No. 00-454

In the Supreme Court of the United States

ATKINSON TRADING CO., INC., PETITIONER

v.

JOE SHIRLEY, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether the Navajo Nation may impose a hotel occupancy tax on non-Indian overnight guests at the Trading Post operated by petitioner on land it owns in fee, when the Trading Post is subject to federal regulations under the Indian Trader Statutes, petitioner's land is wholly surrounded by Indian lands on the Navajo Reservation, and petitioner and its guests receive necessary government services from the Navajo Nation.

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INTEREST OF THE UNITED STATES

The United States' interest in this case arises in part from the national government's special relationship with the Indian Tribes. The United States also has a direct interest in regulation of the reservation activities of non-Indians like petitioner, who are federally licensed to conduct business on Indian reservations. See 25 U.S.C. 261-264 (Indian Trader Statutes); 25 C.F.R. Pt. 141 (regulations governing business practices on the Navajo, Hopi, and Zuni Reservations).

STATEMENT

1. Petitioner Atkinson Trading Company is a New Mexico corporation that owns and operates the Cameron Trading Post, a complex of businesses including a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and recreational vehicle facility. Pet. App. 95a. The complex lies near Cameron, on the Navajo Indian Reservation within the borders of the State of Arizona, and it is used primarily by

tourists on their way to or from the Grand Canyon. *Id.* at 95a-96a. Atkinson owns the land underlying the complex in fee simple. *Id.* at 96a.

Petitioner's land has been within the boundaries of the Navajo Reservation at least since Congress confirmed those boundaries in 1934. See Act of June 14, 1934, ch. 521, 48 Stat. 960. It is entirely surrounded by tribal land. Pet. App. 96a. All travelers to and from the Cameron Trading Post cross the Reservation on state and federal highways constructed pursuant to rights-of-way granted by the Navajo Nation. *Ibid.* The Nation also provides municipal services (such as police and fire protection) to petitioner and its customers. *Id.* at 96a-98a. In the high season, petitioner has approximately 120 employees, about three-quarters of whom are members of the Nation. *Id.* at 96a.

2. In 1992, the Navajo Nation Council enacted a hotel occupancy tax applicable to all persons who pay for hotel rooms within the Reservation costing $2 or more per day. 24 Navajo Tribal Code § 102 (*reprinted in* Pet. App. 103a). The rate is eight percent of the price paid. Pet. App. 2a & n.1. Hotel operators must assess and collect the tax. *Id.* at 103a (§ 104). The Code declares that the tax, which is administered by the Navajo Tax Commission, is "imposed for the purposes of promoting tourism and tourism development" and is to be "applied for the advancement of local tourism promotion, and to develop projects throughout the Navajo Nation." *Id.* at 124a (§ 142).

Petitioner challenged the Navajo Nation's jurisdiction to enforce the hotel occupancy tax against petitioner and its guests. The Navajo Tax Commission received evidence, issued findings of fact and conclusions of law, and ruled against petitioner. Pet. App. 91a-101a. The Navajo Supreme Court affirmed. *Id.* at 70a-90a. Petitioner then sought relief in federal district court.

3. The district court granted summary judgment in favor of respondents. Pet. App. 53a-69a. Accepting facts found by the Navajo Tax Commission and not disputed by petitioner, the court recognized that its legal analysis should be based on the test articulated by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), and *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997). Those cases recognize a general rule that Indian Tribes lack inherent sovereign power over nonmember activities on reservation land owned in fee by nonmembers, subject to exceptions for "nonmembers who enter consensual relationships with the tribe or its members" and for nonmember 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 565-566; see *Strate*, 520 U.S. at 445-447.

Because this case involves taxation, the district court also sought guidance from this Court's decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which discussed the scope of tribal taxing powers. The court stated:

> Where a tribe provides essential services within Indian Country, even to nonmembers and even on [nonmember-owned] fee land, and thus affords the "benefits of a civilized society" to those nonmembers, fairness indicates that it be allowed to impose taxes to help pay for those services. * * * The *Merrion* provision-of-services or benefits-of-a-civilized-society factors, thus, are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present to allow the tribe to impose a tax upon the fee-land activity.

Pet. App. 63a-64a. Even if such a consensual relationship was found, however, the court indicated that there was a further balancing of interests to be performed:

> The real question with respect to tribal-taxation cases and the consensual relationships test is whether the non-

> members' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity. * * * [T]he extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on 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.

Id. at 64a.

Applying this analysis, the court first concluded that, despite the absence of any "explicit consensual relationship" between the Tribe and petitioner's guests, such a relationship is established within the meaning of *Montana* when those guests "travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there." Pet. App. 65a. Second, the court concluded under its balancing test that "the presence of the guests creates a greater need, both actual and potential, for tribal services," such as medical, police, and fire services, and that the burden imposed by the tax is minimal. *Id.* at 66a-67a. The court accordingly held that the Navajo had the authority to impose its tax on petitioner's guests.

4. The court of appeals affirmed. Pet. App. 1a-51a. The court accepted the district court's application of the *Montana* test, which it concluded "appropriately appl[ied] and complement[ed] the Supreme Court's Indian law jurisprudence." *Id.* at 14a. It emphasized that the *Montana* analysis necessarily gives Tribes some regulatory power over nonmembers on their reservations, even on nomember-owned lands, and concluded that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." *Id.* at 11a. The court also agreed that *Merrion* was highly relevant to the analysis, even though it dealt with tribal lands, because *Merrion*

characterized the power to tax as "an essential attribute of sovereignty," rather than simply "an extension of a tribe's power to exclude." *Id.* at 12a. The court also relied on 18 U.S.C. 1151, which defines "Indian country" to include all lands within the borders of a reservation (without regard to title), and *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), which upheld tribal taxation of a business on nonmember land. See Pet App. 14a-19a.

Particularly in light of this Court's citation of *Buster* in both *Montana* and *Strate*, the court of appeals concluded that this Court had not established "one rule for assertions of tribal jurisdiction on fee land (*Montana*, et al.) and another rule for tribal land (*Merrion*)." Pet. App. 15a. The court held instead that the fee status of land was only one factor in a case-by-case analysis "in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations," as the district court had held. *Id.* at 15a-18a; see also *id.* at 20a n.11 (fee status is relevant but not determinative). The court summarized:

> 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. Any accounting of fee status either falls into the Court's study of these factors or becomes secondary.

Id. at 25a.

Applying this analytic framework, the court of appeals sustained the district court's judgment that the Navajo Nation could properly impose its occupancy tax on petitioner's guests under *Montana*'s exception for consensual relationships. The court noted that the guests travel over

reservation lands to reach the complex, and that they receive the benefit of "police, fire, emergency medical, and tourist services provided by the tribe," which constitute the "benefits of a civilized society" mentioned in *Merrion*. Pet. App. 26a-30a. It concluded that "[t]he consensual relationship between the guests and the tribe is one of implied consent, or privilege and tax, similar to that set forth in *Buster*: the consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax." *Id.* at 29a. Having found such a consensual relationship, the court applied its balancing test and held that the tax burden on the guests was "not disproportionate to the benefits they receive by availing themselves of Navajo tribal services." *Id.* at 30a-32a. It accordingly affirmed the district court's judgment sustaining the tax.

Judge Briscoe dissented. Pet. App. 33a-51a. She found the majority's interpretation of *Montana* flawed, principally because it discounted the importance of fee ownership. See *id.* at 37a-42a. In her view, "*Montana* operates from a presumption that * * * a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land," while "*Merrion* operates from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers' conduct occurring on tribal land." *Id.* at 41a-42a. Applying what she considered to be *Montana*'s analysis, without reference to factors from *Merrion*, she concluded that the Navajo Nation does not have inherent authority to impose its tax under the "consensual relationships" exception, because any consent by petitioner was irrelevant to a tax imposed on hotel guests, and because there was insufficient evidence in the record to show that petitioner's guests entered into "a consensual relationship, either express or implied," with the Tribe. *Id.* at 44a-48a. Judge Briscoe also rejected application of the

second *Montana* exception, because in her view there was no evidence "that the conduct, or even the mere presence, of [petitioner's] non-Indian guests represents a threat to, or has a direct effect on, the Nation's political integrity, economic security, or health and welfare." *Id.* at 50a; see also *id.* at 48a-51a.

SUMMARY OF ARGUMENT

The tax at issue in this case is imposed on commercial transactions between nonmembers of the Navajo Nation, occurring on land that is located within the Navajo Reservation, but that is held in fee by a nonmember of the Tribe. The Tribe's power to impose such a tax must be evaluated in light of this Court's decisions addressing both tribal taxing authority specifically and tribal civil authority over nonmembers more generally.

The Court has made clear that Indian Tribes possess an inherent power to tax. Under the Court's decisions and longstanding federal policy, that power extends to nonmembers of a Tribe, even on nonmember fee land within a reservation, to the extent they enjoy privileges of trade or other activity to which the Tribe can attach a tax.

This Court's decisions in *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981), and *Strate* v. *A-1 Contractors*, 520 U.S. 438, 446 (1997), hold that a Tribe may tax or regulate the activities of nonmembers on nonmember fee land within a reservation if the nonmembers enter "consensual relationships with the tribe or its members," or if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." In the particular circumstances of this case, the Navajo Nation's hotel occupancy tax is valid under both those tests.

Petitioner itself has, for *Montana* purposes, entered into a "consensual relationship" with the Navajo Nation by conducting a substantial business within the boundaries of the

Tribe's Reservation, under regulations issued by the Secretary of the Interior that afford the Tribe the opportunity to play a substantial role in regulating that business. By applying for and accepting a federal Indian Trader's license under those regulations, petitioner has accepted privileges of trade to which the Tribe may attach a tax. That conclusion supports the tax here, even though the Navajo tax is formally assessed against petitioner's customers, rather than against petitioner itself.

The Tribe's modest occupancy tax is also valid under *Montana*'s second test. Petitioner's business is subject to comprehensive federal regulations, enforceable by the Tribe, that reflect a conclusion by the Secretary of the Interior that petitioner's operations do have a direct effect on the Tribe and its members. The commercial transactions to which the Navajo tax applies take place on nonmember fee land that is completely surrounded by tribal lands, so that apparently all or almost all other commercial and residential property in the immediate community is subject to full tribal jurisdiction. And those nonmember transactions have, in the aggregate, foreseeable consequences that require attention and response from the Tribe's government. Under those circumstances, the Tribe's tax "does not reach beyond what is necessary to protect tribal self-government," *Strate*, 520 U.S. at 459 (bracket and citations omitted), and it should be sustained as a reasonable exercise of the Tribe's limited but important civil authority over the conduct of nonmembers on nonmember fee lands within its Reservation.

ARGUMENT

IMPOSITION OF THE NAVAJO HOTEL OCCUPANCY TAX ON PETITIONER AND ITS CUSTOMERS IS A REASONABLE EXERCISE OF THE TRIBE'S SOVEREIGN POWER

A. *Montana* And *Strate* Provide The Proper Framework For Analysis

The occupancy tax at issue in this case is imposed on the purchase of overnight lodging at any hotel, including petitioner's, that is located within the territorial boundaries of the Navajo Nation. Pet. App. 2a, 103a. Petitioner's hotel is built on land located within the boundaries of the Nation (and the State of Arizona), but held in fee simple by petitioner, a New Mexico corporation that is owned and run by individuals who are not members of the Navajo Nation. See *id.* at 2a, 95a-96a. The validity of the hotel occupancy tax, as applied to petitioner's business establishment, must be evaluated in light of this Court's decisions specifically addressing the inherent powers of an Indian Tribe to tax—including a Tribe's power to tax non-Indians within its reservation in appropriate circumstances—as well as the Court's decisions addressing more generally a Tribe's authority to exercise civil jurisdiction over the activities of nonmembers on nonmember fee land within the reservation.

1. This Court has made clear that Indian Tribes possess an inherent power to tax that has not been divested by the United States. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

In 1934, Congress enacted the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, which, in Section 16, provides that an Indian Tribe may elect to organize under that Act and provide in its constitution for the exercise of "all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. 476(e). Immediately after passage of the Act, the Solicitor of the Department of the Interior, in his seminal opinion entitled *Powers of Indian Tribes*, 55 Interior Dec. 14 (1934), interpreted the quoted phrase in Section 16 of the IRA to confirm in Tribes "the whole body of tribal powers which courts and Congress alike have recognized as properly wielded by Indian tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties." *Id.* at 18.[1] With respect to the power to tax, the Solicitor stated, in a paragraph this Court quoted with approval in *Colville*:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

447 U.S. at 153 (quoting 55 Interior Dec. at 46) (emphasis added by the Court); see also *Merrion*, 455 U.S. at 139 (quoting from same passage in Solicitor's opinion).

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[1] Although the Navajo Nation is not organized under the IRA, it possesses the same inherent governmental powers—including the power to tax non-Indians—as Tribes that are organized under that Act. See *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985); see also 25 U.S.C. 476(f)-(g).

The Court explained in *Merrion* that a Tribe's power to tax non-Indians on its reservation "derives 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 (citing *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824)). For Indian Tribes, as for States, "[t]he power of taxation is indispensable to their existence" as independent entities. *Gibbons*, 22 U.S. (9 Wheat.) at 199.

Although *Merrion* itself involved taxation of non-Indian activities on land held in trust for the Tribe, the Court, in rejecting the proposition that a Tribe's power to tax derives solely from its power to exclude non-Indians,[2] discussed at some length the decision in *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), which involved a Tribe's taxation of a non-Indian business on non-Indian fee land. The Court explained:

> [T]he decision in *Buster* v. *Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster* v. *Wright*. In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorpo-

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[2] The Court addressed the power to exclude as a basis for taxation because the non-Indian argued that the Tribe had relinquished any power to exclude it from tribal lands when the Tribe entered into a long-term lease of tribal lands with the non-Indian for production of oil and gas, and had relinquished its power to tax as a result. See 455 U.S. at 141-143, 144-145.

> rated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained the power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners*." 135 F. at 952 (emphasis added).

455 U.S. at 143-144 (footnote omitted). See also *Colville*, 447 U.S. at 153 (including *Buster* v. *Wright* among cases cited for the proposition that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity"); 55 Interior Dec. at 46-48 (extensively discussing *Buster* in support of the statement, quoted at page 10 above, concerning a Tribe's inherent power to tax); *Merrion*, 455 U.S. at 144 n.8 (citing F. Cohen, *Handbook of Federal Indian Law* 142 (1942), for its discussion of *Buster*).

This is not to say, of course, that a Tribe has plenary power to tax non-Indians on its reservation, at least on lands owned in fee by non-Indians. Rather, as the Court explained in *Merrion*, echoing the opinion of the Solicitor of the Department of the Interior, cases such as *Buster* v. *Wright* "demonstrate that 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." 455 U.S. at 141-142. Accordingly, the circumstances in which a Tribe may assess a tax against non-Indians on a reservation must be evaluated under the

general framework established by this Court for the exercise of civil authority over non-Indians on a reservation, albeit with an appreciation of the requirements of an Indian Tribe, like any sovereign, to raise revenue to support essential services that are furnished to the reservation community—including, in some instances, to non-Indians who are in that community.

2. Two of this Court's cases set out the central principles relevant to determining more generally whether an Indian Tribe may exercise civil authority over the activities of nonmembers on nonmember fee land within the Tribe's reservation. In *Montana* v. *United States*, 450 U.S. 544, 563-567 (1981), the Court held that a Tribe did not have inherent sovereign authority to regulate hunting and fishing by nonmembers on nonmember fee land. Concluding that the regulation of such activities on nonmember land bore "no clear relationship to tribal self-government or internal relations," the Court endorsed "the general proposition that the inherent sovereign powers of an Indian tribe do not extend" that far. *Id.* at 564-565. The Court recognized, however, two exceptions to that general principle. First, a Tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. Second, a Tribe retains "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

In *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), the Court relied on *Montana* in holding that a Tribe had no inherent jurisdiction to adjudicate a civil claim brought by one nonmember against another nonmember arising out of an accident that occurred on a state highway right-of-way,

which the Court assimilated, for this purpose, to nonmember fee land. See *id.* at 442, 456. The Court concluded that, as to nonmembers, the Tribe's adjudicative jurisdiction did not exceed its legislative jurisdiction, and it confirmed that, in the absence of a controlling treaty or federal law, *Montana*'s general rule and exceptions "delineate[] * * * the bounds of the power tribes retain" to exercise civil authority over nonmembers' activities on nonmember fee lands within a reservation. *Id.* at 453.

The *Strate* Court concluded that neither of the *Montana* exceptions applied to the situation at issue in *Strate*. As to the first exception, the Court held that a lawsuit between "two non-Indians involved in [a] run-of-the-mill [highway] accident" on a state right-of-way did not involve any "'consensual relationship' of the qualifying kind," but was "distinctly non-tribal in nature." 520 U.S. at 457.[3] As to the second exception, the Court interpreted *Montana* to hold that "a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 459 (brackets omitted) (quoting *Montana*, 450 U.S. at 564). A nonmember's careless driving on the state highway, the Court reasoned, did not have such a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe" that denial of jurisdiction over a resulting lawsuit would "trench unduly on tribal self-government" or interfere impermissibly with "the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 457-459 (in part quoting *Montana*, 450 U.S. at 566, and *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)).

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[3] Compare *United States* v. *McBratney*, 104 U.S. 621 (1881) (State, rather than United States, has jurisdiction to prosecute criminal offense committed by one non-Indian against another non-Indian in Indian country).

In the present case, the court of appeals recognized the central relevance of *Montana* and *Strate*. See, *e.g.*, Pet. App. 24a. Its discussion, however, appears to blur the distinction this Court has consistently drawn, in cases involving the exercise of tribal jurisdiction over nonmembers, between nonmember fee land and other reservation lands. See, *e.g.*, *id.* at 19a-20a & n.11. If petitioner's hotel were *not* located on fee land, there would be no question that both petitioner and its guests were subject to taxation (and other regulation) by the Tribe. See, *e.g.*, *Strate*, 520 U.S. at 454 & n.8; *Montana*, 450 U.S. at 557; *Merrion*, 455 U.S. at 136-148; *Colville*, 447 U.S. at 152-154; cf. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 330-343 (1983). Accordingly, and contrary to the court of appeals' view, the fact that petitioner holds its land in fee is not "largely inconsequential in this case." Pet. App. 20a n.11. It is, instead, one of the two key factors—the other being that the Tribe's tax falls on nonmembers—that make it necessary to assess the validity of the tax using the test set out in *Montana* and *Strate*.

B. In The Particular Circumstances Of This Case, The Navajo Tax Is A Proper Exercise Of Tribal Jurisdiction Under Both Of The *Montana* Exceptions

The district court and the court of appeals sustained the Navajo Nation's occupancy tax on the basis of *Montana*'s recognition of tribal authority over situations in which nonmembers have entered into some sort of consensual relationship with a Tribe or its members. See Pet. App. 11a n.8, 32a, 63a-68a & n.28. The Navajo Supreme Court upheld the tax both on that ground (*id.* at 83a-87a) and on the basis of *Montana*'s second exception, for nonmember conduct that threatens or has a "direct effect" on the political integrity, economic security, or health and welfare of the Tribe (see *id.* at 88a-89a). Under the circumstances presented by this case, including in particular the regulatory regime that governs

petitioner's business, which was adopted by the Secretary of the Interior under the Indian Trader Statutes, we believe that the tax may be sustained under both of the *Montana* exceptions.

1. In View Of Federal Regulations That Govern Petitioner's Business, The Tax Is Valid Under *Montana*'s First Exception As A Condition On The Privilege Of Engaging In Commercial Transactions At Petitioner's Trading Post

a. Petitioner itself has, for *Montana* purposes, entered into a "consensual relationship" with the Navajo Nation by conducting a substantial business within the boundaries of the Navajo Reservation under regulations issued by the Secretary of the Interior that afford the Navajo Nation the opportunity for a substantial role in the regulation of petitioner's business.

In both *Montana* and *Strate*, this Court specifically cited *Buster* v. *Wright* as an example of situations that fall within the first *Montana* exception. See 450 U.S. at 566; 520 U.S. at 457. As it had done in *Merrion* (see pp. 11-12, *supra*), the Court in *Strate* explained that *Buster* upheld a Tribe's "permit tax on nonmembers for the privilege of conducting business within [the] Tribe's borders," and "characterized as 'inherent' the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders.'" 520 U.S. at 457 (quoting *Buster*, 135 F. at 950); see also *Williams*, 358 U.S. at 223; *Morris* v. *Hitchcock*, 194 U.S. 384, 391-393 (1904); compare *Merrion*, 455 U.S. at 145 n.11 (quoting *Buster*, 135 F. at 958: "The ultimate conclusion * * * is that purchasers of lots * * * within the original limits of the Creek Nation * * * are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns[.]").

There is no occasion here to identify as a general matter the circumstances in which the ability of a non-Indian to engage in business on non-Indian fee land on a reservation may properly be regarded as the acceptance of a privilege to trade that triggers the Tribe's inherent power to tax non-Indians under the first *Montana* exception. In this case, those circumstances are established by a special regulatory regime that has been established by the Secretary of the Interior for the Navajo, Hopi, and Zuni Reservations under the Indian Trader Statutes, 25 U.S.C. 261-264. See 25 C.F.R. Pt. 141.[4] As this Court pointed out in *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994), "[t]hroughout this Nation's history, Congress has authorized 'sweeping' and 'comprehensive federal regulation' over persons who wish to trade with Indians and Indian tribes." *Id.* at 70 (quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 687-689 (1965)); accord *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980). Under that regulatory regime, petitioner (or any other nonmember-owned business) may offer goods and services for retail sale on the Navajo Reservation only if it has been licensed to do so. See 25 C.F.R. 141.1, 141.2, 141.3(*l*), 141.5(a); Parties' Joint Lodging Materials 163 (petitioner's federal license). Application of those regulations to petitioner was upheld in *Ashcroft* v. *United States Department of the Interior*, 679 F.2d 196, 200 (9th Cir. 1982), cert. denied, 459 U.S. 1201 (1983), against a challenge by petitioner and other Indian Traders based on the nature and history of their land and the relative volume of their business with non-Indians. As interpreted in *Ashcroft*, the

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[4] We also note that although petitioner's customers are primarily tourists, petitioner engages in substantial direct consensual relationships with members of the Tribe in the form of employment. See Pet. App. 56a-57a, 72a; J.A. 52-53.

regulations reflect a determination that all nonmembers who engage in retail businesses on the Navajo Reservation, even on fee land and even predominantly with other nonmembers, have a sufficient nexus with the Tribe and its members in the conduct of their businesses to warrant comprehensive regulation under the Indian Trader statutes. See *id.* at 200 n.3.

Anyone seeking to obtain or renew a license under the regulations must first obtain "any clearance or tribal council approval required by tribal or Federal regulations." 25 C.F.R. 141.6(b), 141.9(d). The regulations require licensed businesses to comply with tribal health regulations and standards for weights and measures, and to make themselves available semi-annually at meetings of the Tribe's governing body. 25 C.F.R. 141.17, 141.22. They prohibit a licensee from selling or leasing a building without the consent of both the Bureau of Indian Affairs and the Tribe. 25 C.F.R. 141.22. The regulations expressly contemplate direct "tribal enforcement of the[] regulations [themselves] or consistent tribal ordinances." 25 C.F.R. 141.11; compare *United States* v. *Mazurie*, 419 U.S. 544, 553-559 (1975) (discussing delegation to tribal government of federal power over fee land on reservation). And the regulations specifically "do not preclude the Hopi, Navajo, or Zuni tribal councils from assessing and collecting such fees or taxes as they may deem appropriate from reservation businesses." 25 C.F.R. 141.11; compare *Warren Trading Post*, 380 U.S. at 689-690 (describing a similar regulation as an order by the Secretary of the Interior that "the governing body of an Indian reservation may assess from a trader 'such fees, etc., as it may deem appropriate'" (quoting 25 C.F.R. 252.27c (1964 ed.))). Moreover, in the federal license itself, the licensee "expressly warrants that all applicable Federal, State and Tribal laws and regulations will be fully complied with in all respects." Parties' Joint Lodging Materials 163.

By applying for and accepting an Indian Trader's license under these regulations, with their provisions for the Tribe to have an extensive role, petitioner has "accept[ed] privileges of trade" on the Reservation "to which taxes may be attached as conditions" by the Tribe. *Colville*, 447 U.S. at 153 (quoting *Powers of Indian Tribes*, 55 Interior Dec. at 46). Petitioner's voluntary submission to this regulatory regime gives rise to a "consensual relationship" with the Navajo Nation within the meaning of the *Montana* test. Petitioner's operations are accordingly subject to tribal regulation, including taxation, under the first *Montana* exception.

b. We do not believe that the first *Montana* exception is rendered inapplicable here simply because the occupancy tax is assessed against customers who stay at petitioner's Trading Post, rather than against petitioner itself. See Pet. App. 103a (§ 102(A)).[5]

First, in *Buster*, the court referred to the power of the Tribe "to prescribe the terms upon which noncitizens may transact business within its borders," 135 F. at 950, not merely to the power of the Tribe to tax the owner of the business itself. Because petitioner's business establishment as a whole is brought within the first *Montana* exception under the special Indian Trader regulations discussed above, the Tribe's authority to tax encompasses the power to tax the transactions that take place in the course of petitioner's business. By the same token, because the presence and operation of petitioner's business on the Reservation is contingent upon compliance with the governing regulations, including those providing a role for the Navajo Nation, petitioner's customers, like petitioner itself, are properly regarded as having "accept[ed] privileges of trade" on the

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[5] The Code requires petitioner to "collect for the [Navajo Tax] Commission the tax that is imposed" on its customers. Pet. App. 103a (§ 104).

Reservation "to which taxes may be attached as conditions" by the Navajo Nation. *Colville*, 447 U.S. at 153 (quoting *Powers of Indian Tribes*, 55 Interior Dec. at 46).

Second, it is in any event clear that petitioner itself could be subjected to a tax by the Navajo Nation, in an amount equal to eight percent of the amount charged to each guest who stayed there.[6] The tax at issue in this case—assessed against petitioner's customers and collected by petitioner—is the functional equivalent of such a tax, and there is no reason why, for purposes of *Montana*'s first exception, it should be treated differently. To be sure, in other contexts this Court has given dispositive significance to the legal incidence of a tax. In particular, when the fundamental principle of immunity of Indians from state taxation is at stake, the Court has held that a State may not levy a tax directly on an Indian Tribe or its members inside Indian country, even though the State could achieve a functionally equivalent result by amending its law to change the tax's legal incidence. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457-460 (1995). But there are special reasons for attending to form as well as substance where that immunity principle is concerned, because the Court's cases have made clear that the historic doctrine of Indian tax immunity is absolute. See, *e.g.*, *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985). As the existence of the *Montana* exceptions makes clear, the "general rule" (see *Strate*, 520 U.S. at 446) that nonmembers are not subject to tribal taxes is *not* similarly absolute. In applying those exceptions, therefore, a "cate-

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[6] The court of appeals gave little consideration to whether the Tribe could tax petitioner itself under the first *Montana* exception. The court concluded that there was a sufficient consensual relationship between the guests and the Tribe to allow that tax. Pet. App. 26a-32a. The court simply noted that, to the extent it might be relevant, the existence of a consensual relationship with petitioner would follow *a fortiori*. *Id.* at 25a n.12.

gorical" approach to legal incidence is out of place. See *Oklahoma Tax Comm'n*, 515 U.S. at 458.

2. The Navajo Hotel Occupancy Tax Also Is Valid Under The Second *Montana* Exception Based On The Governing Regulations And The Direct Effect Of Petitioner's Business On The Navajo Nation

Under the second *Montana* exception, a Tribe may "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." 450 U.S. at 566. Here, the particular "civil authority" the Navajo Nation exercises is the power to assess a tax, at the modest rate of eight percent of the room charge, on each guest who stays at petitioner's Trading Post. That tax reflects a reasonable effort by the Navajo Nation to obtain support for the government that provides necessary services to petitioner's Trading Post business and its customers who stay overnight on the Reservation. Because the tax is assessed on the amount paid for nights actually spent on the Reservation, it is reasonably calibrated to the impact that petitioner's business has on the community and the responsibility that petitioner and its guests may reasonably be expected to bear for the support of the Navajo Nation, which provides not only tourist services and promotion (to which the proceeds of the hotel occupancy tax are devoted), but also "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979)); see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626-627, 628-629 (1981).

Although *Montana* and *Strate* provide the proper framework for analysis here, there are at least three material

differences between the hotel occupancy tax imposed on petitioner's guests and the hunting regulations and tort suit that the Court considered in those cases. Those differences justify the exercise of tribal jurisdiction under *Montana*'s "direct effects" test.

First, petitioner's business is subject to comprehensive regulations issued by the Secretary of the Interior, and subject to enforcement by the Tribe, based on petitioner's commercial relationship with the Navajo Nation and its members. Second, the nonmember fee land at issue here is located in an area of the Reservation where both the land and the population are overwhelmingly Navajo, and is completely surrounded by tribal lands that are unquestionably subject to the Navajo government's civil jurisdiction. Third, the nonmember conduct that the Tribe seeks to tax involves commercial transactions routinely entered into at petitioner's fixed place of business on the Tribe's Reservation—transactions that, in the aggregate, have foreseeable consequences for the Tribe's government, for other individuals and enterprises in the local area, and for the local environment. Denying the Navajo any authority to tax (or otherwise regulate) that sort of nonmember activity, on nonmember land that is situated like petitioner's, would indeed leave the Tribe without even the residuum of sovereign power that is "necessary to protect tribal self-government or to control internal relations," and thereby "directly affect[] the tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446, 459 (in part quoting *Montana*, 450 U.S. at 564).

a. *Indian Trader regulations.* The second *Montana* exception is designed to identify those situations in which there is a sufficient justification for the exercise of tribal civil authority over the conduct of non-Indians because of the "direct effect" that conduct may have on the political integrity, economic security, and health or welfare of the Tribe.

Here, the Secretary of the Interior, exercising authority conferred by Congress under the Indian Trader Statutes, has concluded that petitioner's business operations do have a direct effect on the Navajo Nation and its members, and has issued regulations that govern that relationship and afford the Navajo Nation an opportunity for a significant role in the regulation of petitioner's business. See pp. 17-18, *supra*. That conclusion is material to the *Montana* analysis, in light of the Secretary's responsibility for the administration of the Indian Trader Statutes and for Indian affairs generally.

b. *Character of the nonmember land.* Petitioner's "nonmember fee land," on which its hotel and other Trading Post facilities are located, is completely surrounded by tribal trust lands. Pet. App. 96a. In 1990, all but 24 of the 1035 residents of the Reservation's Cameron Chapter were Indians. Parties' Joint Lodging Materials 181. Thus, although it is true that petitioner owns its land in fee simple, it is also apparently true that the Navajo Nation exercises essentially plenary civil jurisdiction over all or almost all other land, businesses, and residents in the area of the reservation surrounding petitioner's enclave. Compare *Montana*, 450 U.S. at 548 (28% of reservation in question was held in fee by non-Indians).

That fact is significant in evaluating the "direct effect" that petitioner's activities, and the visits of its thousands of overnight hotel guests, have on the Navajo Nation and its members. See *Montana*, 450 U.S. at 566. In *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433-444 (1989) (opinion of Stevens, J., announcing the judgment of the Court in No. 87-1622), the Court upheld a Tribe's power to apply its zoning regulations to nonmember fee land in an area of its reservation that was still overwhelmingly tribal in land status and character. Contrasting that area, "in which only a very small percentage of the land [was] held in fee," with another area "in

which approximately half of the land [was] held in fee," Justices Stevens and O'Connor concluded that it was "inconceivable that Congress would have intended," when it adopted policies that led to varied ownership, "that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community." *Id.* at 437 & n.2; see also *id.* at 442 ("[I]t is enough to recognize that notwithstanding the transfer of a small percentage of allotted land the Tribe retains its legitimate interest in the preservation of the character of the reservation.").[7] Because petitioner's parcel is apparently the only nonmember fee land in the Cameron area, a similar analysis is appropriate here.

The ability to regulate and tax all local businesses on a non-discriminatory basis is important if a local government is to operate effectively and fairly. Exempting one business in an area, or its patrons, from reasonable local taxes on commercial transactions, solely on the basis that it sits on an "island" of fee land within a reservation, makes no more sense than allowing the holders of a few scattered parcels to develop their land "without regard to an otherwise common scheme." *Brendale*, 492 U.S. at 441 (opinion of Stevens, J.).[8]

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[7] Justice Stevens' opinion for himself and Justice O'Connor controlled the judgments of the Court in *Brendale* and the cases decided with it. Three other Justices would have held that the Tribe could enforce its zoning regulations throughout the reservation, while four would have held that the Tribe could not zone any nonmember fee land. Justices Stevens and O'Connor concluded that the Tribe had the power to zone in the area of the reservation that retained its tribal character, but not in an area where there was widespread nonmember ownership. See *Strate*, 520 U.S. at 447 n.6 (describing *Brendale*).

[8] Here, the Tribe seeks only to impose a nondiscriminatory tax, uniform across its Reservation; as in *Brendale*, "[i]t is [petitioner] who seeks a special, privileged status." 492 U.S. at 443. And here, as in *Brendale*, there is no allegation that collection of the Tribe's modest tax "interfere[s] with any significant state or county interest." *Id.* at 444.

Indeed, it would impose a direct disadvantage on tribal businesses, or nonmember businesses operating on tribal land, within the Tribe's own Reservation. Endorsing such an exemption would interfere materially with "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); see *Brendale*, 492 U.S. at 443-444 (opinion of Stevens, J.) (concluding that recognition of tribal zoning authority in heavily Indian areas was consistent with *Montana*'s second test).

c. *Nature of the nonmember conduct.* The nonmember activities at issue in this case are also distinctly different from those at issue in *Montana* and *Strate*. *Montana* invalidated tribal regulations that sought to ban or severely restrict nonmember hunting and fishing on private lands within a reservation. See 450 U.S. at 549-550. *Strate* held that tribal courts could not exercise jurisdiction over a claim against a nonmember defendant arising out of an accident between nonmembers on a state right-of-way. See 520 U.S. at 442. In this case, by contrast, the nonmember conduct that the Tribe seeks to tax is the routine commercial purchase of overnight lodging in a tourist hotel permanently situated at a strategic point on the Tribe's Reservation.

Petitioner's hotel attracts a substantial number of tourist guests to the Navajo Reservation—in part by stressing the Cameron Trading Post's long history as a point of contact with the Navajo Nation and its members. See, *e.g.*, Pet. App. 72a-73a; *Manygoats* v. *Cameron Trading Post*, No. SC-CV-50-98 (Navajo Sup. Ct. Jan. 14, 2000), slip op. 2-3, 4-9.[9]

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[9] We are informed that the volume of the Navajo Reporter that will contain this case has not yet been published. For the Court's convenience, we have lodged a copy of the slip opinion with the Clerk. See also www.camerontradingpost.com/history.htm (visited Feb. 13, 2001) (italics omitted):

That is not a bad thing: Petitioner's Trading Post is, for example, the Cameron area's primary employer. See Pet. App. 96a (petitioner has approximately 120 employees, 75-80% of whom are tribal members); *Manygoats*, slip op. 3. Nevertheless, the comings, goings, and overnight stays of the thousands of guests petitioner hosts each year give rise to a foreseeable set of issues of legitimate concern to the tribal government.

On one hand, precisely because petitioner's tourist business is a valuable local economic resource, the Tribe has an interest in supporting and leveraging petitioner's efforts. With appropriate resources, it could do so by, for example, providing clean, safe, and attractive rest stops at appropriate places on the Reservation; providing convenient facilities for local merchants to sell tribal crafts, souvenirs, or other items; or providing information about local attractions that might induce tourists to prolong or repeat their stays. See, *e.g.*, Pet. App. 124a (provision of Navajo Code specifying that proceeds from hotel occupancy tax are to be "applied for the advancement of local tourism promotion"); J.A. 63-66, 70-75 (testimony of Tribe's Director of Tourism).

On the other hand, petitioner's hotel guests impose some actual or potential burdens on the local government. They

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> Visitors see firsthand a way of life that has changed little over the years - locals hauling water, trading for goods, buying feed and visiting with friends from the far corners of the reservation. * * * "What makes Cameron special," says Joe Atkinson [petitioner's President, see J.A. 20], "is not only the fine weavings, baskets and beadwork—it's the ambiance. Here you're not just told about the people, their traditions and what trading post life is like. You experience it!"

See also G. Richardson, *Navajo Trader* 142 (1986) (relating author's experiences at petitioner's Cameron Trading Post in earlier days) ("Tourists off the highway were over-filled with curiosity in those days, just as they are now - especially about Indians and anyone working stock.").

demand part of the 22 million gallons of water that petitioner pumps each year from wells on its land (and therefore on the Reservation). J.A. 24-25, 39. They generate wastewater, which petitioner treats in a plant on its property and then discharges into the Little Colorado River, which flows through the Reservation. J.A. 25, 39-40, 49. They generate trash and garbage, which was disposed of on the Reservation until that landfill was closed, and petitioner began having it hauled away. J.A. 40-41. They incrementally increase the local demand for basic government services, such as police and fire protection, highway patrols, and emergency medical assistance. See, *e.g.*, Pet. App. 57a-58a.[10] Given the limited pool of resources available to all governments, including the Navajo Nation, providing those resources to petitioner and its guests necessarily requires the Nation either to develop additional resources, or to divert existing resources away from the provision of services directly to tribal members. Finally, petitioner's guests support petitioner's business, which in turn entails tribal government attention to matters such as employment, health, and environmental regulation.

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[10] Because of the framework of criminal jurisdiction in "Indian country," see 18 U.S.C. 1151, the Navajo Nation has exclusive jurisdiction to arrest and prosecute offenses between Indians and victimless offenses by Indians. See 18 U.S.C. 1152; see also 18 U.S.C. 1153 (federal jurisdiction over all major crimes committed by Indians). The Nation's government is thus the only one with authority to prosecute a host of offenses that may occur on petitioner's premises, including minor crimes committed by one of petitioner's Indian employees against another, or by another Indian against an Indian employee, as well as disorderly conduct or other status-type offenses committed by Indians on petitioner's land. In addition, the Navajo Nation necessarily acts as first responder for a host of offenses over which it may share jurisdiction with the United States, including crimes by Indians against non-Indians and serious crimes by Indians. Cf. *Strate*, 520 U.S. at 456 n.11 (noting authority of tribal police to patrol roads built on rights-of-way through a reservation).

See, *e.g.*, *Manygoats*, *supra* (resolving claim brought against petitioner under tribal labor law); cf. J.A. 48, 53-54.

Of course, all businesses, and all tourists, impose some local costs, as well as bringing many local benefits. The Navajo Nation, like all governments, seeks both to maximize the benefits and to manage the costs of local businesses, including tourism. The necessity for the Navajo Nation to exercise its "legislative jurisdiction," *Strate*, 520 U.S. at 453, over nonmember transactions on petitioner's land would, perhaps, be more obvious if petitioner were operating a garbage dump or a polluting factory. Cf. *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963) (holding that creation of reservation included water rights necessary to make land livable) (cited in *Montana*, 450 U.S. at 566 n.15). The Tribe's power to exercise that jurisdiction should, however, be equally clear in the less dramatic context of this case.[11]

Petitioner operates a successful business on the Navajo Reservation. Petitioner's Trading Post, and the guests who come to and stay at it, make demands on, and present opportunities for, the local government. All governments need to fund their activities, including those directly affected by visiting tourists; and the imposition of a modest occupancy tax on hotel guests is one wholly conventional way of seeking the necessary revenue. Cf. *Merrion*, 455 U.S. at 137-138 (where petitioners engaged in business on reservation and benefitted from government services, there was "nothing exceptional in requiring [them] to contribute through taxes to the general cost of tribal government"). *Montana* and *Strate*, of course, underscore that the sover-

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[11] The imposition such a tax places on such a business or its patrons is, moreover, considerably less onerous than many other forms of civil regulation, such as the prohibition or restraint on land development that was at issue in *Brendale*, or the requirement at issue in *Strate* that a nonmember defend litigation brought against it in an unfamiliar forum.

eign powers of Tribes are circumscribed when it comes to regulating nonmember activities on fee land. In this case, however, as we have discussed, federal regulations specifically contemplate a role for the Tribe in regulating petitioner's business; the tribal government has civil jurisdiction over the other lands and businesses in the relevant area of its Reservation; and the commercial transactions that the Tribe seeks to tax are ones that have foreseeable direct effects—both positive and negative—on the economic security, health, and welfare of the local Navajo. Under these circumstances, the Tribe's occupancy tax does not represent an extension of jurisdiction "beyond what is necessary to protect tribal self-government." *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). The Tribe's right to collect the tax should accordingly be sustained.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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