was not yet ripe for federal review because Ms. Knighton had not appealed the issue to the Tribal Court of Appeals. (App. 12a) On June 30, 2015, the Tribal Court granted RISE's motion to dismiss for lack of personal jurisdiction.

Knighton appealed the Tribal Court's ruling on her motion, on July 20, 2015, on the basis that the Tribal Court lacked jurisdiction and the complaint must be dismissed because RISE was an indispensable party whose joinder was no longer feasible. On March 7, 2016, the Tribal Court of Appeals affirmed the Tribal Court's order denying Ms. Knighton's motion but remanded the indispensable party issue to the Tribal Court to consider first. (App. 12a) Ms. Knighton filed a motion to dismiss for failure to include RISE as an indispensable party. On June 29, 2016, the Tribal Court denied the motion in its entirety, which Ms. Knighton appealed to the Tribal Court of Appeals. On September 26, 2016, the Tribal Court stayed the entire tribal case and vacated the appeal pursuant to a stipulation between the parties. The parties further stipulated that Ms. Knighton had exhausted her Tribal Court remedies with respect to the lack of jurisdiction and the indispensable party issues.

On October 12, 2016, Knighton filed a federal court complaint for declaratory and injunctive relief against the Cedarville Rancheria, Tribal Court, and Tribal Judge Lenzi on the basis that the tribe lacks jurisdiction over her and that the tribe's lawsuit against her cannot proceed due to the tribe's failure to join RISE as an indispensable party. (App. 12a) On December 16, 2016, the Respondents<sup>2</sup> filed a motion to dismiss alleging, amongst other things, that the Tribal Court had jurisdiction over Ms. Knighton under *Montana*. On February 15, 2017, the District Court granted Respondents' motion to dismiss based on its finding that under *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011), the tribe's inherent authority to exclude nonmembers from tribal land gave it both regulatory and adjudicative authority over Ms. Knighton. (App. 13a)

Ms. Knighton appealed the District Court's order and judgment to the Ninth Circuit. The Ninth Circuit issued its original opinion on March 13, 2019, affirming the judgment of the District Court. Ms. Knighton filed a petition for rehearing. On April 24, 2019, the Ninth Circuit issued its order granting the petition for rehearing and issued a superseding opinion filed concurrently with that order, continuing to affirm the judgment of the District Court. (App. 1-32a)

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2. The Cedarville Rancheria, the Tribal Court, and the Tribal Court Judge are all represented by the same counsel, attorney Jack Duran. Mr. Duran also represented the Cedarville Rancheria in its complaint against Ms. Knighton in Tribal Court.

## REASONS FOR GRANTING THE PETITIONER

As a citizen of the United States, Ms. Knighton should be afforded the protections of Due Process of law. There is absolutely no way Ms. Knighton could have consented to tribal court jurisdiction during her employment, as there was no judicial code nor a tribal court for the Cedarville Rancheria. Holding otherwise eviscerates the reasonable expectations of a defendant.

Moreover, this Court has never *carte blanche* held that a tribal court may exert civil jurisdiction over nonmembers. The issue was presented to the Court in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); however, the Court resolved that matter on other grounds and left the uncertainty. That uncertainty was raised in *Dollar General Corporation v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016) but an equally divided court precluded a decision. Thus, the issue remains unresolved. This issue is of great importance to citizens of the United States whom are being haled into a foreign tribal court, as well as to the Native American community so that it can properly define its legislative and adjudicative authority.

Moreover, as the decision in this matter demonstrates, the Ninth Circuit has created an all expansive civil tribal court jurisdiction scheme whereby basically any contact with a tribe or within tribal land will confer unlimited civil jurisdiction upon a tribal court. The gravity of the Ninth Circuits opinion herein is exponential, eviscerating Due Process of nonmember citizens. A nonmember should not be required to defend themselves in a secret tribunal, without a jury, with potentially unknown and obscure



tribal laws, and risk millions in damages. There must be conscious foreseeability of tribal court jurisdiction.

**I. This Case Squarely Presents The Issue Left Open in Hicks and the Question The Court Granted Certiorari To Decide, But Did Not, In Plains Commerce Bank And Dollar General.**

This case presents the Court with another opportunity to finally resolve the question granted certiorari in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) and in *Dollar General Corporation v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016). As stated above, the importance of resolving this question cannot be understated for both non-Indians and for Native American communities.

In *Plains Commerce Bank*, tribal members tried to sue a nonmember bank in tribal court alleging various torts. The Eighth Circuit concluded that the bank entered into a consensual relationship with the tribal members, thus falling within the *Montana* first exception. This Court explained that the “existence of a consensual relationship is not alone sufficient to support tribal jurisdiction.” *Plains Commerce* at 316. Tribal authority must take the form of taxation, licensing, or “other means” with respect to nonmembers. The scope of “other means” was the issue brought before this Court. Unfortunately, the Court did not answer the question and it resolved the case on other grounds. The Court, therefore, left unanswered whether tribes may regulate nonmembers through tort lawsuits brought within tribal court.

In *Dollar General*, the issue of tribal court jurisdiction involving torts alleged by tribal members against a nonmember arose again. Justice Scalia passed away after oral argument, resulting in an equally divided court; the question presented was unanswered still. This case presents the Court with another opportunity to finally resolve the questions left unanswered in *Plains Commerce* and *Dollar General*.

Further, this case presents the opportunity for this court to set a national standard as to tribal court jurisdiction, whereas, the Ninth Circuit's decision herein has created basically an all-expansive tribal court jurisdiction model for tort matters between a tribe and a nonmember which is at odds with several other circuits and this Court. The decision below completely foregoes Due Process and the fundamental fairness measures of having advance notice of tribal court processes, laws, and remedies. The United States government is not permitted to legislate and then *ex post facto* impose those regulations upon its citizens. Why should the Cedarville Rancheria be permitted to *ex post facto* create a judicial code and impose a tribal court process upon a nonmember whom could not have conceivably consented in any fashion to any such jurisdiction? The Cedarville Rancheria should not be permitted to do so.

The breadth of application of the Ninth Circuit's decision is dramatic and affects every non-Indian in this country. It subjects nonmembers to jurisdiction involving unwritten laws and customs to be exclusively determined and applied by the tribe. It subjects nonmembers to defend themselves in a secretive forum. It subjects nonmembers to defend themselves before a tribal court without a jury.

In this case, the tribal court judge was selected and paid by the twelve adult members of the Cedarville Rancheria whom have brought this action. Further, the tribal court and its judge is represented by the same counsel whom also represents the Cedarville Rancheria in its tort complaint against Ms. Knighton.

It should also be remembered that the Cedarville Rancheria is not left without a forum to pursue its claims. It may pursue its claims in either California state court or federal court. These are jurisdictions in which Ms. Knighton has consented; these are jurisdiction that offer the fundamental rights of open courts and trial by jury; these jurisdictions comport with fundamental fairness encompassed by Due Process.

## **II. Absent Congressional Authorization, Tribal Courts Have No Jurisdiction to Adjudicate Tort Claims Against Nonmembers, And Any Adjudicative Authority Cannot Exceed Its Legislative Authority.**

The Ninth Circuit's decision in this case is wrong. Tribal courts lack jurisdiction to adjudicate private tort claims against nonmembers. Their adjudicative authority cannot exceed their legislative authority. In all three Supreme Court cases addressing tribal adjudicative jurisdiction over nonmembers (*Strate*, *Hicks* and *Plains Commerce Bank*), a tribe's adjudicative jurisdiction may not exceed its regulatory jurisdiction. *Water Wheel*, 642 F.3d at 814.

As the petition for writ of certiorari in *Dollar General* squarely pointed out, "This Court has rightly questioned whether tribal courts should ever be deemed

to have jurisdiction over nonmembers without Congress's authorization...." *Dollar General* Petition for Writ Of Certiorari at pages 18-20. The general rule is clear, tribal courts do not have jurisdiction over nonmembers. The *Montana* exceptions are "limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330. This Court has "emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 554 U.S. at 338 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001)). The *Montana* exceptions must be construed to avoid "the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Plains Commerce Bank*, 554 U.S. at 337.

Here there was absolutely no tribal court regulation nor authority during Ms. Knighton's employment because there was no judicial code, nor was there a tribal court. There was no way for Ms. Knighton to have discerned or agreed to any tribal tort laws and remedies because they did not exist.

Under the second *Montana* exception, a tribe retains no civil authority over the conduct of nonmembers unless "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank*, 554 U.S. at 320, citing *Montana*, 450 U.S. at 566. Despite its broad phrasing, the second *Montana* exception has been narrowly construed by the courts.

Read in isolation, the Montana rule's second

exception can be misperceived. Key to its proper application, however, is the Court's preface: Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations. *Strate*, 520 U.S. at 459, citing *Montana*, 450 U.S. at 564 (internal quotation marks omitted).

Jurisdictional analysis requires an examination of the specific conduct a tribe's legal claims seek to regulate. "Each claim must be analyzed individually in terms of the Montana principles to determine whether the tribal court has subject matter jurisdiction over it." *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d at 930. For the second exception to apply, the conduct alleged "must do more than injure the tribe, it must imperil the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation marks omitted). At least one court has found that employment disputes do not fall under the second *Montana* exception. In *Atkinson Trading Co. v. Manygoats*, No. CIV 02-1556-PCT-SMM, 2004 U.S. Dist. LEXIS 31789,\*31 (D. Ariz. Mar. 16, 2004), the court held that "while employment matters concerning tribal members are certainly related to the economic security and welfare of the tribe, they do not have a substantial impact on the tribe as a whole." The dispute the Cedarville Rancheria has with Ms. Knighton was an employment dispute. The matters complained of all arise out of her employment with the tribe. Accordingly, neither

prong of *Montana* is applicable in this case.

### **III. The Ninth Circuit Has Created Conflicting Precedent That Basically Provides For Limitless Tribal Court Jurisdiction**

Under Ninth Circuit precedent, two frameworks exist for determining whether a tribe has jurisdiction over a lawsuit involving a nonmember defendant: (1) The two exceptions articulated in *Montana v. United States*, 450 U.S. 544 (1981), and (2) the right of a tribe to exclude non-tribal members from tribal land. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017)

The Ninth Circuit's recent decisions in *Water Wheel*, 642 F.3d 802, *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc*, 715 F.3d 1196 (2013), and *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 917 (9th Cir. 2017) signify a break from application of the limited *Montana* framework. As noted by the dissent in *Window Rock*, the Ninth Circuit is the only federal circuit court that has narrowly interpreted *Hicks* "to mean that the Montana framework need not be applied to questions of tribal jurisdiction over nonmembers in the absence of competing state interests," an interpretation which the *Window Rock* dissent argues is further narrowed in that case. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 917 (9th Cir. 2017). No case law, from any circuit, supports such a narrow application of *Hicks*.

The Eighth and Tenth Circuits have broadly interpreted *Hicks*, repeatedly holding that the *Montana* analysis applies to the question of tribal court jurisdiction over a nonmember defendant irrespective of whether the

claim arose on tribal land. In *MacArthur v. San Juan Cty.*, 497 F.3d 1057 (10th Cir. 2007), the Tenth Circuit found that *Hicks* “put to rest” the notion that whether *Montana* applies depends on whether the conduct at issue occurred on tribal land. Similarly, post-*Hicks*, the Eighth Circuit has moved toward analyzing tribal jurisdiction based on the membership status of the litigants, with location becoming one of several factors in determining whether *Montana*’s “harm to tribe” exception applies. See *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008); *Attorney’s Process and Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010). See also Jacob R. Masters, *Off the Beaten Path? The Ninth Circuit’s Approach to Tribal Courts’ Civil Jurisdiction over Nonmember Defendants*, 38 Am. Indian L. Rev. 187, 204-207 (2013).

In *Stifel v. Lac DU Fambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), the Seventh Circuit rejected the Ninth Circuit’s approach of limiting *Montana* to cases involving non-Indian land and disagreed that land ownership should be considered a threshold or determinative factor. The court held that the Supreme Court’s holding in *Plains Commerce Bank* “leaves no doubt that *Montana* applies regardless of whether the actions take place on fee or non-fee land.” *Stifel* at 207.

In the present case, the Ninth Circuit expanded tribal court jurisdiction even further. The Ninth Circuit now holds that tribal court civil jurisdiction is conferred “over nonmembers on tribal land...from its inherent sovereign power to protect self-government and control internal relations.” App A, page 5. The Ninth Circuit further stated, “According, we now hold that under the

circumstances presented here, the tribe has authority to regulate the nonmember employee's conduct at issue pursuant to its inherent power to exclude nonmembers from tribal lands." (pg 5.) Even though the underlying case against Ms. Knighton has no connection, whatsoever, to excluding individuals from tribal lands, that "authority" somehow now confers unrestricted adjudicative authority to any and all torts. This holding is in conflict with other circuits and with the opinions of this Court.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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