No. 24-3487

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KRISTIN TIX,

n/k/a Kristin Ann McGowan,

Plaintiff – Appellant,

v.

ROBERT TIX,

Defendant – Appellee,

On Appeal from the United States District Court
for the District of Minnesota
Case No. 24-cv-1824 (KMM/ECW)
Hon. Katherine Menendez

PETITION FOR EN BANC REVIEW

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RULE 40(b) STATEMENT AND INTRODUCTION

In this case, the panel rejected long-exercised tribal family law jurisdiction over a divorce involving a tribal member father, non-member mother, and three tribal member children who lived near the reservation. The state court, the tribal court, and the federal district court all recognized the tribe's jurisdiction, concurrent with the state court. In rejecting their consensus, the panel created new conflicts of authority, exacerbated an existing split, ignored the position of the United States, and contravened Supreme Court precedent. *See Lexington Insurance Co. v. Smith*, 94 F.4th 870 (9th Cir. 2024); *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255 (Alaska 2016); *Estin v. Estin*, 334 U.S. 541 (1948). And its decision now threatens serious disruption for families who have relied for decades on tribal courts to exercise family law jurisdiction. The Court should grant en banc review.

FACTUAL BACKGROUND

1. The Prairie Island Mdewakanton Dakota Indian Community ("Community") is a federally recognized Indian tribe. It has long exercised jurisdiction over family law disputes, including cases involving off-reservation families. *See* Aple.-App. 126; R. Doc. 17-1, at 175. The

Community exercises its jurisdiction off reservation because the Community's land base is exceptionally small and cannot accommodate all tribal members. Aple.-App. 127; R. Doc. 17-1, at 182.

Appellee is a Community member. Aplt.-App. 78; R. Doc. 30, at 2. Appellant is not. *Id.* The parties married in September 2008, in Minneapolis, Minnesota. *Id.*

The parties had three children and enrolled them in the Community. *Id.* The family received substantial benefits from the Community, including financial, education, and childcare assistance. Aplt.-App. 90; R. Doc. 30, at 14. Because of the Community's small land base, the family could not reside on the reservation, but they lived nearby and regularly visited for tribal services, family visits, and cultural events. Aplt.-App. 78; R. Doc. 30, at 2; Aple.-App. 10-11, 13, 78, 111; R. Doc. 17-1, at 108.

2. When the parties decided to divorce, Appellant filed in state court, while Appellee filed in tribal court. Aplt.-App. 78-79; R. Doc. 30, at 2-3. Appellee moved to stay the state case, and the state court granted the motion. Aplt.-App. 79-80; R. Doc. 30, at 3-4. It concluded that the tribal court possessed concurrent jurisdiction "because [Appellee] and the

minor children have a significant connection to the Community and substantial evidence is available in the tribal court concerning the minor children's care, protection, training, and personal relationships." Aple.-App. 26; R. Doc. 17-1, at 8. It deferred to the tribal court after determining "the tribal court would be a more convenient forum for the parties to proceed with the custody matters in their dissolution." Aple.-App. 29; R. Doc. 17-1, at 11.

Appellant moved to dismiss the tribal court action for lack of jurisdiction. The tribal trial court denied the motion and adjudicated the divorce. Aple-App. 32-41, 108; R. Do. 17-1, at 14-23, 105. Appellant was represented by counsel and allowed to present extensive evidence. Aple.-App. 42-43; R. Doc. 17-1, at 39-40.

Following a four-day trial, the tribal trial court issued a 65-page opinion. Aple.-App. 42-106; R. Doc. 17-1, at 39-103. Among other things, the court dissolved the parties' bonds of marriage, addressed spousal maintenance, determined the care and custody of the tribal children, and divided marital assets. Aple.-App. 70-104; R. Doc. 17-1, at 67-101.

Appellant appealed the tribal trial court's jurisdictional determination; she did not challenge its merits rulings. The tribal court of appeals affirmed. Aple.-App. 107-21; R. Doc. 17-1, at 104-18.

3. Appellant filed this federal action, arguing that the tribal court lacked subject matter jurisdiction over the divorce and personal jurisdiction over her. Aplt.-App. 83-84; R. Doc. 30, at 7-8. The district court rejected both arguments. Aplt.-App. 84; R. Doc. 30, at 8. On appeal, Appellant challenged only subject matter jurisdiction, waiving any personal jurisdiction challenge. *See DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013). The panel reversed.

LEGAL BACKGROUND

Tribes retain inherent sovereignty, including a "variety of self-government powers." *Haaland v. Brackeen*, 599 U.S. 255, 329 (2023) (Gorsuch, J., concurring). Those powers include regulating "internal and social relations," *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), which encompasses "handl[ing] their own family-law matters and domestic disputes," *Brackeen*, 599 U.S. at 329 (Gorsuch, J., concurring) (cleaned up). When a tribe seeks to regulate a non-member's activities outside such core areas of tribal power, tribal authority is more

constricted. Even still, the Supreme Court—in *Montana v. United States*, 450 U.S. 544 (1981)—recognized tribal civil jurisdiction over non-member conduct outside these core contexts in two circumstances. First, "[a] tribe may regulate[] … the activities of nonmembers who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. Second, a tribe may address "conduct [that] threatens or has some direct effect on … the health or welfare of the tribe." *Id.* at 566.

REASONS FOR GRANTING THE PETITION

I. THE PANEL DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEAL.

a. The Panel Exacerbated An Existing Circuit Split And Created A New, Intra-Circuit Split Over The *Montana* Consensual-Relationship Test.

As the district court concluded below, the tribal court possessed concurrent subject matter jurisdiction here under *Montana*'s first prong. Appellant "voluntarily entered a marriage with [Appellee], a member of the [Community]." Aplt.-App. 90; R. Doc. 30, at 14. She therefore "could reasonably anticipate … that the Tribal Court could exercise jurisdiction over their marriage dissolution." *Id.*

The panel rejected this conclusion on two grounds. First, it held that *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S.

316 (2008), "established a substantive limit on the scope of [*Montana*'s] consensual relationship exception"—namely, that the exercise of tribal jurisdiction must be "'necessary for tribal self-government or controlling internal relations.'" Opn. 8 & n.5 (quoting *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019)). Second, it held that when parties "do not marry on [a tribe's] reservation or ever reside there," their subsequent divorce lacks "a sufficient connection to tribal property" to support tribal jurisdiction. Opn. 9-10. In so holding, the panel expanded an existing circuit split over whether *Plains Commerce* added a separate self-governance inquiry to *Montana*'s first prong, and it created an entirely new split—intra-circuit—over whether *Montana*'s first prong requires marriage or residence on a reservation. Both conflicts merit en banc review.

1. The Court should grant en banc review because the panel exacerbated the circuit conflict over the meaning of *Plains Commerce*. The split on this issue is well recognized, having received the attention of twenty-two judges on the Ninth Circuit. *See Lexington Insurance Co. v. Smith*, 117 F.4th 1106, 1107 (9th Cir. 2024) (opinion respecting denial of rehearing en banc); *id.* at 1112 (Bumatay, J., dissenting). As the

sixteen judges in the majority there explained, "[t]he Fifth and Ninth Circuits have rejected the separate inquiry notion." *Id.* at 1108 (opinion respecting denial of rehearing en banc) (citing *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174-75 (5th Cir. 2014); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 903-04 (9th Cir. 2019)). Before the panel decision here, "[o]nly the Seventh Circuit [had] explicitly require[d] this separate inquiry." *Id.* (citing *Jackson v. Payday Fin.*, 764 F.3d 765, 783 (7th Cir. 2014)).

The panel disagreed with this description of the split. Its disagreement reflected a misreading of the relevant cases. *See Lexington Insurance*, 117 F.4th at 1115 (Bumatay, J., dissenting) (conceding the Fifth Circuit's position and acknowledging that the Sixth Circuit's position is dicta). But even accepting the panel's characterization, this Court's precedent and the Ninth Circuit's directly conflict—presenting a clear case for en banc review.

En banc review is especially warranted because the panel adopted the wrong side of the split. Aple. Br. 47-48. As the Ninth Circuit has explained, imposing an additional self-governance test on *Montana*'s first prong "misreads *Plains Commerce*." *Lexington Insurance*, 94 F.4th at

886. The Supreme Court "was merely stating that even if a nonmember consented to tribal law, the tribe could impose that law on the nonmember only if the tribe had the authority to do so under the power to exclude[] … []or the *Montana* exceptions." *Id.* (cleaned up). Hence, "[i]f the conduct at issue satisfies one of the *Montana* exceptions, it necessarily follows that the conduct implicates the tribe's authority in one of the areas described in *Plains Commerce*." *Id.*

The panel maintained that this Circuit already resolved this issue in *Kodiak Oil & Gas (USA) Inc. v. Burr*. Opn. 8 n.5. Even Appellant, however, treated this question as open before this Court. *See* Op. Br. 18 (never citing *Kodiak Oil*); Reply Br. 4 (same); *see also Lexington Insurance*, 117 F.4th at 1111-12 (opinion respecting denial of rehearing en banc) (explaining that *Kodiak Oil* "discuss[ed] federal preemption" and "do[es] not relate to tribal jurisdiction"). And either way, *Kodiak Oil* does not bind this Court sitting en banc. Since *Kodiak Oil*, the recognition of this issue's importance has grown substantially, yet the panel never grappled with the reasoning that sixteen judges on the Ninth Circuit accepted. The Court should grant en banc review to give this issue full consideration and align with the Ninth and Fifth Circuits.

Or, alternatively, the en banc Court should clarify that this question remains open in this Circuit, and wait to resolve it. The panel did not need to address this question, as any self-governance requirement *is* satisfied here. Aple. Br. 47, 49-51. But the panel went forward, declined to engage with the substantial arguments against a separate self-governance inquiry, and got the answer wrong. Whether to join the Ninth and Fifth Circuits or wait to do so until a case requires it, en banc review is warranted.

2. The panel also created a new split over whether parties must "marry on the Community's reservation or … reside there" at some point to satisfy *Montana*'s first prong. Opn. 9-10. The panel said that such features were present in "analogous cases where courts have found tribal jurisdiction." *Id.* at 9. But that is not so. Aple. Br. 33, 44-45. In *Barrett v. Barrett*, for example, the Oklahoma Supreme Court held that a tribal court had jurisdiction over a divorce between a member and non-member who "were neither domiciled within the boundaries of the Tribal reservation nor were any of the property or business holdings located within such boundaries." 878 P.2d 1051, 1052, 1054-55 (Okla. 1994). And *Johnson v. Jones* upheld *this Community's* jurisdiction over a family that

lived 1500 miles from the reservation. No. 6:05-cv-1256, 2005 WL 8159765, at *1-2 (M.D. Fla. Nov. 3, 2005).

The need for en banc review is particularly pressing because this conflict is intra-circuit. Unlike the panel here, the North Dakota Supreme Court recognized concurrent tribal jurisdiction over a divorce where "the marriage occurred [far from the reservation] in Nevada; the child was conceived off of the reservation and born off of the reservation; although living for a period of time with the family on the reservation, [the non-member] moved off of the reservation while the marriage was still ongoing and purchased a home in Bismarck; the parties owned extensive property and a business off of the reservation; and [the tribal member] worked at the insurance business in Bismarck during the marriage." *Kelly v. Kelly*, 759 N.W.2d 721, 725 (N.D. 2009). The North Dakota Supreme Court and the panel have thus provided conflicting instructions as to whether a North Dakota state court may, as the state court did here, "defer to the tribal court" when the state court "concludes that the tribal court is the more convenient court." *Id.* at 728.

Rather than create this conflict, the panel should have recognized the Community's concurrent subject matter jurisdiction. In holding

otherwise, the panel suggested discomfort with "connection[s] to tribal property of a … limited and incidental character" giving rise to tribal jurisdiction. Opn. 10. But personal jurisdiction was the place for such concerns, Aple. Br. 46-47—and Appellant intentionally waived her personal jurisdiction challenge, *supra* 4. Thus, even if such concerns had merit (*but see* Aple. Br. 51-52), the correct course was not to shoehorn them into *Montana*'s consensual-relationship test. It was to hold Appellant to her waiver, issue a narrow ruling, and leave for the next case whether a preserved personal jurisdiction challenge would alter the result (without creating a split).

b. The Panel Created A Conflict Over Tribes' Inherent Authority Over Family Law Matters Involving Non-Members.

The tribal court also possessed concurrent jurisdiction over the divorce by virtue of its inherent authority over family law matters. Aple. Br. 18-27. To Appellee's knowledge, every court before now to consider this source of authority has concluded that tribes possess inherent "extra-territorial jurisdiction when it comes to … domestic matters," even when non-members are parties to such cases. *Cohen's Handbook of Federal Indian Law* § 15.03, at 962 (2024). And they have held that this

jurisdiction reaches its zenith when, like here, a case involves the care and custody of tribal member children. *See Cent. Council*, 371 P.3d at 269-71.

The panel's contrary conclusion conflicts with a trilogy of extensively reasoned cases from the Alaska Supreme Court. *See John v. Baker*, 982 P.2d 738 (Alaska 1999); *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014); *Cent. Council*, 371 P.3d at 255. It also conflicts with the decisions of other courts and with the United States's position. In *Kaltag Tribal Council v. Jackson*, for instance, a federal district court determined that a tribal court had authority to issue an off-reservation adoption order impacting a non-member parent because "it is the membership of the child that is controlling [for jurisdictional purposes], not the membership of the individual parents." No. 3:06-CV-211, 2008 WL 9434481, at *6 (D. Alaska Feb. 22, 2008). On appeal, the Ninth Circuit affirmed. *Kaltag Tribal Council v. Jackson*, 344 F. App'x 324, 325 (9th Cir. 2009) (unpublished). And before the Supreme Court, the United States maintained that the Ninth Circuit "correctly determined that the tribal court had concurrent jurisdiction to initiate and adjudicate proceedings concerning custody of a child member of the tribe," even

though "the child's biological father was not a member of the tribe." U.S. Br., *Hogan v. Kaltag Tribal Council*, No. 09-960, 2010 WL 3391759, at *8 (U.S. Aug. 27, 2010). The United States explained that "[t]ribal jurisdiction over domestic relations, including the welfare of child members of the tribe, lies at the core of [tribes'] retained sovereignty," and that the Ninth Circuit's decision reflected the "longstanding rule providing for concurrent tribal-court and state-court jurisdiction over child-custody proceedings involving Indian children who are not domiciled or residing on a reservation." *Id.* at *9.

Likewise, in *Atwood v. Fort Peck Tribal Court Assiniboine*, the Ninth Circuit held that a non-member father was required to exhaust tribal remedies in a child custody dispute. 513 F.3d 943, 945 (9th Cir. 2008). Underscoring that the child "*is* a member of the tribe," the Ninth Circuit concluded that "tribal court jurisdiction almost certainly is proper." *Id.* at 948. Other decisions are in accord. *E.g.*, *In re Marriage of Skillen*, 956 P.2d 1, 18 (Mont. 1998), *overruled in part on other grounds*; *Gila River Indian Community v. Department of Child Safety*, 395 P.3d 286, 291 (Ariz. 2017). And this split, too, is intra-circuit. *See Byzewski v. Byzewski*, 429 N.W.2d 394, 399 (N.D. 1988).

Declining to acknowledge these cases and the United States's position, the panel, in a single sentence, became the first court to hold that this tribal authority dissipates whenever a family includes a non-member parent. The panel maintained that *Montana* compelled that conclusion because it said that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Opn. 14 (cleaned up) (quoting *Montana*, 450 U.S. at 565). But *Montana* there referred only to "*the general proposition*" that tribes lack such authority. *Montana*, 450 U.S. at 565 (emphasis added). *Montana* then proceeded to recognize that this general proposition is subject to exceptions. *See id.* Two of those exceptions are the *Montana* prongs themselves. Another is tribes' inherent authority over family law matters. *See Cent. Council*, 371 P.3d at 270 (explaining that tribal authority over family law matters "critically differs" from "the source of tribal authority that *Montana* and ensuing cases have analyzed").

En banc review is warranted to address this unprecedented split. Certainly, rejecting this previously unbroken line of cases called for more than one sentence. The Court should grant the petition and uphold the

inherent tribal authority that before now had been universally recognized.

c. The Panel Created A Conflict With Supreme Court Precedent Over The Divisibility And In Rem Nature Of Divorces.

Finally, the tribal court possessed concurrent jurisdiction to, at minimum, dissolve the parties' bonds of marriage by virtue of its in rem authority. Aple. Br. 27-28. Severing those marital bonds—*i.e.*, declaring the parties no longer husband and wife—was a regulation of status, not conduct. *Montana* was thus the wrong framework for analyzing this aspect of the tribal court's jurisdiction.

The panel held that the Community's in rem authority "cannot establish the Tribal Court's subject matter jurisdiction over a dispute concerning the distribution of non-tribal property and regulation of nonmember conduct." Opn. 14. But that reasoning contravened controlling Supreme Court precedent in two ways.

First, to the extent the panel held that the Community lacked jurisdiction to dissolve the bonds of marriage because the proceeding *also* addressed other matters, that ruling directly conflicts with binding Supreme Court precedent holding that divorces are "divisible." *Estin*, 334

U.S. at 549. When a court has the power to "affect[] the marital status," that aspect of the court's judgment carries legal force even if it is "ineffective" as to other issues. *Id.*

Second, to the extent the panel held that actions to dissolve the bonds of marriage in fact fall under *Montana*, that too contradicted well-established law. "*Montana* only applies insofar as [a] tribe … is seeking to assert regulatory authority over *the activities* of a nonmember." *Solis v. Matheson*, 563 F.3d 425, 436 (9th Cir. 2009) (emphasis added). An action to dissolve the bonds of marriage does not regulate conduct. Rather, it is "quasi in rem," as it merely "dissolve[s] the marital relation and determines *the status* of the parties." *Sutherland-Innes Co. v. Am. Wired Hoop Co.*, 113 F. 183, 188 (8th Cir. 1901) (emphasis added). So long as a court has "obtain[ed] jurisdiction of the res, that is, of the marriage status," then "the court has in rem jurisdiction to grant relief." 27A C.J.S. Divorce § 146.

In practice, this means that an action to dissolve the bonds of marriage may proceed "based on the [citizenship] of [just] one of the parties," *id.*, for a sovereign "ha[s] the power[] … to exercise jurisdiction over cases concerning the legal status of its citizens regardless of whether

the other spouse" has contacts with that sovereign, *id.* § 159. Or as the Supreme Court put it in the state context (where citizenship is determined by domicile), "[t]he domicil of one spouse within a State gives power to that State[] … to dissolve a marriage wheresoever contracted." *Williams v. North Carolina*, 325 U.S. 226, 229-30 (1945). Appellee's citizenship was thus enough to allow the tribal court to dissolve the parties' marital bonds. The panel created a clear conflict to the extent it held otherwise.

II. THE PANEL'S DECISION HAS BROAD AND DISRUPTIVE RAMIFICATIONS.

The jurisdictional questions here are exceedingly important, as evidenced by and detailed in the four amicus briefs on file. If allowed to stand, the panel's decision will upend families' lives, reopen long-resolved disputes, and burden state courts with unwinding "Schrödinger's marriages" that were believed dead for decades.

First, the panel's decision casts doubt on the validity of *all* divorces—tribal or non-tribal—in which only one of the parties was a citizen of the jurisdiction that dissolved the bonds of marriage. If dissolving these bonds of marriage was not an exercise of in rem authority here, then it must not be an exercise of in rem jurisdiction in

state cases either. And if divorces are not divisible, that throws into question every divorce that has been resolved in two or more proceedings.

Second, even ignoring the impact on state divorces, the panel's decision appears to undo the countless off-reservation, non-ICWA family law proceedings involving non-members that have occurred in this Circuit under tribal law. Though it is impossible to identify the exact number of impacted cases, Appellee understands it to be substantial. Such matters have been resolved under tribal law for over 20 years[1]—and that is a conservative estimate, *see* Legal Scholars Amicus Br. 8-29 (detailing the lengthy history of tribal divorces involving non-members). In 2023, for example, the Community alone heard 14 domestic relations cases involving non-members. *See* Prairie Island Amicus Br. 10. While doctrines like res judicata may preserve these tribal decisions, they also may not, given that a lack of subject matter jurisdiction makes affected rulings "absolutely void." *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 589 U.S. 57, 64 (2020). At the very least, the families

[1] *E.g.*, *Johnson*, 2005 WL 8159765; Aple.-App. 35-37, 113; R. Doc. 17-1, at 17-19, 110 (collecting cases).

who have built their lives around these decisions will face substantial uncertainty going forward.

Third, the panel's ruling will saddle state courts with difficult litigation over the status of these families. Critically, such state suits can be expected *even when all parties agree that the tribal court was the appropriate forum*. For example, no matter what the parties to an impacted divorce agreed to, only a state court can now ensure their marriage is over. Those state suits will consume the parties' time, waste their resources, and tax their emotions. Those suits will also be a hassle for the state courts themselves, who will face intractable questions about how to undo a marriage already thought undone. Nor is it apparent what state courts are to do with subsequent marriages. Indeed, while one hopes no prosecutor would pursue bigamy charges in these circumstances, if the panel's decision stands, those in such marriages must take it on faith they will not face criminal consequences. *See Williams*, 325 U.S. at 227 (deciding validity of interstate divorce in the context of a bigamy prosecution).

The dispute here illustrates the state-court headaches to come. The state court itself thought the tribal court was better situated to decide

this divorce. *Supra* 2-3. But under the panel's ruling, it must now intervene, and in far messier circumstances. Nearly two and a half years have passed since the tribal court issued its divorce order. The parties' marital homestead has been sold, the proceeds have been spent, and both parties have secured alternative housing. The parties' assets that were valued and distributed by the tribal court have been dissipated. And the circumstances bearing on spousal maintenance—including Appellee's education and training—have significantly changed. Reopening all these issues now, long after the parties were functionally divorced, will force the state court to wade through a legal and factual quagmire of the panel's making. And it will likely be just the first of many state courts to have to do so. En banc review is needed.

CONCLUSION

The petition should be granted.

Respectfully submitted this 9th day of January 2026.

/s/ Leonard R. Powell

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 40(d)(3)(A) because it contains 3,893 words, excluding those parts of this brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in the proportionally spaced typeface of 14 point Century Schoolbook font using Microsoft Word 365. This brief has been scanned for viruses pursuant to Eighth Circuit Local Rule 28A(h)(2) and is virus-free.

/s/ Leonard R. Powell
Leonard R. Powell

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on January 9, 2026. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Leonard R. Powell
Leonard R. Powell