No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS of the NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, ALABAMA, COLORADO, FLORIDA, MICHIGAN, MISSISSIPPI, NORTH DAKOTA, OKLAHOMA AND UTAH IN SUPPORT OF PETITIONER

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INTRODUCTION

The States of South Dakota, Alabama, Colorado, Florida, Michigan, Mississippi, North Dakota, Oklahoma and Utah, through their respective Attorneys General, respectfully submit a brief Amicus Curiae pursuant to S. Ct. R. 37.2 in support of Petitioner.

INTEREST OF AMICI CURIAE

Each State appearing as amicus curiae contains one or more Indian reservations created through operation of federal law. The reservations were originally intended by Congress to be the exclusive territory of tribal members. Congress, however, reversed its course in the General Allotment Act, and in other legislation. As one scholar states, "the United States invited its citizens to homestead Indian land," and "non-Indians accordingly built homes and livelihoods within reservation boundaries." *See generally* Charles F. Wilkinson, *American Indians, Time, and the Law* 23 (1987). The United States, to our knowledge, has never developed precise statistics on land ownership within reservations, but case law makes it clear that it is common for very significant portions of the reservation to be held in fee ownership. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 683 (1993) ("[t]oday trust lands comprise less than 50% of the reservation").

The intermingling of fee and trust lands on reservations has created a jurisdictional quagmire. In response, this Court has developed a finely tuned rule applicable to the precise situation at issue in this case: the extent of tribal regulatory authority, exercised through any means,

over non-Indians on fee lands within reservations. In *Montana v. United States*, 450 U.S. 544 (1981), as further explicated in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court set out the "main rule" that the tribes lack jurisdiction over nonmembers on nontribal land within a reservation with two narrow exceptions. The rule gives guidance to the lower courts and, more importantly, to those living in areas integrated by congressional invitation. The rule has created a set of expectations on which tribes and nonmembers, together with the state and federal governments, rely. The decision below undermines this Court's clear precedent and analysis and would insert, in its place, a sliding-scale balancing test to determine tribal authority not only to tax nonmembers on fee lands on the reservation but also, by necessary implication, to regulate other nonmember activities or transactions.

The States share the interest of all those living on reservations for stability and predictability in their daily lives. The States also seek to protect their ability to make arrangements with tribes for the rational integration of state and tribal taxation authority in ways beneficial to both. *See, e.g.*, S.D. Codified Laws Ann. §§ 10-12A-1 *et seq.* (1996) (allowing agreements between the state and tribes to collect tribal taxes); Mont. Code Ann. § 18-11-103(1)(b) (1999) (authorizing public agency to enter into state-tribal agreements).

SUMMARY OF ARGUMENT

1. This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), and related cases hold that, once a tribe has lost "gatekeeping" authority with respect to reservation lands by virtue of alienation to a nonmember, it ceases to have the power to regulate nonmembers or their conduct on such lands other than in two exceptional situations. The Tenth Circuit ignored these decisions in concluding that land ownership status was not the controlling consideration in determining the applicable standard for resolving Petitioner's challenge to the Navajo Nation's hotel occupancy tax. In reaching that erroneous conclusion, the Court of Appeals misapprehended the significance of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and 18 U.S.C. § 1151 with respect to presumption against tribal authority arising under *Montana* principles. The result in *Merrion* is grounded in the existence of consent to tribal jurisdiction, one of the exceptions to *Montana*'s "main rule," and in the tribe's retention of "gatekeeping" power, while § 1151 does not constitute a congressional delegation or recognition of substantive tribal authority over nonmembers.

2. Neither exception to *Montana*'s "main rule" applies. The first, or consent, exception rests upon the presence of nonmember consent to extant tribal authority as the quid pro quo for engaging in an activity either directly with the tribe or its members that the tribe may prohibit absent compliance with the particular regulatory measure. No such consent exists here because the Navajo Nation is a stranger to the commercial transaction between Petitioner and its guests. A contrary holding could be based only on the simple act of entering the Navajo Reservation, and that result would swallow *Montana*'s "main rule" into the consent exception and effectively permit *all* forms of tribal regulation.

The second exception, which is predicated on conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe (*Montana*, 450 U.S. at 566), is limited to instances where application of state law to the conduct sought to be regulated by a tribe is preempted. No plausible preemption argument can be advanced in view of this Court's repeated recognition of, most importantly, state taxation power over commercial transactions between nonmembers and tribal businesses under circumstances comparable to those here.

ARGUMENT

I.

THE "MAIN RULE" ESTABLISHED IN *MONTANA* CONTROLS BECAUSE NONMEMBER CONDUCT ON NONTRIBAL LAND IS SOUGHT TO BE SUBJECTED TO THE NAVAJO NATION'S TAX.

The standards governing resolution of Petitioner's challenge to the Navajo Nation's hotel occupancy tax should not have been in dispute below. They were detailed by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and reaffirmed recently in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Tenth Circuit nevertheless lost its way, misapplying not only what *Strate* characterized as the "main rule" established under *Montana* but also the consent exception to that rule. Because the Court of Appeals has so departed from the "pathmarking" trail left by *Montana*, any analysis must

begin by reviewing that decision's basic contours in the context of tribal tax regulation.

A. Where *Montana*'s Main Rule Applies, a Tribe Presumptively Lacks Inherent Authority to Regulate Nonmember Conduct or Transactions.

1. The issue in *Montana* was whether the Crow Tribe could regulate nonmember hunting and fishing on lands acquired in fee by nonmembers following allotment of the Tribe's reservation. In resolving that issue, this Court employed a two-step approach. It initially examined whether positive federal law conferred regulatory authority on the tribe and then turned to whether the tribe could regulate pursuant to its retained inherent authority. No treaty-grounded delegation of authority was found since, notwithstanding the initial creation of the reservation " 'for the absolute and undisturbed use and occupation of the Indians' " (450 U.S. at 558) (italics removed), Congress's later allotment policy, whose purpose was "the eventual assimilation of the Indian population . . . and the 'gradual extinction of Indian reservations and Indian titles' " could not be reconciled with a determination "that non-Indians purchasing allotted lands would become subject to tribal jurisdiction" (*id.* at 559 n.9). The lower court's reliance on 18 U.S.C. § 1165 also was rejected because "Congress deliberately excluded fee-patented lands from the statute's scope." *Id.* at 561.

With respect to the Tribe's inherent authority, this Court found the presumptive absence of such power because "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe

bears no clear relationship to tribal self-government or internal relations." *Montana*, 450 U.S. at 564. It further extrapolated from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), "the general proposition that the inherent sovereign powers of a tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, the Court identified two exceptional situations where the presumption against tribal authority would be rebutted "even on non-Indian fee lands":

> 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 dealing, contracts, leases, or other arrangements. . . . 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 565-66 (citations omitted). The first – or consent – exception was found to be absent because, quite simply, "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." *Id.* at 566. The second exception was deemed inapplicable, since the Tribe and the United States did not allege nonmember hunting and fishing threatened tribal subsistence, trial evidence established that the State traditionally had regulated nonmember hunting and fishing on fee lands, and the state regulatory scheme did not foreclose the Tribe "limiting or forbidding

non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members." *Id.* at 566-67.

2. The *Montana* standards were revisited in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. 679 (1993). The dispute in *Brendale* involved application of a tribal zoning ordinance to two parcels of nonmember-owned property, one an isolated parcel surrounded by tribal land in a formerly "closed area" of the reservation and the second a parcel situated in an "open area" where substantial nonmember property existed. This Court divided sharply on the validity of the ordinance. Four Justices concluded that, under *Montana*, the tribal regulation could be applied to neither parcel; two Justices held that the regulation could be applied to the parcel in the formerly "closed area" but not in the "open area"; and three Justices stated that the regulation could be applied to both parcels.

The first of these opinions, authored by Justice White, is relevant here, since no question exists as to the "open" nature of Petitioner's property.[1] Justice White

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[1] The "open" rather than "closed" nature of the area in which the parcel was situated assumed importance in *Brendale* because, in the view of Justices Stevens and O'Connor, Congress "could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land." 492 U.S. at 441. Where, however, a tribe "no longer possesse[d] the power to determine the basic character of the area" (*id.* at 446) and thereby "lost any claim to an interest analogous to an equitable servitude" (*id.* at 447), inherent tribal authority over nonmembers was forfeit. The

drew from *Montana* the "general principle," subject to the two exceptions, that the tribe had "no authority to impose its zoning ordinance on the fee lands" at issue. 492 U.S. at 428. "The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Id.* at 430. Justice White additionally found both exceptions inapplicable, the first because neither landowner had a consensual relationship with the tribe; Justice White found that *Montana* had "necessarily decided" that simple status as an on-reservation landowner did not constitute consent. *Id.* at 428. The second exception was inapplicable because, to the extent the tribe might possess a "protectible interest . . . arising under federal law" with respect to the landowners' use of their properties, state and local remedies existed to vindicate it.[2] *Id.* at 431.

Navajo Supreme Court described Petitioner's business as "located on non-Indian fee land and completely surrounded by Navajo Nation trust lands" but also occupied by a facility "cater[ing] to the tourist trade, with a hotel, restaurant, cafeteria, gallery, curio shop, retail store and recreational vehicle park." Pet. 71a-72a. The facility is used primarily by nonmember tourists visiting the nearby Grand Canyon. Pet. 72a. The commercial character of the property's use thus makes any comparison to the property of Philip Brendale – which was an isolated parcel within an otherwise pristine area of tribal lands – inapposite. *See Brendale*, 492 U.S. at 438-440 (Stevens, J.) (describing location of Brendale's property).

[2] Justice Blackmun issued the third opinion in *Brendale*. He contended that the body of the Court's decisional authority supported the proposition "that tribal civil jurisdiction over non-Indians on reservation lands is consistent with the dependent status of the tribes" (492 U.S. at 455) and that *Montana* "should be read[ ] to recognize that tribes may regulate the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected" (*id.* at 456-57).

This Court returned to the issue of inherent tribal civil authority four years later in *Bourland*. The question there was whether a tribe possessed inherent authority to regulate non-Indian hunting and fishing on reservation lands that had been sold to the United States for flood control purposes. Although the treaty creating the reservation had set aside the lands for the involved tribes' " 'absolute and undisturbed use and occupation' " (508 U.S. at 682),

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689 (footnote omitted); *see also id.* at 692 ("regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control"). Addressing the assertion that the tribe retained inherent authority to regulate non-Indians in the area, the Court stated that, "[h]aving concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence in the relevant

treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty." *Id.* at 695. It left for determination on remand whether either *Montana* exception applied. *Id.* at 695-96.

3. This Court's decision in *Strate* reaffirmed *Montana*'s status as "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445. "*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. This Court additionally removed any dispute over the plenary breadth of the term "tribal civil authority" by emphasizing that, "[w]hile *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of 'inherent sovereignty.' " *Id.* at 453. *Montana* thus governed the determination of the propriety of any manifestation of such authority, including the tribal adjudicatory jurisdiction at issue in *Strate*, since the accident giving rise to the controversy occurred on a state highway as to which the tribes "retained no gatekeeping right" and could not "assert a landowner's right to occupy and exclude." *Id.* at 456. Applicability of *Montana*'s "main rule" (*id.* at 453) meant that, to prevail, the "tribal-court action against nonmembers [must] qualif[y] under one of *Montana*'s two exceptions" (*id.* at 456).

Montana, as made crystal clear in *Strate*, thus establish the core principle that, to the extent the exercise of inherent tribal civil authority is predicated on the right to exclude, that authority is lost as to nonmembers when the conduct sought to be regulated occurs on nontribal lands

except where Congress explicitly directs the contrary. *But see Brendale*, 492 U.S. at 441-42 (Stevens, J.). The rationale underlying the principle is that, upon divestiture of authority to control access to particular land, a tribe necessarily forfeited the lesser "incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Bourland*, 508 U.S. at 689. Because Petitioner's business operations are located on nontribal fee lands within the Navajo Reservation, *Montana*'s main rule applies here, and the Navajo Nation presumptively lacks authority to tax transactions between Petitioner and its guests on those lands.

B. The Tenth Circuit Misconstrued Not Only *Montana* But Also *Merrion* and Improperly Assumed the Existence of Tribal Authority on the Basis of 18 U.S.C. § 1151.

The Court of Appeals reviewed *Montana* and its progeny but concluded that "the analysis set forth in these cases and others can be more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations." Pet. 17a. As a consequence, "the status of the land involved as fee land or tribal land is simply one of the factors a court should consider when determining whether a tax on nonmember activity on the reservation falls within the civil jurisdiction of the tribe." Pet. 19a-20a. The Tenth Circuit's conclusion is remarkable given the clarity with which this Court has spoken concerning *Montana*'s main rule. Two fundamental errors led to the Court of Appeals' patent misreading of controlling doctrinal principles: misapprehension of the reasoning in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and misapprehension of the import of 18 U.S.C. § 1151 where

a tribe attempts to exercise civil authority over nonmember activities on reservation fee lands.

1. The Tenth Circuit concurred in the District Court's opinion that *Merrion* "was not necessarily limited to cases involving tribal lands because the Supreme Court characterized the tribe's authority to tax non-Indians doing business on the reservation as an 'essential attribute of sovereignty' and not merely an extension of a tribe's power to exclude persons from its tribal lands." Pet. 12a; *see also* Pet. 17a ("[e]ven in cases that were resolved favorably for the tribes, the Supreme Court did not indicate that its decision turned on the point of trust land status"). This Court, of course, did hold in *Merrion* that the source of a tribe's inherent power to tax is not merely the power to exclude but emanates additionally from the "tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137. As this Court explained further:

> [A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

Id. at 141-42. The issue in *Merrion*, as here, thus was whether the nonmember taxpayers had entered "tribal jurisdiction."

Merrion arose from the imposition of a tribal severance tax on production from reservation trust lands by oil and gas companies pursuant to leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g. This Court held that the lessees entered "tribal jurisdiction" under two theories – the first predicated on the fact that the producers had established a commercial relationship with the tribe and the second on the conclusion that the tribe retained the right to exclude the producers from the affected lands notwithstanding the leases. *See* 455 U.S. at 142 ("a tribe may exercise [the taxing] power over non-Indians who receive privileges from the tribe, such as the right to trade on Indian land"); *id.* at 144-45 ("When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation"). Characterized under *Montana*'s analytical structure, therefore, the Court's reasoning was grounded in the first instance on the consent exception and in the second on the continued existence of a gatekeeping power.[3] *Merrion* is thus fully compatible with *Montana*.

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[3] That the first prong of the Court's reasoning in *Merrion* was premised on consent principles is reflected in the reliance

2. The Court of Appeals construed 18 U.S.C. § 1151 as a congressional "determin[ation] that all lands within the outer bounds of the reservation are within Indian Country and are therefore subject to reasonable tribal authority." Pet. 19a. In reaching this conclusion, the court looked chiefly to *Seymour v. Superintendent*, 368 U.S. 351 (1962), which it construed as holding that "the enactment of § 1151 'squarely put to rest' the issue of whether land owned in fee fell outside tribal jurisdiction." Pet. 18a.

Seymour does not bear the weight placed upon it by the Court of Appeals. It held only that the alienation of land within a reservation to a non-Indian did not remove the property from the reach of § 1151 for purposes of federal law and so preempted state criminal law with respect to an Indian accused of burglary. *Seymour*, 368 U.S. at 357-58. This Court also has employed § 1151 to define the scope of special Indian law preemption principles in a civil context (*see, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-26 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987)), but *Montana* and its successors establish unequivocally that simple Indian country status does not serve to recognize a tribe's inherent authority over lands owned in fee by nonmembers. *Montana*, 450 U.S. at 559 n.9; *accord, Bourland*, 508 U.S. at 691-92, 695. As *Strate* reiterated, "[s]ubject to controlling provisions in treaties and

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on the three tax decisions identified in *Montana* as exemplifying the consent exception to the main rule. *See Merrion*, 455 U.S. at 137-38 (relying on *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 382 (1980)) & *Merrion*, 455 U.S. at 141-44 (disputing dissent and finding support in *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905)).

statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee land [on reservations] generally 'do[es] not extend to the activities of nonmembers of the tribe.' " *Strate*, 520 U.S. at 453. Indeed, were the Tenth Circuit's conclusion correct with regard to the effect of § 1151, the presumption *against* inherent tribal authority over nonmembers would be transformed into a presumption *of* such authority.[4]

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[4] The Tenth Circuit's failure to distinguish between the role of § 1151 in defining the reach of positive federal law, which was *Seymour*'s focus, and the reach of inherent tribal authority is reflected in its misunderstanding of this Court's rejection of 18 U.S.C. § 1165 as a basis for tribal jurisdiction in *Montana*. *See* Pet. 19a n.10. Section 1165 prohibits unauthorized hunting or fishing on specified lands and was deemed by the *Montana* Court to be unhelpful because the lands covered by the statute are limited to those "owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians." *Montana*, 450 U.S. at 561-62. This Court then observed that, had Congress "wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian country" in 18 U.S.C. § 1151." *Id.* at 562. Even if one assumes that the Court's reference to "tribal jurisdiction" was intended to hold that § 1165 constitutes an affirmative grant of authority to tribes, such a grant would have been the explicit congressional directive that *Strate* refers to as a "controlling provision[ ]" in a statute that vests in a tribe jurisdiction over a nonmember. *Strate*, 520 U.S. at 453. Thus, the jurisdictional grant with respect to unauthorized hunting and fishing would have arisen from § 1165, not from § 1151 which would have served to define the territorial breadth of the conferred or recognized tribal authority. A comparable oversight makes inapposite the Court of Appeals' heavy reliance on *Buster v. Wright, supra*, where the Eighth Circuit effectively held that Congress intended in 1901 legislation to

II.

NEITHER *MONTANA* EXCEPTION APPLIES IN THIS CASE. NONMEMBERS DO NOT CONSENT TO INHERENT TRIBAL TAXATION AUTHORITY MERELY BY ENTERING A RESERVATION, WHILE THE SECOND EXCEPTION HAS NO APPLICATION IN THIS CASE.

A. *Montana*'s Consent Exception Does Not Apply.

Although the Court of Appeals rejected the centrality of land ownership in determining the standards against which the Navajo Nation's exercise of inherent authority is to be assessed, it nonetheless relied on *Montana*'s consent exception for its holding. Pet. 25a, 29a, 32a. The court's conclusion that consent on the part of Petitioner's customers to the hotel occupancy tax exists is, on its face, anomalous in view of the utter absence of any actual commercial relationship between the Tribe and those customers. That facial anomaly is not dispelled by either an analysis of *Montana* and the decisions upon which it relied as exemplifying the consent exception or a review of the Tenth Circuit's tortured construction of the exception.

B. A Straightforward Reading of *Montana* Establishes That the Consent Exception Is Limited to Situations Where a Tribe May Condition Access to a Privilege or Product by a Nonmember Upon Compliance With Tribal Law. The Navajo Nation Lacks That Authority With Respect to Transactions Between Petitioner and Its Nonmember Customers.

Two principles relevant to determining the proper application of the consent exception can be drawn from

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leave unaffected pre-existing tribal authority to impose the challenged privilege tax. *See* pp. 22-24, *infra*.

the earlier discussion of *Montana*. First, no grounds exist to distinguish taxation from other forms of civil regulation when applying the exception. This principle is dictated by the Court's explicit reference to "taxation" as a form of civil regulatory authority in *Montana*, 450 U.S. at 565, and was reinforced subsequently in *Strate*, which made clear that the term "civil authority" includes *all* noncriminal authority exercised pursuant to " 'the inherent sovereign powers of an Indian tribe.' " *Strate*, 520 U.S. at 453. Second, the required consent does not arise from mere presence in Indian country; it instead requires an actual consensual relationship between the tribe and the nonmember pursuant to which the latter consents to some form of tribal regulation as the quid pro quo either for the right to enter into an otherwise consensual relationship with the tribe or its members or for the right of engaging in conduct that the tribe may preclude by virtue of retained gatekeeping authority. This principle flows not only from the literal description of the first exception – which focuses on commercial transactions with the tribe or its members – but also from the fact that the *Montana* Court rejected the notion that Congress intended to delegate or recognize authority over nonmembers simply by virtue of the reservation location of their land holdings. *See Bourland*, 508 U.S. at 695 n.15 ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation[ ]' . . . and is therefore *not* inherent") (citation omitted).

Each of these principles is reflected in the four cases relied upon in *Montana* as exemplifying the consent exception. The first, *Williams v. Lee*, 358 U.S. 217 (1959), unlike the remaining three, was not concerned directly

with a tribal authority issue. Rather, it involved the question whether a state court had jurisdiction over a debt collection action brought by a reservation merchant against tribal members. The Court found such jurisdiction preempted and, in that portion of the opinion cited in *Montana*, observed that the merchant "was on the Reservation and the transaction with an Indian took place there" and that prior decisions had "consistently guarded the authority of Indian governments over their reservations." *Williams*, 358 U.S. at 223. Thus, while *Williams'* holding dealt with preemption, its reasoning led ineluctably to the conclusion that, by entering the commercial relationship with the tribal members, the merchant agreed to be bound by tribal law as controlling the resolution of any disputes which could arise from the relationship.

The other decisions cited in *Montana* carried forward this element of a consensual commercial relationship as forming the predicate for tribal regulatory authority. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), this Court rejected a challenge to a Chickasaw Nation privilege tax and to Department of Interior regulations providing for the enforcement of the tax. The tax, adopted in 1902, was imposed on nonmembers who had entered into contracts with tribal members for livestock grazing on allotments. According to the Court, the tax reflected the tribe's power under earlier treaties "to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id.* at 389. While that plenary authority had been limited under the Curtis Act, ch. 517, 30 Stat. 495 (1898), to require the President's approval of certain forms of tribal legislation,

including the challenged tax, the Court construed the statute, "in light of the previous decisions of this court and the dealings between the Chickasaws and the United States," as permitting "the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventative of arbitrary and injudicious action." *Id.* at 393.

A year later, the Eighth Circuit issued its opinion in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), upholding under comparable circumstances the Department's authority to enforce an occupational fee assessed by the Creek Nation against nonmembers trading within that tribe's territory. It reasoned that the tribe's authority "to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement with the United States" but was an "inherent and essential attribute[ ] of its original sovereignty." *Id.* at 950. That authority additionally remained "intact" except to the extent "destroyed or limited by act of Congress or by the contracts of the Creek tribe itself." *Id.* The court refused to interpret a 1901 statute, ch. 676, 31 Stat. 861, which authorized the purchase of town site lots by nonmembers, as divesting the tribe of the power to impose the tax for several reasons, including the fact that agreement between the United States and the tribe ratified in the statute prohibited taxation with respect to cattle grazing on rented tribal land but "made no provision that noncitizens who engaged in the mercantile business in the Creek Nation should be exempt from [the occupational] taxes." *Id.* at 954. Since the occupational

fee's enactment predated the agreement and, indeed, had been approved specifically by Attorney General Griggs in 23 Op. Att'y Gen. 214 (1900), "the conclusive presumption is that . . . the power of the Creek Nation to exact these taxes, and the authority of the Secretary of the Interior and his subordinates to collect them, were neither renounced, revoked, nor restricted." *Id.*

The last case, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), upheld tribal sales taxes imposed on nonmember purchasers of cigarettes owned by several tribes and sold through reservation outlets whose operators were required to pass the tax through to the ultimate consumer. This Court reasoned that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152. It found no congressional abrogation of that authority and "no overriding federal interest that would necessarily be frustrated by tribal taxation" in the context at hand. *Id.* at 154. *Colville* thus presented a situation where nonmembers consented to the taxation by engaging in a commercial transaction with an agent of the tribe.

In sum, *Morris*, *Buster*, and *Colville* embodied straightforward quid pro quo relationships where a tribe possessed the authority to control access to a particular privilege or product by demanding compliance with a tax; i.e., the tribes had the right to preclude horse- or cattle-grazing, trading, or purchasing cigarettes without the tax being first paid by federal agency enforcement or simply refusing to sell the good. Here, however, the

Navajo Nation may not control nonmember access to or patronage of Petitioner's place of business because the tribe possesses "no gatekeeping right" in that respect. *Strate*, 520 U.S. at 456. Respondents instead seek to tax a transaction between nonmembers to which the tribe is a stranger commercially and, for *Montana* purposes, legally. Expanding the consent exception beyond the narrow circumstances reflected in the exception's common law sources to this situation "would severely shrink" (*Strate*, 520 U.S. at 458), if not entirely eviscerate, the presumption against the existence of tribal civil authority because consent would arise merely through presence on the reservation. It accordingly comes as no surprise that the Court of Appeals' reasoning accomplishes just such a result.

C. The Tenth Circuit's Construction of *Montana*'s First Exception Adopts a Standardless Consent Test That, as a Practical Matter, Authorizes All Forms of Tribal Regulation Over Nonmembers.

As discussed in Part I, the Tenth Circuit's understanding of *Montana*'s "main rule" departed dramatically from this Court's analysis in *Strate*. The Court of Appeals nevertheless continued on to adopt and eventually reapply the District Court's three-part test for determining whether consent to tribal jurisdiction existed: "(1) [whether] the hotel guests staying at [Petitioner's] hotel had entered into a consensual relationship with the tribe; (2) [whether] the relationship entered into was relevantly related to the tax in question; and (3) [whether] the tax was . . . a disproportionate burden on [Petitioner's]

guests." Pet. 9a.[5] None of these factors, except the first, is discernable from the decisions relied upon by this Court in *Montana* as exemplifying the consent exception, while the test's actual application virtually assures that consent to tribal authority will be found.

The Tenth Circuit's reconfiguration of the consent exception was drawn principally from the *Montana* Court's reliance on *Buster* as one example of the consent exception. *See* Pet. 14a (describing *Buster* as "what may be the most significant case illustrating the consensual relationship exception as it relates to tribal taxation of non-Indians on fee land"). The Court of Appeals reasoned that

> [t]he consensual relationship holding in *Buster* involved merchants and traders who were deemed liable to pay taxes for exercising a taxable privilege – that of conducting business

[5] The Court of Appeals also approved the trial court's description of its test as " 'a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.' " Pet. 13a-14a. It later characterized the standard as a two-pronged analysis:

> The primary considerations that the Supreme Court has taken into account in cases involving tribal jurisdiction and nonmembers on the reservation are (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved.

Pet. 25a. The court apparently saw no substantive difference among these several formulations, since it affirmed the District Court by reviewing the record against the three factors described in the text. Pet. 25a-26a.

> within the boundaries of the Creek Nation. . . . The relationship was consensual because the nonmember business owners could "refrain from the [privilege] and . . . [therefore] remain[ ] free from liability for the [tax]."

Id. Although Judge Sanborn, in writing for the Eighth Circuit panel, did begin the court's opinion with the quoted excerpt to suggest that the exaction "partakes far more of the nature of a license than of an ordinary tax[ ] because it has the optional feature of the former and lacks the compulsory attribute of the latter" (*Buster*, 135 F. at 949), it was not merchants' consent that gave rise to the Creek Nation's authority to preclude trading without the tax's payment.

The merchants instead voluntarily determined to expose themselves to the tribe's *preexisting* jurisdiction to impose the tax which arose by virtue of retained inherent authority over all lands within the Creek territory. *Id.* at 950-51, 952-53. Not only had that authority been left largely unaffected by the Curtis Act and the 1901 statute incorporating the Federal Government's agreement with the tribe (*id.* at 953-54), but the Creek legislature's license tax also was characterized by Judge Sanborn as "in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation" (*id.* at 956). In sum, when the analysis in *Buster* is extrapolated more broadly, it stands for the fundamental proposition that nonmembers cannot create tribal inherent authority or jurisdiction but that they can determine to enter into a relationship with a tribe or to engage in conduct that brings them within the scope of

otherwise extant tribal power.[6] *See also Merrion*, 455 U.S. at 142 ("the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction").

The critically distinguishing aspect of *Buster* for present purposes lies in the fact that here, unlike the tribe there, the Navajo Nation lacked the preexisting jurisdiction to which Petitioner's guests could be deemed to consent. Contrary to the Tenth Circuit's conclusion below and as explained *supra* at pp. 14-15, Congress's definition of Indian country in 18 U.S.C. § 1151 did not constitute a determination "that all lands within the outer boundaries of the reservation are . . . subject to reasonable tribal

[6] *Buster*, it should be noted, does *not* claim to set out a general rule that alienation of land does not forfeit the jurisdiction of the tribe. *Buster* plainly recognized that the alienation of land *does* generally divest the tribe of any preexisting jurisdiction when it recognized the "general rule of law announced in *Bates v. Clark*, 95 U.S. 204, 205, 208, 24 L.Ed. 471 (1877), that all the original Indian country remains such until the Indian title to it is extinguished, and no longer, 'unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.' " *Buster*, 135 F. at 952. This "general rule," *Buster*, 135 F. at 958, provides in effect that loss of the original Indian title does in fact extinguish the authority of the tribe because, in the understanding of the time, loss of tribal ownership terminated reservation status. *See Solem v. Bartlett*, 465 U.S. 463, 468 (1984). *Buster* did not apply this "general rule" but found that the peculiar situation before the Court fell under an "express *exception* to the rule," 135 F. at 952 (emphasis added), relating to the fact that the Creeks held their territory under a patent from the United States and under an act of Congress which expressly provided that it should be the country of the Creeks so long as they existed as a nation and continued to occupy the territory.

authority." Pet. 19a. A necessary predicate for application of the consent exception is consequently absent. The Court of Appeals' three-part "balancing test," in other words, is concerned not with what should be the threshold question of whether the tribe has inherent authority to regulate the matter at hand but rather with whether the exercise of such authority is "reasonable" under the particular facts. Again, however, the question of consent becomes material only when tribal civil authority over the involved land or transaction has been established under governing principles. *Montana* unequivocally compels a conclusion that such authority is lacking over the Petitioner and its guests since, unlike the situation in *Buster*, no statute or treaty rebuts the "main rule" foreclosing the exercise of tribal authority over nonmembers with respect to nontribal land transactions.

There are nevertheless two points that must be made about the Tenth Circuit's "balancing test." First, the practical effect of the balancing test, when coupled with the lower court's expansive understanding of tribal jurisdiction pursuant to § 1151, is to authorize application of tribal taxes without reference to land ownership considerations. Nonmembers will be deemed to have entered into the requisite "consensual" relationship with the tribe by virtue of their simple presence on the reservation; the "relevantly related" factor will be satisfied in most, if not all, instances by establishing a nexus between the tax and the conduct constituting the consensual relationship; and the "disproportionality" consideration rarely, if ever, will be disqualifying.

Thus, for example, in finding the Navajo tax not "disproportionate," the Tenth Circuit relied on decisions

measuring the validity of local taxes on hotel or motel room occupancy under the Due Process and Equal Protection Clauses. Pet. App. 30a. This Court, however, has rejected the contention that the Due Process Clause requires "the amount of general revenue taxes collected from a particular activity [to] be reasonably related to the value of the services provided to the activity." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981).

The Court additionally has stressed that the "latitude afforded the States under the Due Process Clause" is no less than that afforded them under the Commerce Clause (*id.* at 623) which requires only that "the measure of the tax must be reasonably related to the extent of the contact" *Id.* at 626 (emphasis omitted); *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (state tax is permissible under the Commerce Clause if it "is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State"). It would be a highly unusual tribal tax that could not meet the elastic standards implicitly proposed by the Court of Appeals.

Second, although this case has arisen in connection with a tribal tax, the Tenth Circuit's analytic prescription extends to determining the validity of *all* attempts by tribes to exercise civil authority over nonmembers. It is therefore instructive to compare how *Montana* itself would have been analyzed under the Court of Appeals' approach to that actually used by this Court. The first element of the "balancing test" would have been met because the nonmember hunters and fishers had entered the Crow Reservation voluntarily. The second element

would have been met because the tribal regulation was "relevantly related" to the nonmembers' conduct on the affected fee lands. Resolution of the third element would have been more troublesome because the involved tribal ordinance prohibited any reservation hunting and fishing by nonmembers. *Montana*, 450 U.S. at 548-49. Resolving whether a blanket prohibition was "disproportionate" presumably would have demanded close examination of why complete cessation of nonmember hunting and fishing was appropriate and balancing tribal and nonmember interests with reference to achieving the interests that underlay the ordinance. In fact, though, this Court summarily dismissed the first exception's applicability with the statement that nonmember hunters and fishers had not entered into any agreements "so as to subject themselves to tribal civil jurisdiction." *Id.* at 566; *see also Strate*, 520 U.S. at 457 (no consensual relationship for first exception purposes where, despite fact that respondent was on reservation performing a subcontract for the tribe, accident was with a person not associated with the contract and the tribes were otherwise " 'strangers to the accident' "); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. at 428 (plurality op.) (petitioners "do not have a 'consensual relationship' with the Yakima Nation simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided").

It is plain that, in determining whether a consensual relationship exists, the Court has looked to see if there were actual, not implied, commercial or other direct dealings between the nonmember and the tribe or its members to which the affected regulation was directed. The

Tenth Circuit's approach cannot be squared with this Court's and would have the probable effect of expanding the consent exception to a broad array of tribal regulatory measures where the sole contact between the nonmember and the tribe is the former's presence within the reservation.

D. *Montana*'s Second Exception Is Inapplicable Because State Law Is Not Preempted From Application to the Commercial Relationship Between Petitioner and Its Guests.

The Navajo Supreme Court, in addition to finding consent to tribal jurisdiction, found that tribal jurisdiction also existed under the second *Montana* exception. *See* Pet. 88a-89a. Neither the District Court (Pet. 65a n.28) nor the Court of Appeals (Pet. 11a n.8) ruled on the applicability of the second exception. Nonetheless, because the ultimate determination of this cause will require consideration of both prongs of the *Montana* test, the Amici States suggest that it is appropriate to consider the scope of that exception.

The *Montana* second exception is limited to those situations in which application of tribal law "is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.' " *Strate*, 520 U.S. at 459 (quoting *Williams*, 358 U.S. at 220). The *Williams* standard describes a federal common law rule of preemption, as do the remaining three decisions cited in support of the exception. *See Fisher v. District Court*, 424 U.S. 382 (1976) (state court jurisdiction preempted with respect to adoption proceeding that involved tribal members residing on

reservation); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) (state tax imposed on nonmember-owned cattle grazing on reservation lands); *Thomas v. Gay*, 169 U.S. 264 (1898) (same). It is unsurprising that *Strate* emphasized that the question raised by the second exception is whether the "State's . . . exercise of authority would trench unduly on tribal self-government." *Strate*, 520 U.S. at 458. When that question is answered affirmatively, state authority to regulate the involved conduct is preempted and tribal law is appropriately given effect. The exception is thus quite narrow since, as *Strate* pointedly observed, a broader application "would severely shrink the [main] rule."[7] *Id.*

Here, there is no room for dispute over whether state law generally, and state tax law specifically, can be applied to the commercial relationship between Petitioner and his guests. This Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992), held that its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." Several years earlier, the Court had upheld imposition of a state oil and gas severance on reservation trust land production by a corporation pursuant to lease entered into with a tribe pursuant to the Indian Mineral

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[7] Given the divided opinions in *Brendale*, it is unresolved whether the second exception can be used offensively – i.e., to subject an unconsenting nonmember to tribal jurisdiction – or only defensively – i.e., to prevent state law from being applied. This issue need not be decided here, since the exception is inapplicable.

Leasing Act. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). *Cf. Montana v. Crow Tribe*, 523 U.S. 696, 717 (1998) (under *Cotton Petroleum*, state tax preempted only to the extent "extraordinarily high"). It routinely has rejected preemption challenges to sales or related taxes imposed on nonmembers doing business with *tribal* retailers. *See, e.g., Department of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *California State Bd. of Equal. v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Needless to say, the two tax decisions cited in connection with the second exception – *Montana Catholic Missions* and *Thomas* – further argue unmistakably against the second exception's applicability.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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