No. 24-3487

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

KRISTIN ANN TIX,
now known as Kristin Ann McGowan,
Plaintiff-Appellant,

v.

ROBERT WILLIAM TIX,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Minnesota

BRIEF OF LEGAL SCHOLARS MAGGIE BLACKHAWK, ALEXANDRA FAY, DAN LEWERENZ, AND JEAN O'BRIEN AS AMICI CURIAE IN SUPPORT OF EN BANC REVIEW

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INTEREST OF AMICI CURIAE[1]

Amici curiae, listed below, are professors and scholars who teach and research federal Indian law and its history. They have an interest in the accurate recitation of the history of relations between Native American tribal governments and the United States and the cohesive and correct development of Indian-law jurisprudence. This expertise bears on the question of whether tribal governments have authority to adjudicate divorces involving their members, including cases involving non-members when distribution of tribal property and custody of tribal-member children are at issue.

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[1] No party's counsel authored this brief in whole or in part and no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Supreme Court has consistently turned to the historical exercise of tribal governance to inform its determination about whether tribal power exists. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981). Similarly, the Court has looked to history, as well as state- and federal-court recognition of that history, to determine whether tribal governments possess authority that "is ancillary to [an] authority that we have already recognized." *United States v. Cooley*, 593 U.S. 345, 352 (2021). As detailed in Amici's panel-stage brief, the United States has continuously recognized tribal governments' jurisdiction over domestic relations—and particularly marriage and divorce—from the Founding into the modern era. *See* Br. of Legal Scholars Blackhawk *et al.* as Amici Curiae at 6–28, (Apr. 9, 2025) ("Amici Panel Br.").

History confirms that domestic relations lie at the very heart of tribal sovereignty. *Id.* at 4–5. Marriage and divorce define community

boundaries and allocate benefits and obligations tied to family status—including for individuals who joined the tribal community by marriage. For Native nations, as for all governments, domestic relations are intertwined with community membership and access to tribal resources. Accordingly, the United States has always treated domestic relations as an exceptional—and vital—area of the law over which tribal governments must exercise jurisdiction. *See* Br. for the United States at 9, *Hogan v. Kaltag Tribal Council*, No. 09-960 (U.S. Aug. 27, 2010), 2010 WL 3391759, at *9 (arguing that the U.S., since its Founding, has always recognized tribal sovereignty over matters such as "[t]ribal jurisdiction over domestic relations, including the welfare of child members of the tribe," which "lies at the core of that retained sovereignty").

The panel opinion failed to engage with—and departed from—this unbroken historical understanding by concluding that the tribe's exercise of jurisdiction here was not necessary to tribal self-government or the control of internal relations. Op. at 10–11 (Dec. 12, 2025). That conclusion is at odds with the well-established history of the United States treating domestic relations as central to tribal sovereignty and consistently recognizing tribal jurisdiction over such matters. This Court should grant

en banc review to revisit the panel opinion in a manner that fully accounts for that history.

ARGUMENT

I. The United States has long recognized that tribal jurisdiction over domestic relations is central to tribal sovereignty and self-government.

The United States has long observed a "settled policy" of recognizing tribal authority over the domestic relations of tribal communities. *United States v. Quiver*, 241 U.S. 602, 603–05 (1916); Amici Panel Br. 6–8 (collecting cases). Indeed, tribal power over marriage and divorce was seen as so "complete and exclusive" that state law did not apply to "the domestic relations of Indians living in tribal relationship," even when they were state citizens. Cohen, *Handbook of Federal Indian Law* 137 (1945). "The courts of the several states . . . have almost uniformly upheld [Indian custom marriages and divorces] on the theory that the national government has recognized the autonomy of the Indians . . . and thus removed them from the realm of state law in this respect." Lewis Meriam, *The Problem of Indian Administration* 760 (1928) (collecting cases).

Family-law matters, such as marriage and divorce, have always shaped who belongs within tribal families—and, thus, tribal

communities—and what privileges they are afforded by tribal governments. *See* Amici Panel Br. 6–8. Jurisdiction over family-law matters was all the more important when families incorporated non-Indians: tribal law defined the scope of tribal families and the benefits afforded to them, even when they incorporated non-Indians.

Historically, marriage was one of the primary avenues for non-Indians to access the rights and privileges afforded to the community by tribal governments. *See Nofire v. United States*, 164 U.S. 657, 661–62 (1897). Because intermarriage offered certain privileges, particularly to male heads-of-household, the United States often referred to both Indians and non-Indians who had married into the tribe as "Indians"—causing some difficulty in differentiating the two groups within the historical record. *Id.* (recognizing tribal jurisdiction over a non-Indian man who exercised the franchise on behalf of his Cherokee family at a time when Cherokee women were not enfranchised, referring to him as an "Indian by adoption"). However, these forms of citizenship "by adoption" were distinct from true Indian status or tribal citizenship, which were afforded full property and political rights, and were not

rescinded by a divorce proceeding. *See Red Bird v. United States* (*Cherokee Intermarriage Cases*), 203 U.S. 76, 82 (1906).

Strategic access to tribal governments' wealth had been facilitated by federal law, which presumed equal rights of distribution to all community members, *Cherokee Intermarriage Cases*, 203 U.S. at 82 (citing *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894)), and promised treaty rights and protections for all members of tribal communities, even those who joined through intermarriage. *See, e.g.*, Treaty with the Choctaw and Chickasaw Indians arts. 26, 38, Apr. 28, 1866, 14 Stat. 777, 779. Thus, the Supreme Court recognized the necessity of supporting tribal governments' regulation of domestic affairs involving non-Indians to prevent the strategic taking of tribal resources. *Cherokee Intermarriage Cases*, 203 U.S. at 82–83 (recognizing tribal regulation of intermarriage to address non-Indians seeking to "share in the wealth of the Nation").

Tribes historically regulated marriages between their citizens and non-citizens. The Cherokee Nation, for example, enacted an 1839 law regulating intermarriage between non-Indian men and Cherokee women, authorizing tribal-court judges to perform such marriage ceremonies,

and providing that the failure to comply stripped non-Indians "of the rights and privileges of a citizen of this Nation." An Act to Legalize Intermarriage with White Men (1839), *in John Ross Papers*, https://bit.ly/IntermarriageAct1839; *see also* Amici Panel Br. 14–16 (describing additional examples in Choctaw and Cherokee Nations).

The federal government recognized these exercises of tribal jurisdiction over non-Indians as legitimate, even as the United States began to constrict its recognition of tribal power over non-Indians in other areas. For example, Attorney General Caleb Cushing concluded that while a non-Indian may not be subject to the Choctaw Nation's criminal jurisdiction, the tribe retained civil jurisdiction over his property dispute with his Choctaw wife's children. *Jurisdiction of the Courts of the Choctaw Nation*, 7 Op. Att'y Gen. 174, 184–85, 1855 WL 2297 (1855) ("a [non-Indian] who [through marriage] enters into [a Native nation] has no just cause of complaint of being held amenable, in questions of local right, to the jurisdiction of the tribunals of that nation").

State governments also recognized tribal governments' authority over marriages between Indians and non-Indians during this period. For instance, in view of the general rule that "[a] marriage good by the laws

of the country where consummated is held good in all others," a Tennessee court held valid a marriage "according to the forms and ceremonies of the tribe" between a non-Indian man and a Cherokee woman. *Morgan v. McGhee*, 24 Tenn. 13, 13–15 (1844). In Missouri, a court held that a marriage between an Indian and a non-Indian that was "unquestionably good according to the laws and customs of the Indians" was valid for state purposes, as "a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere." *Johnson v. Johnson's Adm'r*, 30 Mo. 72, 80, 88 (1860).

Following the Indian Removal Era and the Civil War, tribal governments continued to regulate marriage and divorce involving non-Indians. The Osage Nation, for example, required U.S. citizens to apply for a license, pay a fee, and swear an oath to support the Nation's Constitution and laws. Osage Nation Const. art. IX, § 1 (asserting that "jurisdiction of [Osage] civil laws should be exercised over all persons whatever"), *reprinted in Treaties and Laws of the Osage Nation, as passed to November 26, 1890*, at 51, 90 (Cedar Vale 1895); *see also* Amici Panel Br. § II.C (discussing Courts of Indian Offenses' exercise of jurisdiction over marriage, divorce, property division, and child support).

Congress also recognized the validity of tribal intermarriage laws in the Oklahoma Organic Act, which showed deference to tribal marriage statutes and barred interference with their operation. *See* An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes, ch. 182, § 38, 26 Stat. 81, 98 (1890). The Act authorized the U.S. territorial courts to issue marriage licenses, but limited their power to avoid "interfer[ing] with the operation of the laws governing marriage enacted by any of the civilized tribes." *Id.* It also authorized the federal territorial courts to solemnize marriages or "unite" non-Indians and "a member of any of the civilized nations," but only when "arranged according to the laws of the nation of which said Indian person is a member." *Id*.

The federal territorial court would later describe the Oklahoma Organic Act as "a direct recognition of the validity of the Choctaw [marriage] statute by the United States through its laws enacted by Congress" and "statutory recognition of the sovereignty of these civilized nations to . . . control their own marriage and naturalization laws." *Senter v. Choctaw Nation*, No. 234 (Indian Territory Ct. 1898), *in* 1898 Dep't

Interior Ann. Rep. 467, 470–71. That court characterized the power to regulate domestic affairs, including "the right to regulate marriage and prescribe all reasonable rules relating to the naturalization of white men in this country," as among "the most simple and common, as well as the most necessary, attributes of sovereignty." *Id.* at 470. Power over family law and naturalization were "so essential to the virtue and welfare of the commonwealth that they ought not to be construed away from this Indian tribe except upon the most positive and certain terms of the law." *Id.*

The Executive, in administering federal Indian law, relied on tribal law governing marriage and divorce in determining the distribution of tribal resources. For example, to fulfill its mandate of breaking up and distributing reservation land to tribal community members, the Dawes Commission was "required by law to determine the rights of citizenship in all of the five tribes," which necessitated distinguishing between non-Indians who had obtained the rights and privileges of citizenship in tribal governments by marriage and non-Indians who had not properly obtained access to these rights and privileges. *Indian Territory Affairs: Before the H. Comm. on Indian Affs.*, 58th Cong. 4 (1904) (statement of Tams Bixby, Chairman of the Commission to the Five Civilized Tribes).

The Secretary of the Interior, too, affirmed this tribal authority in enrollment appeals. *See id.* at 23–25 (noting 538 approvals and 236 approvals by the Secretary of applications for Choctaw and Chickasaw enrollment, respectively, on the basis of citizenship by intermarriage); *id.* at 31 (noting 1,149 "[i]ntermarried [non-Indians] . . . on final Cherokee roll approved by the Department").

Courts within the United States, including the U.S. Supreme Court, similarly affirmed tribal authority over non-Indians in domestic relations with tribal members and tribal families. *See, e.g.*, *Nofire*, 164 U.S. at 662 (upholding tribal jurisdiction over a criminal matter involving a non-Indian who had married into an Indian family and was operating as its head-of-household). State courts likewise consistently recognized tribal jurisdiction over marriage and divorce involving non-Indians, even if those marriages did not occur within tribal-government territory. *See* Amici Panel Br. § II.C; *see also, e.g.*, *La Riviere v. La Riviere*, 10 S.W. 840, 841 (Mo. 1889) ("It cannot be said that, the moment these Indians happen to be off their reservation, that they lose tribal custom. There was therefore no error in refusing the instruction [that tribal governments only had jurisdiction over domestic relations within their territory].").

In the early twentieth century, Congress and the Executive recognized tribal jurisdiction over domestic affairs as long settled. *See* Amici Panel Br. § II.D.

As a notable example, the Department of the Interior's official position during this period was that tribal customary divorce was "a valid divorce dissolving the prior marriage relation, no matter what may have been the method or the manner by which the marriage was assumed"—meaning that individuals married under state law could be divorced under tribal law. *Noah Bredell*, 53 Interior Dec. 78, 83–84 (1930) (citation omitted). The Solicitor affirmed that "the validity of Indian custom marriage and divorce . . . must be recognized and treated as being of equal validity with [state law] marriage and legal divorce." *Id.* at 82.

Contemporary treatises echoed the principle that tribal jurisdiction over domestic relations—including marriage and divorce—was well-settled for all "persons within the tribal community," Indians and non-Indians alike, and without limitation to "the particular boundaries of the reservation." 38 C.J. *Marriage* § 4 (1925) ("The North American Indians continuing in their tribal relations, although within the territorial jurisdiction of a state, are not subject to its laws in respect of marriage

. . . . The tribal jurisdiction does not depend on the particular boundaries of the reservation . . . .” (footnotes omitted)); Amici Panel Br. 25 n.11 (additional examples).

Today, tribal courts continue to adjudicate divorces, including those involving non-Indians and families who live outside reservation boundaries, and their authority has been upheld by both federal and state courts. *See* Amici Panel Br. § II.E.

II. The tribal court properly exercised jurisdiction over this family-law case.

At issue in this case is the dissolution of a tribal citizen’s marriage that will decide the distribution of tribal property, the privileges of tribal wealth, and the care and custody of tribal-citizen children. The tribal court, applying tribal laws regarding intermarriage within the tribe and the limitations on privileges of intermarriage following dissolution, held that Appellant could no longer benefit individually from distributions of tribal wealth, services, and resources following dissolution. Historically, the United States afforded tribal governments the authority to set the terms of marriage and divorce, in part to allow tribal law to determine who could benefit from the rights and privileges gained by marriage and

who could continue to benefit following divorce. The tribal court's exercise of jurisdiction is consistent with that history and jurisprudence.

CONCLUSION

This Court should grant en banc review to correct the panel opinion.

Date: January 16, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(a)(4) and 29(b)(4). This brief contains 2,597 words, including all headings, footnotes, and quotations, and excluding the parts exempted under Rule 32(f).

2. In addition, this brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

/s/ Steven J. Alagna

CERTIFICATE OF SERVICE

I certify that on January 16 2026, I electronically filed the original version of this brief, using the Court's CM/ECF system, which served all counsel of record.

/s/ Steven J. Alagna