No. 22-62

IN THE
Supreme Court of the United States

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

ALDEN BIG MAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner, a private corporate entity that "enter[s] consensual relationships" with members of the Crow Tribe of Indians "through commercial … contracts" to sell electric power, *Montana v. United States*, 450 U.S. 544, 565 (1981), is subject to a Crow tribal regulation that limits the conditions under which utility-service providers can terminate residential service during the winter.

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INTRODUCTION

The petition asks this Court to resolve whether an Indian Tribe may exercise jurisdiction over "a nonmember federally funded and federally regulated electric cooperative tasked with providing electrical service to all customers within its service territory." Pet. i. The Court should deny certiorari because Petitioner did not raise that question, or any of the main arguments it raises in its petition, in the proceedings below. For that reason, the Ninth Circuit's unpublished memorandum decision did not address the issues Petitioner now raises. And Petitioner hardly makes any effort to challenge the factbound rationale on which the decision below actually rested.

This case implicates the scope of what is known as "*Montana*'s first exception"—a reference to this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, this Court set forth a general rule governing tribal jurisdiction over nonmember conduct on nontribal land within reservation boundaries. *See id.* at 563-65. The Court held that Indian Tribes' authority to regulate nonmember conduct derives from their power "to protect tribal self-government [and] to control internal relations," and regulating nonmember conduct on non-Indian fee land (land alienated from tribal control) is not necessarily related to either goal. *Id.* at 564-65. Thus, the Court concluded that Indian Tribes lack an overarching power to regulate nonmembers' activities on nontribal land.

Montana also recognized two exceptions to this general rule—that is, two scenarios in which "tribes retain inherent sovereign power to exercise some forms

of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. 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.* Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The decision below is a straightforward, factbound application of *Montana*'s first exception.

Petitioner Big Horn County Electric Cooperative, Inc., long ago entered into an agreement to sell electric power to Respondent Alden Big Man, a member of the Crow Tribe of Indians (Crow Tribe, or the Tribe) who lives on the Crow Indian Reservation in Montana. When Petitioner did so, it became subject to a Crow tribal regulation that limits the circumstances under which utility-service providers can shut off their residential customers' service during the harsh Montana winters. Far from novel, the Crow winter-shutoff regulation has analogues under the laws of many States and a near-verbatim analogue under Montana law.

In the middle of the winter over a decade ago, Petitioner shut off Mr. Big Man's electricity because he had fallen behind on his payments. That was a blatant violation of the Crow winter-shutoff regulation, and Mr. Big Man sought to vindicate his rights under Crow law by suing Petitioner in Crow tribal court. The Crow

appellate court, a federal magistrate judge, and the federal district court all held that *Montana*'s general principle limiting tribal jurisdiction was inapplicable because the disconnection occurred at Mr. Big Man's residence on tribal trust land. Each also held that even if *Montana*'s general rule applied, both of its exceptions could also sustain tribal jurisdiction.

The Ninth Circuit affirmed, reaching only *Montana*'s first exception. It rejected what had been Petitioner's primary contention across five tribal and federal forums: that even though it had formed "consensual" "commercial" "contracts" with the Crow Tribe and its members (and with Mr. Big Man specifically), *Montana*, 450 U.S. at 565, there was no nexus between those agreements and the Crow winter-shutoff regulation. In a brief, nonprecedential opinion, the court of appeals found that there was in fact a clear nexus—the regulation directly relates to the manner in which Petitioner provides electricity on the Crow Indian Reservation pursuant to its consensual agreements with Crow members.

Its principal theory having failed repeatedly, Petitioner now comes to this Court with fresh theories of the case. Now, for the first time, Petitioner argues (Pet. 11) that it is a "quasi-governmental entity" inherently immune from tribal jurisdiction. And now, for the first time, Petitioner argues (Pet. 14) that its relationships with the Crow Tribe and its members are not "truly consensual" because, having chosen to do business on the Crow Indian Reservation, it is not free to discriminate against Crow members by denying them service. Petitioner also renews its previously

abandoned argument that the Crow Tribe was divested of its jurisdiction over Petitioner's conduct by language in Mr. Big Man's membership application that purports to select a nontribal forum for dispute resolution.

None of these forfeited, factbound arguments has merit. Petitioner's repeated invocation of the phrase "quasi-governmental entity" is unavailing because Petitioner is not governmental in any sense. Petitioner also fails to demonstrate that its voluntary choice to sell power on the Crow Indian Reservation is somehow rendered involuntary by a prohibition against discriminating on the basis of tribal membership. And Petitioner's argument about the forum-selection and choice-of-law provisions in Mr. Big Man's membership application are unrelated to the lone issue in this suit—whether the Crow Tribe has regulatory and adjudicatory jurisdiction over Petitioner's on-reservation conduct.

Nor does Petitioner demonstrate any conflict of authority. The out-of-circuit cases Petitioner cites involve Indian Tribes that endeavored to exercise jurisdiction over States and their political subdivisions—scenarios that do not resemble the facts of this case.

But most importantly, this Court's review is unwarranted because *no court*—not the lower courts in this case, nor any other court of appeals—has ever addressed the question presented. And because Petitioner forfeited its main arguments long before

reaching this Court, the record is devoid of the facts necessary for evaluating them.

This Court should deny review.

STATEMENT

1. Petitioner is a private, member-owned cooperative, organized under Montana law, that provides electric power to rural areas of Southeastern Montana and Northern Wyoming. Pet. 3, 5-6; Pet. App. 7, 21. Petitioner is "the primary provider of retail electrical services on the Crow Reservation" in Montana. *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 948 (9th Cir. 2000). Though Petitioner itself is a nontribal entity, members of the Crow Tribe comprise about half its membership. Pet. App. 21.

Respondent Alden Big Man is an enrolled member of the Crow Tribe who lives on the Crow Indian Reservation in Montana. Pet. App. 7, 21. Mr. Big Man lives on land held in trust by the United States for the Tribe. *Id.* He has purchased electricity for his residence from Petitioner since signing a membership application in 1999. *Id.* at 7-8, 21-22.

By January 2012, Mr. Big Man had fallen behind on his bills. Pet. App. 8, 22, 48-49. He attempted to enlist the help of a community nonprofit to keep his lights and heat on, but he was unsuccessful. *Id.* at 48-49. On January 24, Petitioner sent a final letter to a P.O. Box, notifying Mr. Big Man that he was in arrears on his payments and that his electricity would be shut off if he did not pay by the next day. *Id.* On January 26, Petitioner cut Mr. Big Man's service, leaving him

without electricity in the "dead-middle of Montana's winter." *Id.* at 36; *see id.* at 48-49.

Montanans rely on electric power to keep their homes heated during the "bitterly cold" Montana winters. Pet. App. 17. To protect those with economic instability, a Montana state regulation bars utility providers from shutting off residential electric service during the winter months (roughly November through March) if a customer cannot pay.[1] Mont. Admin. R. 38.5.1410(1). The regulation also provides that termination of any residential customer's service during the winter requires preapproval from the Montana Public Service Commission. *Id.* R. 38.5.1410(2).[2]

Cooperatives like Petitioner, however, are exempted by statute from the Commission's jurisdiction. *See* Mont. Code Ann. § 35-18-104. With respect to those on the Crow Indian Reservation, this regulatory gap is filled by Crow Law & Order Code § 20-1-110, which

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[1] The prohibition on termination also applies "on any day when the reported ambient air temperature at 8:00 a.m. is at or below freezing or if the U.S. Weather Service forecasts a snowstorm or freezing temperatures for the succeeding 24-hour period." Mont. Admin. R. 38.5.1410(1).

[2] Many States similarly limit utility-service providers' ability to terminate residential electricity for nonpayment during the winter, or on particularly cold or warm days. *See, e.g.*, Ala. Admin. Code r. 770-X-1-.12(2)(e); Nev. Admin. Code § 704.375(6)-(7); Okla. Admin. Code § 165:35-21-10(c); *see also Disconnect Policies*, LIHEAP Clearinghouse, https://liheapch.acf.hhs.gov/Disconnect/disconnect.htm (last updated Sept. 2022) (cataloguing state policies).

contains, essentially verbatim, the same limitations on termination of service as the Montana state regulation.

2. In May 2012, Mr. Big Man sued Petitioner in Crow Tribal Civil Court, seeking damages for the violation of the Crow winter-shutoff regulation. Pet. App. 47, 94-95. In May 2013, the court dismissed the suit, finding that the Crow Tribe lacked jurisdiction over Petitioner, a nonmember. *Id.* at 93-103. But in April 2017, the Apsáalooke (Crow) Appeals Court reversed and remanded, holding that disputes arising from Petitioner's commercial relationship with Mr. Big Man fell within the Tribe's jurisdiction. *Id.* at 46-90.

Petitioner then sued Respondents—Mr. Big Man, Crow tribal judges, and Crow health officials—in the United States District Court for the District of Montana. Pet. App. 22. It sought a declaratory judgment that the Crow tribal court lacked jurisdiction and a corresponding injunction prohibiting Respondents from maintaining the tribal-court suit. *Id.*

a. The magistrate judge to whom the case was referred concluded that the Crow Tribe had jurisdiction. Pet. App. 19-42.

The magistrate judge found that there were three bases for tribal jurisdiction. Pet. App. 25-26. First, he explained that an Indian Tribe generally has regulatory and adjudicatory authority over nonmember conduct on tribal trust land, a power that derives from an Indian Tribe's right to exclude. *Id.* at 25; *see, e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982). He also observed that this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), had set forth two

contexts in which Indian Tribes have jurisdiction over nonmember conduct on *non*tribal land. Pet. App. 26. The magistrate judge found that the Crow Tribe had jurisdiction under each of these three theories.

As to the right-to-exclude theory, the magistrate judge found that "Big Man's property is designated tribal trust land." Pet. App. 28. On that basis, he concluded that the Crow Tribe "has maintained the right to exclude [Petitioner] from Big Man's property" and thus retained authority over Petitioner's conduct there. *Id.* at 32.

With respect to *Montana*'s first exception, Petitioner acknowledged that the Ninth Circuit had previously held that Petitioner "formed a consensual relationship with the Tribe because [it] entered into contracts with tribal members for the provision of electrical services." *Adams*, 219 F.3d at 951; *see* Pet. App. 33. But it argued that the Crow Tribe nonetheless lacked jurisdiction over Mr. Big Man's suit because "no nexus exists between the relationship and the regulation at issue." Pet. App. 33. The magistrate judge rejected that argument, finding that the regulation had a nexus both to Petitioner's overarching "consensual relationship created by [its] provision of electrical services on the Reservation" as well as to its specific agreement with Mr. Big Man himself. *Id.* at 35.

The magistrate judge also concluded that the Crow Tribe had jurisdiction under *Montana*'s second exception. Pet. App. 36-37. He found that "[t]he termination of heat in the middle of the winter clearly poses a danger to the health and welfare of Big Man, and potentially to any Tribal member who obtains electrical

services from [Petitioner] within the reservation boundaries, and thus the Crow Tribe itself." *Id.* at 37.

Finally, the magistrate judge rejected Petitioner's argument that the forum-selection and choice-of-law provisions in Mr. Big Man's membership application waived the Crow Tribe's jurisdiction. Pet. App. 37-41. That application had provided that disputes would be governed by Montana law and be resolved in Montana state courts. *Id.* at 21-22. Petitioner argued that these provisions were enforceable and "effectively operate[d] as a waiver of [the Tribe's] sovereign power to regulate [Petitioner]." *Id.* at 38-39. The magistrate judge concluded that the provisions' enforceability was an issue to be raised in tribal court, and that Mr. Big Man lacked "power or authority to waive sovereign police power" on behalf of the Crow Tribe, which was not a party to the agreement. *Id.* at 40; *see id.* at 38-40.

b. The district court adopted the magistrate judge's conclusions in full and granted summary judgment for Respondents. Pet. App. 5-18.

As to the right to exclude, the district court agreed with the magistrate judge's determination that Mr. Big Man's home was on tribal trust land. Pet. App. 11-14. Accordingly, the court held that the Crow Tribe retained the power to exclude Petitioner. *Id.* at 14.

With respect to *Montana*'s first exception, Petitioner renewed its argument that there was an insufficient nexus between its agreement with Mr. Big Man and the Crow winter-shutoff regulation. Pet. App. 15. Petitioner argued that "because the consensual relationship involves contracts, only regulations

concerning those contracts have a nexus as contemplated by the first *Montana* exception." *Id.* Petitioner also argued that if a nexus existed between its agreements with its customers and Crow Law & Order Code § 20-1-110, that would "eliminate the need for Tribal members to adhere to their service contracts." Pet. App. 15. The district court dismissed Petitioner's arguments as "illogical." *Id.*; *see id.* at 15-16.

Next addressing *Montana*'s second exception, the district court noted that "[w]inter in Montana can be bitterly cold and electric service provides the necessary power to keep the heat on." Pet. App. 17. The court found that "[t]ermination of that service clearly imperils the health and welfare of" the roughly 1,700 tribal members who purchase electric power from Petitioner, thereby threatening the health and welfare of "the Tribe itself." *Id.*

Finally, the district court noted that Petitioner had not objected to the magistrate judge's conclusions that the forum-selection and choice-of-law provisions in Mr. Big Man's membership application "did not constitute a waiver of Tribal sovereign authority" and were therefore "not at issue in the instant case." Pet. App. 17. Nor did the district court find any error in the magistrate judge's analysis. *Id.*

c. Petitioner appealed to the Ninth Circuit. In its appellate brief, Petitioner devoted roughly four pages to *Montana*'s first exception. Appellant's C.A. Br. 33-37. It gave "two reasons" that the exception was inapplicable: "Big Man's Membership Agreement is a contract with a tribal member but is not material to this case, and, even if it were, it reflects that disputes will be

resolved in a non-tribal forum." *Id.* at 33. In other words, Petitioner argued (1) that there was no nexus between its agreement with Mr. Big Man and the dispute at issue; and (2) that the membership application provided insufficient evidence of Petitioner's consent to tribal jurisdiction given its forum-selection and choice-of-law provisions. *See id.* at 35-36. For his part, Mr. Big Man's brief argued that Petitioner had forfeited its argument that the forum-selection and choice-of-law provisions waived tribal jurisdiction. Appellee Big Man's C.A. Br. 3-4.

The Ninth Circuit unanimously affirmed in a four-paragraph, nonprecedential opinion. Pet. App. 1-4 (Bybee, Bea & Christen, JJ.). Concluding "that the first *Montana* exception is sufficient to sustain tribal jurisdiction over the dispute," *id.* at 2, the court did not "need [to] reach the other grounds," *id.* at 4.

Citing its prior decision in *Adams*, the court of appeals explained that Petitioner's "'voluntary provision of electrical services' on the [Crow] Tribe's reservation and its contracts with tribal members to provide electrical services created a consensual relationship, within the meaning of *Montana*." Pet. App. 3 (quoting *Adams*, 219 F.3d at 951). The court then rejected Petitioner's nexus argument, noting that *Adams* had not "limit[ed] the tribal court's jurisdiction to suits on the contract, but merely reaffirmed that the regulation/suit must arise out of the *activity* that is the subject of the contracts/consensual relationship—the provision of

electric services." *Id.*[3] And it agreed with the district court that Petitioner's "unlawful termination of Big Man's electricity services is directly related to the consensual relationship." *Id.* Because Petitioner had formed consensual commercial relationships with tribal members to provide electricity, the Crow Tribe had authority under *Montana* "to regulate the manner in which [Petitioner] provides, and stops providing, that service." *Id.* at 3-4.

The Ninth Circuit denied Petitioner's petition for rehearing en banc with no judge requesting a vote of the full court. Pet. App. 43-44.

REASONS FOR DENYING THE WRIT

The petition raises three main theories as to why the Crow Tribe lacks jurisdiction over Petitioner. This Court should deny certiorari because these theories were either abandoned or never raised by Petitioner in the lower courts, and thus the Ninth Circuit did not rule on them. The court of appeals' brief, unpublished decision was instead a straightforward and factbound application of *Montana*'s well-settled first exception. *See Montana v. United States*, 450 U.S. 544, 565 (1981).

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[3] *Adams* involved the Crow Tribe's effort to impose an ad valorem tax on Petitioner's "utility property" on tribal and trust land. 219 F.3d at 948. The Ninth Circuit held that *Montana*'s first exception did not apply notwithstanding Petitioner's consensual relationship because "[a]n ad valorem tax on the value of [Petitioner's] utility property is not a tax on the *activities* of a nonmember, but is instead a tax on the value of property owned by a nonmember." *Id.* at 951 (emphasis added).

The petition also fails to identify any circuit split. No court has ever addressed Petitioner's novel arguments as to why it—a private corporate entity that voluntarily does business on the Crow Indian Reservation—is not subject to tribal jurisdiction for disputes arising from its commercial relationships with Crow members. Nor is it a surprise that no party, even Petitioner in this very case, has ever raised these arguments before now, as they are meritless. Similarly meritless is Petitioner's contention that Mr. Big Man's membership application served to waive the Crow Tribe's jurisdiction.

The petition should be denied.

I. THIS CASE IS AN UNSUITABLE VEHICLE FOR EVALUATING THE SCOPE OF *MONTANA*'S FIRST EXCEPTION.

For several reasons, this case is an unsuitable vehicle to address the question presented in the petition. First and foremost, Petitioner has forfeited each of the core arguments in the petition either by failing to raise it at any point during this litigation or by abandoning it in the court of appeals. As a result of these forfeitures, none of those arguments was addressed in the decision below. Second, passing upon Petitioner's arguments would require a highly developed factual record, but as a result of the forfeitures, the record is devoid of the materials this Court's review would require. And third, the applicability of *Montana*'s first exception ultimately matters little in this case because the district court correctly identified two other valid bases for tribal jurisdiction over Petitioner.

A. The petition's main arguments were forfeited and thus not addressed by the court of appeals.

Through a decade of litigation in the Crow tribal courts and lower federal courts, Petitioner has never contested that under *Montana*'s first exception, nonmembers who form consensual commercial relationships with members of an Indian Tribe are subject to tribal regulation of their on-reservation conduct arising from those relationships. Nor has Petitioner ever contested that it has consensual relationships with the Crow Tribe and with Mr. Big Man within the meaning of *Montana*. Instead, Petitioner has consistently maintained that the Tribe lacks jurisdiction over its dispute with Mr. Big Man because there is an insufficient *nexus* between its relationship with him and the tribal regulation he seeks to enforce.

But with that argument having repeatedly failed, Petitioner now presents this Court with a slew of alternative theories as to why the Crow Tribe lacks jurisdiction. Petitioner has forfeited each of its main theories, making it impractical to grant review as to any of them. *See, e.g.*, *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37-38 (2015) (arguments "never presented to any lower court" are forfeited and this Court "will not entertain" them "[a]bsent unusual circumstances").

The petition presents three core theories. The first is that Petitioner's character as a rural electrical cooperative inherently immunizes it from tribal jurisdiction under *Montana*'s first exception. Petitioner's theory appears to be that because it receives federal loans, Pet. 7, 26; is subject to "extensive

federal regulation," Pet. 16, 19; and "fulfill[s] the federal purposes of the Rural Electrification Act," Pet. 15, it is a "quasi-governmental" entity, *e.g.*, Pet. 11, 15, 20, to which *Montana* does not apply. The petition's second main alternative theory (*see* Pet. 14-15, 26) is that Petitioner's agreements with its Crow customers are not "consensual" within the meaning of *Montana*, 450 U.S. at 565, because having chosen to do business on the Crow Indian Reservation, Petitioner is prohibited from discriminating against members of the Crow Tribe.

These arguments are forfeited. Before now, Petitioner had never hinted at either theory at any point in this litigation. To the contrary: Petitioner has consistently acknowledged that *Montana*'s first exception would apply here if there were a sufficiently close nexus between the Crow winter-shutoff regulation and Petitioner's agreement with Mr. Big Man. *See, e.g.*, Pet. App. 15; Appellant's C.A. Br. 33.

Petitioner also contends (Pet. 22-27) that the forum-selection and choice-of-law provisions in Mr. Big Man's membership application take this dispute outside the scope of *Montana*'s first exception. This argument, too, has been forfeited.

Petitioner argued in the tribal courts and before the magistrate judge that the language of Mr. Big Man's application divested the Crow Tribe of jurisdiction. *See* Pet. App. 37-39, 50. The magistrate judge rejected that argument, concluding that because the Tribe was not a party to Petitioner's agreement with Mr. Big Man, those provisions were irrelevant to the sole issue in this federal litigation—whether the Crow tribal court has subject-matter jurisdiction, not what law applies in that

forum or whether the agreement reflects the parties' desire to litigate elsewhere. *Id.* at 38.

Petitioner raised many objections to the magistrate judge's findings, but "[n]either party object[ed] to [his] Finding that the choice of law provision in the … membership agreement did not constitute a waiver of Tribal sovereign authority and therefore … is not at issue in the instant case." Pet. App. 17. Nor did Petitioner appeal the issue to the Ninth Circuit. *See* Appellant's C.A. Br. 4. By abandoning the argument, Petitioner forfeited it.

Because Petitioner forfeited each of its three main theories, the Ninth Circuit's brief, unpublished decision addressed none of them. This Court "generally do[es] not address arguments that were not the basis for the decision below," *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996)), and Petitioner provides no reason for the Court to depart from that rule here.

B. Petitioner has not developed the factual record necessary for this Court's review.

Petitioner's failure to preserve its main arguments below has also deprived this Court of the factual record necessary to evaluate them.

Petitioner's forfeited arguments are highly fact intensive. Its principal theory (Pet. 11) is that it is not subject to *Montana*'s first exception because the degree of federal regulation to which it is subject and federal funding it receives renders it a "quasi-governmental entity." But in support of that characterization,

Petitioner provides little in the way of concrete details. It simply asserts that "[r]ural electric cooperatives … have been referred to as instrumentalities of the United States" by other courts in other cases. Pet. 20-21 (citing *Cessna v. Rea Energy Coop., Inc.*, No. 3:16-cv-42, 2016 WL 3963217, at *5 (W.D. Pa. July 21, 2016), *aff'd*, 753 F. App'x 124 (3d Cir. 2018)); *see also* Pet. 3-4 (citing *Ala. Power Co. v. Ala. Elec. Coop., Inc.*, 394 F.2d 672, 677 (5th Cir. 1968)).

There is no record in this litigation on the source of Petitioner's funding. Nor is there a record on the degree to which its operations are hampered or dictated by federal regulation, either on the Crow Indian Reservation or anywhere else. And Petitioner's theory as to the forum-selection and choice-of-law provisions in Mr. Big Man's membership application relies on assertions about the "parties' expectations" regarding the exercise of tribal jurisdiction over their disputes, Pet. 7; *see* Pet. 23, 26, but there is no factual record speaking to that issue, either.

In short, even were this Court inclined to overlook Petitioner's failure to preserve its fact-intensive arguments in the lower courts, review of those arguments would not be feasible given the lack of any suitable factual record.

C. There are several alternative, factbound bases for affirmance.

The district court ruled against Petitioner for two additional reasons. First, it concluded that the Crow Tribe had regulatory authority because Mr. Big Man resides on tribal trust land—rendering the scope of the

Montana exceptions irrelevant. Second, the court held that even assuming the *Montana* framework for nontribal land applied, the Tribe's exercise of jurisdiction independently fell within the second exception, which covers tribal regulations that protect health and welfare. The Ninth Circuit affirmed based on *Montana*'s first exception without reaching those alternative holdings.

If this Court were to grant certiorari, these alternative, factbound bases for affirmance would come to the fore. And even if this Court were ultimately to vacate the decision below, the court of appeals would have little trouble affirming the district court's judgment on these alternative grounds.

1. Though the district court held that both *Montana* exceptions applied, it also held that the Crow Tribe had jurisdiction even without regard to those exceptions. Pet. App. 9-17.

This Court held in *Montana* that Indian Tribes generally lack the inherent power to regulate nonmember conduct "on lands no longer owned by the tribe" if that conduct "bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564-65. Accordingly, *Montana*'s two exceptions cover scenarios in which "tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands*." *Id.* at 565 (emphasis added).

When it comes to conduct on tribal trust land, by contrast, an Indian Tribe's regulatory jurisdiction is broader than what is permitted under *Montana*'s

exceptions. That broader authority derives from the tribe's "power to exclude non-Indians from the reservation" altogether. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). This greater power "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Id.*; *see also South Dakota v. Bourland*, 508 U.S. 679, 687-89 (1993). Thus, for instance, this Court in *Montana* "readily agree[d]" that the Crow Tribe could completely prohibit nonmembers from hunting or fishing on tribal land and trust land, and that the Tribe could also condition that activity "by charging a fee or establishing bag and creel limits." 450 U.S. at 557.

The district court found that Mr. Big Man's "homesite is properly considered tribal [trust] land," not fee land. Pet. App. 14. Accordingly, there is no need to evaluate the *Montana* exceptions at all in this case. The Crow Tribe has retained the sovereign power to *exclude* Petitioner from its land entirely, and when it permits Petitioner access to its members' homes, it does so subject to Petitioner's "compli[ance] with the initial conditions of entry." *Merrion*, 455 U.S. at 144. One of those conditions is reflected in Crow Law & Order Code § 20-1-110, which—like its analogues under the laws of Montana and many other States—prohibits utility-service providers like Petitioner from shutting off certain residential customers' power during the winter.

This alternative justification for the district court's ruling makes this case a poor vehicle for evaluating the scope of *Montana*'s exceptions. If this Court granted review, Respondents would argue as an alternative

ground for affirmance that the scope of *Montana*'s exceptions is irrelevant because its default rule—that Indian Tribes lack jurisdiction over nonmember conduct on nontribal lands—is inapplicable on the facts of this case. It would be awkward for this Court to decide the scope of *Montana*'s exceptions while reserving judgment on whether its default rule applies at all, especially because that antecedent question has been sharply disputed throughout this litigation. If this Court wishes to evaluate the scope of *Montana*'s exceptions, it should await a case in which *Montana*'s rule undisputedly applies to begin with.

2. Even assuming *Montana*'s default rule were implicated—and that Respondents must therefore demonstrate that one of its exceptions applies—tribal jurisdiction is also straightforward under *Montana*'s second exception.

Montana's second exception allows an Indian Tribe "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 … health or welfare of the tribe." 450 U.S. at 566. As the district court found, "[w]inter in Montana can be bitterly cold and electric service provides the necessary power to keep the heat on." Pet. App. 17. This Court, too, has recognized that "the discontinuance of … heating for even short periods of time may threaten health and safety." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978). Petitioner's conduct—terminating electric service during the winter—thus "clearly imperils the health and welfare of any Tribal member who obtains service from [Petitioner]," and "therefore

the Tribe itself." Pet. App. 17; *see United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) (risk of injury even to a small number of tribal members "would certainly be detrimental to the health or welfare of the Tribe" (internal quotation marks omitted)). This gives the Crow Tribe jurisdiction over that conduct. If this Court were to grant certiorari, Respondents would argue for affirmance on this alternative basis as well, complicating the Court's review.

II. THERE IS NO CIRCUIT SPLIT.

Petitioner alleges a circuit split involving the Eighth, Ninth, and Tenth Circuits. No split exists. For one thing, there is not—and could not be—any split as to the question presented in the petition, for no court has *ever* addressed that question, not even the Ninth Circuit below. Nor do the cases cited by Petitioner evince a circuit split on any other question related to this case.

1. Petitioner argues (Pet. 15-21) that the Ninth Circuit split from several other courts of appeals by holding that Petitioner's "quasi-governmental" status did not preclude application of *Montana*'s first exception. Petitioner is incorrect.

At the outset, it is difficult to credit Petitioner's complaint (Pet. 15) that "[t]he Ninth Circuit's decision completely ignored the type of entity [Petitioner] is." That is because, as discussed, Petitioner did not argue in the Ninth Circuit (or any other forum before this one) that, as a private yet "quasi-governmental" entity, it is not subject to *Montana*'s first exception. The court of appeals was understandably silent on this theory, and it could not have created or joined a circuit split by issuing

a nonprecedential opinion that failed to address an argument that was not made.

Further, Petitioner does not even attempt to evince a split of authority as to its other two principal theories—that its commercial relationships with members of the Crow Tribe are nonconsensual because it may not discriminate against them, and that forum-selection and choice-of-law provisions in an agreement can divest an Indian Tribe of jurisdiction even when the Indian Tribe is not a party. Nor does Petitioner suggest a split as to its nexus argument, the only issue it has preserved and the only one actually addressed by the Ninth Circuit.

2. In any event, even had the Ninth Circuit addressed Petitioner's "quasi-governmental-entity" theory, it would have been the first court in the nation to do so. None of the cases Petitioner cites from other circuits addressed anything remotely resembling that theory; nor is there any inconsistency among any of them and the decision below.

Of the decisions Petitioner characterizes as falling on the "other" side of the purported split, most involved tribal jurisdiction over States or their political subdivisions. In other words, the nonmember entity in each case was a state government acting in that capacity, not a private corporate entity like Petitioner.

The first such decision came from the Ninth Circuit itself. *See County of Lewis v. Allen*, 163 F.3d 509 (1998) (en banc). *Allen* involved an agreement in which the nontribal entity was another sovereign—the State of Idaho. *See id.* at 511-12. The en banc court of appeals

observed that *Montana*'s first exception "ha[d] never been extended to contractual agreements between two governmental entities," and it accordingly "decline[d] to hold that the exception applies to an intergovernmental … agreement." *Id.* at 515. Though Petitioner now claims that *Allen*—an en banc Ninth Circuit decision—conflicts with the Ninth Circuit panel decision below, it is telling that Petitioner did not cite *Allen* in its appellate briefing on the scope of *Montana*'s first exception.

Allen presaged what this Court would say about the scope of *Montana*'s first exception just a few years later. In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court explained that the exception covers only those entering "private" consensual relationships, not "States or state officers acting in their governmental capacity." *Id.* at 372; *see id.* at 359 n.3. It therefore held that tribal courts lack jurisdiction to adjudicate tort claims against "[s]tate officials operating on a reservation to investigate off-reservation violations of state law." *Id.* at 374.

Petitioner presents (Pet. 15-18) the Tenth Circuit's decision in *MacArthur v. San Juan County*, 497 F.3d 1057 (2007), and the Eighth Circuit's decision in *Fort Yates Public School District # 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (2015), as the primary sources of conflict with the decision below. But both cases involved political subdivisions of States and were therefore straightforward applications of *Hicks*.

MacArthur held that Navajo courts lacked jurisdiction over an employment dispute between members of the Navajo Nation and a Utah political subdivision. 497 F.3d at 1060-62, 1071-74. The Tenth Circuit explained that under *Hicks*, the employment

relationships did not give rise to tribal jurisdiction because they were (1) between tribal members and a political subdivision—"strictly a creature of Utah law"; (2) were "entered into exclusively in [the subdivision's] governmental capacity" and were "part and parcel of [its] duty to provide medical services to [its] residents"; and (3) involved what was "unquestionably an exercise of the police power." *Id.* at 1074.

Similarly, *Fort Yates* dealt with a dispute between an Indian public student and her school district, "a political subdivision of the State of North Dakota." 786 F.3d at 665. In ruling that the tribal court lacked jurisdiction, the Eighth Circuit primarily relied on a provision of North Dakota law that "restricts state school districts' contractual authority" by barring them from entering into agreements that "'enlarge[] or diminish[] the jurisdiction … that may be exercised by … tribal governments.'" *Id.* at 667 (final alteration in original) (quoting N.D. Cent. Code § 54-40.2-08). The court further explained that when a state political subdivision "act[s] in its official capacity" and "in furtherance of its obligations" under state law, its agreements are not the private, consensual relationships of which *Montana* spoke. *Id.* at 669.

Petitioner is not a political subdivision of any State. Its effort to generate a conflict instead depends on its farfetched attempt (Pet. 16-17) to cast itself as exercising the "police power" of the federal government, thereby making it a "quasi-governmental entity." But even taking that argument on its own terms, it does nothing to suggest a conflict. The cases cited by Petitioner involved creatures of state law (not federal

law) whose conduct was statutorily mandated. Petitioner points to no decision—not even the one below—that addressed whether a private entity that "further[s]" federal "objective[s]" and is "subject to extensive federal regulation and contractual mortgage requirements," Pet. 16, is a "quasi-governmental entity" for purposes of tribal jurisdiction, or what such a characteristic might mean when applying *Montana*'s exceptions.

Petitioner also invokes (Pet. 18-19) the Eighth Circuit's decision in *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (2019). Though that case addressed tribal jurisdiction over private entities, it too is inapposite here because the court did not rely on—or even mention—the entities' purported "quasi-governmental" status.

Kodiak Oil involved tribal-member plaintiffs who owned mineral rights on reservation land and had allowed oil and gas companies to operate wells there. 932 F.3d at 1130. The plaintiffs claimed that they were owed royalties for natural gas allegedly wasted by the companies' processes. *Id.* The Eighth Circuit held that the tribal court lacked jurisdiction over the dispute for two reasons. *Id.* at 1134.

First, the court held that the plaintiffs' claim arose under federal law and therefore could not be adjudicated in tribal court. *See Kodiak Oil*, 932 F.3d at 1134-37. It explained that "oil and gas leases on federally-held Indian trust land are governed by federal law," not general common law, because "[f]ederal regulations control nearly every aspect of the leasing process" and "[f]ederal law also controls the entire process of royalty

payments." *Id.* at 1136. And it concluded that, "at least where non-members are concerned, tribal courts' adjudicative authority is limited … to cases arising under tribal law." *Id.* at 1135.[4] Moreover, the court noted, any attempt to enforce tribal law would run headlong into federal preemption problems given the degree to which federal law "exhaustively occupies the field of oil and gas leases on allotted Indian lands." *Id.* at 1137.

Kodiak Oil also held that, for similar reasons, *Montana*'s first exception could not sustain tribal jurisdiction. 932 F.3d at 1137-38. But that holding turned on the lack of tribal interest in the subject matter of the dispute, not on the possible "quasi-governmental" status of the private oil and gas companies (which no one raised and the court did not address). The court explained that "[t]he complete federal control of oil and gas leases on allotted lands—and the corresponding lack of any role for tribal law or tribal government in that process—undermine[d] any notion" that tribal sovereign interests were at stake. *Id.* at 1138. The suit at issue arose under federal law; involved activities "complete[ly]" under "federal control"; implicated relationships "entire[ly] … mediated by the federal government"; and challenged "activity that t[ook] place

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[4] The Eighth Circuit acknowledged the tension between this broad statement and the holding in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). *See Kodiak Oil*, 932 F.3d at 1135 n.5. The truth is that tribal courts have jurisdiction over some federal claims but not others. *See Hicks*, 533 U.S. at 367-68. In any event, this question has no bearing on Mr. Big Man's suit, which arises under tribal law.

between the non-member companies and the federal government." *Id.*

The subject matter of this dispute, by contrast, bears none of these attributes. Retail sales of electricity are far from under federal control; indeed, the federal government generally *lacks* authority to regulate such sales. *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266-67 (2016).[5] Though it offers low-interest loans (*see* Pet. 7, 26), the federal government plays no role in Petitioner's relationships with its customers. And the activity giving rise to Mr. Big Man's suit directly involved a member of the Crow Tribe. Further, the dispute here is far from the economic squabble in *Kodiak Oil*; it implicates a core sovereign prerogative of the Tribe—"protect[ing] the lives, health, … comfort and general welfare of [its] people." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

For these reasons, the decision below does not conflict with the decision of any other circuit. Contrary to Petitioner's view (Pet. 19-20), neither does the Ninth Circuit's decision in *Window Rock Unified School District v. Reeves*, 861 F.3d 894 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018). Petitioner argues (*id.*) that *Window Rock*—like the decision below—is in conflict with each of the cases just discussed. But in fact, *Window Rock* said nothing at all about the scope of *Montana*'s first exception.

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[5] Petitioner makes no claim to deriving its "quasi-governmental" character from any State. Rather, it claims (Pet. 16) to exercise the "federal government's police power."

In *Window Rock*, the Ninth Circuit held only that a claim of tribal jurisdiction arising from an Indian Tribe's "right to exclude, which generally applies to nonmember conduct on tribal land," was "colorable or plausible." 861 F.3d at 898. That was enough to require exhaustion of the jurisdictional question in tribal court. *Id.* at 897; *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985). The court therefore did not need to evaluate "the exceptions articulated in *Montana*, … which generally apply to nonmember conduct on non-tribal land." *Window Rock*, 861 F.3d at 898; *see id.* at 899 n.4 ("Because we hold that jurisdiction is colorable under the right-to-exclude framework, we need not reach [the] arguments about the [*Montana*] framework.").[6]

III. THE DECISION BELOW IS CORRECT.

The Court should deny review for the additional reason that the Ninth Circuit's decision is correct. *Montana*'s first exception easily sustains the Crow Tribe's jurisdiction.

A. Petitioner is subject to tribal jurisdiction under *Montana*'s first exception.

The Ninth Circuit's sole holding below was that the Crow winter-shutoff regulation "has a nexus to the activity that is the subject of the consensual

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[6] Despite Petitioner's insertion (Pet. 19) of quotation marks around the term "quasi-governmental" in its discussion of *Window Rock*, this phrase does not appear in that case or any other case Petitioner cites. Like *Allen*, *MacArthur*, and *Fort Yates*, the entities at issue in *Window Rock* were state political subdivisions—namely, school districts. *Window Rock*, 861 F.3d at 907 (Christen, J., dissenting).

relationship" Petitioner has formed with the Crow Tribe and its members. Pet. App. 3. Thus, under *Montana*'s first exception, the Tribe has jurisdiction.

Petitioner objects (Pet. 14) that the agreement at issue here "does not justify tribal court jurisdiction over *all* aspects of the relationship or over [Petitioner] in general." But Petitioner attacks a straw man. The Ninth Circuit did not hold, and Respondents have never claimed, that all disputes between Petitioner and Mr. Big Man belong in tribal court. All that is required to sustain jurisdiction here is that the "regulation imposed by the Indian tribe have a nexus to the consensual relationship." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). It undeniably does. Petitioner agreed to sell electric power to Mr. Big Man on the Crow Indian Reservation. The Crow Tribe seeks nothing more than to regulate the manner in which Petitioner stops performing its duties under that agreement. And the Tribe's regulation imposes no greater burden than Montana already places on most utility-service providers operating in the State—on or off the reservation.

B. The decision below is consistent with *Plains Commerce*.

Petitioner criticizes (Pet. 11-15) the decision below for "impermissibly expand[ing]," Pet. 11, *Montana*'s first exception. In so arguing, Petitioner relies (*see* Pet. 13-15) almost exclusively on this Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). Petitioner's criticism is misplaced, as the decision below is entirely consistent with *Plains Commerce*.

Plains Commerce involved a sale of fee land by a non-Indian bank to non-Indian buyers. 554 U.S. at 320. The land's previous owners—an Indian couple—brought suit in tribal court, seeking to unwind that sale. *Id.* at 320-23. This Court held that the tribal court lacked jurisdiction because "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land." *Id.* at 332. *Plains Commerce* does not dictate the outcome here for two reasons: the land at issue here is tribal trust land, not fee land; and the Crow Tribe is regulating *conduct* on that land, not the attempt to alienate it.

This Court's analysis in *Plains Commerce* repeatedly emphasized the importance of the land's fee status. *See* 554 U.S. at 331 ("The status of the land is relevant 'insofar as it bears on the application of … *Montana*'s exceptions to [this] case.'" (alterations in original) (quoting *Hicks*, 533 U.S. at 376 (Souter, J., concurring))); *see also, e.g.*, *id.* at 330 (under *Montana*'s "'general proposition,'" an Indian Tribe's efforts "to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid'" (quoting *Atkinson*, 532 U.S. at 651, 659)). And the Court relied heavily on the fact that the Indian Tribe was attempting to "regulate *the sale* of non-Indian fee land." *Id.* at 332 (emphasis added); *see id.* at 334 ("[W]hether or not we have permitted regulation of nonmember activity on non-Indian fee land in a given case, in no case have we found that *Montana* authorized a tribe to regulate *the sale* of such land. Rather, our *Montana* cases have always concerned *nonmember conduct* on the land." (emphasis added)).

Plains Commerce thus drew a distinction between regulating a nonmember's *conduct* on nontribal fee land,

which Indian Tribes have power to do within the bounds of *Montana*, and regulating a nonmember's *alienation* of such land, which Indian Tribes may not do. *See Plains Com.*, 554 U.S. at 334 & n.1 ("The distinction between sale of the land and conduct on it is well established in our precedent … ."); *id.* at 340 ("[C]onduct taking place on the land and the sale of the land are two very different things."). As the Court explained, the basis for this distinction is that unlike regulation of nonmembers' economic activity, "regulation of the sale of non-Indian fee land … cannot be justified by reference to the tribe's sovereign interests" because it "has already been removed from the tribe's immediate control." *Id.* at 335-36.

The fact pattern here bears no resemblance to *Plains Commerce*. The relevant land—the tract on which Mr. Big Man received electricity from Petitioner—is tribal trust land, not fee land. Pet. App. 14. The Crow Tribe is asserting jurisdiction over Petitioner's *conduct* on that land, not an attempt to *alienate* that land. And protecting Mr. Big Man—a tribal member living on tribal trust land—from exposure to cold during the middle of the winter implicates the Tribe's core sovereign interests. *See Montana*, 450 U.S. at 564-66.

C. Petitioner's other arguments against tribal jurisdiction are meritless.

The petition raises several complex theories as to why Petitioner is not subject to tribal jurisdiction under a straightforward application of *Montana*'s first exception. In addition to being forfeited, none of these arguments has any merit.

1. Petitioner's preferred theory seems to rely on its repeated characterization (Pet. 2, 11, 15, 16, 19, 20) of itself as a "quasi-governmental" entity. Petitioner also relatedly and repeatedly asserts (Pet. 3, 4, 20, 21, 26) that it is an "instrumentality of the United States." The upshot of the argument is that Petitioner must therefore be immune from tribal jurisdiction, which would in some fashion frustrate the "objective[s]," *e.g.*, Pet. 16, 21, of the Rural Electrification Act of 1936, ch. 432, 49 Stat. 1363 (codified as amended at 7 U.S.C. §§ 901-918c).

For starters, Petitioner's characterization of itself as a federal governmental entity of some stripe is difficult to grasp given that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power *of the States*." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (emphasis added). In recognition of that fact, this Court's cases have consistently held that retail sales of electric power are outside federal jurisdiction. *See, e.g.*, *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373, 378-79 (2015). Rather, local regulators—*i.e.*, States and Indian Tribes—regulate utilities. So it is unclear what role Petitioner might play in that market as a federal actor.

In any event, Petitioner—a member-owned cooperative organized under Montana law—is not a governmental entity of any variety. Petitioner suggests (*see* Pet. 16-17, 26) that it must be a federal entity because it takes federal loans and "fulfills the federal purposes of the Rural Electrification Act," Pet. 15, but that theory is implausible. If receipt of federal loans or achieving a congressionally approved goal were enough

to "federalize" an entity, an enormous number of small businesses would find themselves, unwittingly, instrumentalities of the government—and immune from tribal jurisdiction (and perhaps, to some extent, from state jurisdiction too). Indeed, the entire purpose of the Rural Electrification Act was to accomplish rural electrification through *private* enterprise. *See Ark. Elec. Coop.*, 461 U.S. at 386 (the Act created "a lending agency rather than a classic public utility regulatory body").

The same goes for Petitioner's theory (*see* Pet. 16-17) that it is a quasi-governmental entity because it is subject to federal regulations. The same could be said about many corporate entities. But it would be a surprise to most to learn that the federal laws regulating their conduct actually morph them into federal entities. It is therefore little surprise that Petitioner musters no authority from this Court or any court suggesting that either receipt of federal funds or obligations under federal law can imbue a private corporate entity with "quasi-governmental" character. Indeed, the nonmember defendant bank that challenged tribal jurisdiction in *Plains Commerce* was surely subject to far more federal regulation than Petitioner, but this Court did not suggest that it was immune from tribal jurisdiction on that basis.

Moreover, Petitioner does not explain *why* its status as a purported "quasi-governmental" entity would render its relationship with Mr. Big Man nonconsensual. Petitioner does not allege that it is compelled by the federal government to operate using federal loans, or that it is compelled to sell electricity on the Crow Indian

Reservation (or at all). Far from the political subdivisions at issue in cases like *MacArthur* and *Fort Yates*—creatures of state law bound by state law to enter into relationships with Indian Tribes or their members—Petitioner exists of its own volition and is not forced to do *anything*.

Petitioner hints that its relationships with tribal members are nonconsensual because it is prohibited by federal regulation from declining to serve customers based on their tribal membership. *See* Pet. 26 (citing 7 C.F.R. § 15.3).[7] But the mere fact that Petitioner is barred from intentionally discriminating against tribal members does not establish that its relationships are nonconsensual. Federal and state antidiscrimination laws are ubiquitous, applying to the vast majority of employment relationships and consumer transactions. This does not suggest that most economic relationships are "nonconsensual." Indeed, if Petitioner's theory were correct, *Montana*'s first exception would be largely illusory. For example, an employer operating on tribal trust land could argue that it is exempt from tribal jurisdiction over its disputes with tribal-member employees because Title VII prohibits it from refusing to hire them in the first place. That is obviously not the law.

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[7] Though Petitioner largely treats its nondiscrimination obligations as an external constraint on its freedom to contract, it acknowledges (*see* Pet. 3) that it self-imposes a nondiscrimination policy as one of its "[c]ooperative [p]rinciples," *Cooperative Principles*, Big Horn Cnty. Elec. Coop., Inc., https://www.bhcec.com/about-us/cooperative-principles (last visited Nov. 3, 2022).

2. Finally, Petitioner argues (Pet. 22-27) that the Crow Tribe was divested of its authority over Petitioner's conduct by the forum-selection and choice-of-law provisions in Mr. Big Man's membership application. But these provisions have nothing to do with this suit, which was instantiated by Petitioner for the purpose of a federal injunction against the tribal courts' exercise of *subject-matter jurisdiction* over it. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) ("[V]enue and subject-matter jurisdiction are not concepts of the same order."). The tribal courts have yet to rule on the enforceability of those provisions, and Petitioner does not ask this Court to do so.

In any event, the Crow Tribe was not a party to Petitioner's agreement with Mr. Big Man. That agreement could therefore not have affected the Tribe's sovereign right to regulate Petitioner's conduct and adjudicate disputes arising from it. *See Merrion*, 455 U.S. at 148 (an Indian Tribe's "sovereign power" is an "enduring presence that governs all contracts subject to [its] jurisdiction … unless surrendered in unmistakable terms").

To support its theory, Petitioner cites (Pet. 23-25) several cases for the tenuous proposition that *Montana*'s first exception requires the nonmember's affirmative consent to tribal jurisdiction. But none of those cases says any such thing.

Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc., 715 F.3d 1196 (9th Cir.), *cert. denied*, 571 U.S. 1110 (2013), involved a commercial contract with a tribal entity, and simply noted that when an Indian Tribe contracts with a nonmember, it *may* waive its

jurisdiction in the contract if it does so "in unmistakable terms." *Id.* at 1205 (quoting *Merrion*, 455 U.S. at 148). As for the role of consent, the court observed only that explicit consent offers an *additional* basis for tribal jurisdiction—above and beyond *Montana*'s two exceptions. *Id.* at 1205-06.

Petitioner's other cases are likewise unhelpful. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided Court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 579 U.S. 545 (2016), involved tribal jurisdiction over a *tort* claim, and the language Petitioner cites (Pet. 23-24) was an aside unrelated to the court's application of *Montana*. *See Dolgencorp*, 746 F.3d at 173, 174 n.4. And the language Petitioner block-quotes (Pet. 24) from *Ute Indian Tribe of the Uintah & Ouray Reservation v. McKee*, 32 F.4th 1003 (10th Cir. 2022), simply restates the unobjectionable proposition that an Indian Tribe's jurisdiction under *Montana*'s first exception is limited to disputes that "relate to the parties' contractual relationship." *Id.* at 1009. That is the nexus requirement the Ninth Circuit found was satisfied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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