No. 19-1143

IN THE

Supreme Court of the United States

FMC CORPORATION,

Petitioner,

v.

SHOSHONE-BANNOCK TRIBES,

Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, POWER COUNTY DEVELOPMENT AUTHORITY, AND BANNOCK DEVELOPMENT CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its

[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties received notice and have provided consent to this filing.

members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as this case involving the scope of tribal regulatory jurisdiction over businesses owned or operated by nonmembers on non-Indian lands.

The Shoshone-Bannock Tribes (Tribes), the Respondent in this case, is a federally recognized tribe based at the Fort Hall Reservation, established pursuant to the Treaty of Fort Bridger of 1868. Power County Development Authority and Bannock Development Corporation are local non-profit economic development entities in the State of Idaho. These entities have substantial interests in non-Indian fee lands near or within the boundaries of the Fort Hall Reservation. Prior to its closure in 2000, FMC Corporation's phosphate processing plant and mining operation carried a payroll in excess of $40 million annually and paid millions of dollars in state and local taxes. The closure of the FMC plant was a significant economic loss for the region. Power County Development Authority and Bannock Development Corporation are intensely interested in the successful redevelopment of the 2,000-acre former FMC site (along with development of other nearby industrial sites). Located at the intersection of two major interstate highways and accessible to rail and air transport as well as gas and electric power lines, the FMC site is well situated to capitalize on economic opportunities. And though the site is located within the Eastern Michaud Flats Superfund Site, hundreds of acres of this Superfund site have already been certified by the U.S. Environmental Protection Agency (EPA) for redevelopment. An economic impact analysis completed in 2011 found that "a remediated FMC site likely represents the area's best

possibility for attracting major industrial development and associated high paying jobs."[2]

While *Amici* deeply respect tribal sovereignty over Indian lands, they have a strong interest in ensuring that the courts faithfully apply this Court's framework from *Montana* v. *United States*, 450 U.S. 544 (1981), concerning tribal jurisdiction over nonmembers on non-Indian fee lands within reservation boundaries. Fee lands held by nonmembers near or within the boundaries of an Indian reservation are almost always subject to the jurisdiction of the federal, state, and local governments, where nonmembers have the opportunity to participate in the democratic process. The Ninth Circuit's decision upsets this longstanding arrangement and considerable reliance interests, by businesses and others, premised on it.

The Ninth Circuit's decision below conflicts with the approach to the *Montana* exceptions taken by other circuits, and also merits review by this Court because it raises an exceptionally important issue that only this Court can resolve: whether, as the Ninth Circuit holds, the *Montana* exceptions grant tribal regulatory jurisdiction over nonmembers on nonmember fee lands even where that jurisdiction is not necessary to protect tribal self-government.

SUMMARY OF ARGUMENT

Across the United States, communities and businesses exist on non-Indian fee lands near or within Indian reservation boundaries. In settling on those lands and ordering their affairs, they have long relied on the strong

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[2] Neil Tocher, *Economic Impact Analysis For a Remediated and Redeveloped FMC Site* at 3 (2011), available at http://www.co.power.id.us welcome-to-power-county-idaho/business-and-industry/power-county-develpment-authority/.

presumption—founded on this Court's Indian law jurisprudence—that nonmembers on non-Indian fee lands are not subject to tribal regulation. *Montana*, 450 U.S. at 565 (explaining "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). Congress has enacted statutes to alter this principle in particular contexts, and none of these statutory exceptions apply here. Furthermore, this Court has provided only two very narrow judicial exceptions to this strong presumption: one for a limited kind of consensual commercial dealings, and a second for certain activities that constitute a significant "threat" to a core attribute of tribal sovereignty—a tribe's political integrity, economic security, or health or welfare. Seldom is either exception applicable; even more rare would be a case where *both* exceptions applied simultaneously, as the Ninth Circuit incorrectly found here. As this Court has made plain, these "*Montana* exceptions" only apply where necessary to protect tribal self-government. See *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001) ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.").

The Ninth Circuit improperly concluded that tribal regulatory requirements of the kind imposed on FMC were justified under the first *Montana* exception, finding a "consensual relationship" arose when FMC "negotiated and entered into [a] permit agreement with the Tribes…." Pet. App. 30a. This is not the kind of consensual relationship through commercial dealings that this Court has found sufficient under the first *Montana* exception. Even where consensual commercial relationships exist, tribal authority to assert regulatory jurisdiction only applies to the extent necessary to protect the tribe's interests in the commercial dealings at issue. *Atkinson*

Trading Co. v. *Shirley*, 532 U.S. 645, 656 (2001) ("nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another-it is not 'in for a penny, in for a Pound'." (internal citation omitted)). The Ninth Circuit, however, expanded the first *Montana* exception to encompass a wide range of noncommercial, nonconsensual interactions.

Additionally, the Ninth Circuit improperly found that waste disposal at the FMC site—though overseen by EPA in keeping with federal requirements and in an area on the border of the reservation with substantial other development and industrial activity—constituted a "threat" sufficient to apply the second *Montana* exception. However, EPA has been actively involved in a lengthy process under federal law, with significant involvement of the Tribes and other stakeholders, to resolve environmental waste concerns at the FMC site. By invoking the second *Montana* exception, the Ninth Circuit authorized the Tribes to assert regulatory jurisdiction over the site and impose millions of dollars in fees (essentially in perpetuity), even though the federal government is already taking action for the express purpose of addressing the asserted threat. In so doing, the Ninth Circuit broke from the framework established in *Montana* and has taken an approach that disrupts the jurisdictional equities vis-à-vis tribes and non-tribes on non-Indian fee lands and poses an especially acute risk of harm to the Idaho *amici* given their interests in and proximity to the particular non-Indian fee lands at issue in this case. This Court should grant the petition and reverse.

ARGUMENT

I. THE *MONTANA* EXCEPTIONS ARE NARROW AND RARELY INVOKED, BUT THE NINTH CIRCUIT WRONGLY INVOKED BOTH EXCEPTIONS HERE

Unlike several other recent Indian law cases before this Court,[3] this case does not turn on the interpretation of the treaty between an Indian tribe and the United States. Instead, this case turns on the strong presumption established in *Montana* v. *United States*, 450 U.S. 544 (1981). *Montana* addressed the "sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547. Because the 1868 Fort Laramie Treaty did not grant regulatory powers, *id.* at 561, this Court considered whether concepts of "inherent sovereignty" gave regulatory powers to the tribe, *id.* at 563, and reiterated the longstanding "general proposition" that inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers. *Id.* at 565 (recognizing that Indian tribes have "some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands"). This Court, then, set forth two[4] exceptions to this general proposition: 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"; and second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct

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[3] *E.g., Herrera* v. *Wyoming*, 139 S. Ct. 1686 (2019) (addressing power of state to penalize hunting by a tribal member under an 1868 treaty between the United States and the Crow Tribe).

[4] The Ninth Circuit identified "three" *Montana* exceptions because it seemed to treat legislation as one of the exceptions. Pet. App. 2a, 28a.

of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. This Court plainly described these exceptions in narrow terms. *Id.* at 566 (nonmember activity must "so threaten the Tribe's political or economic security as to justify tribal regulation"). For either of the *Montana* exceptions to apply, tribal regulation of the activity must be "necessary to protect tribal self-government." *Id.* at 564 (citations omitted).

Eight years later, *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation* also framed the *Montana* exceptions in narrow terms. 492 U.S. 408, 431 (1989) ("impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe"). And this Court's decisions after *Brendale* confirm that tribal authority to regulate nonmembers on non-Indian fee lands is severely constrained. *E.g.*, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) ("efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid" and the *Montana* "exceptions are limited ones" and "cannot be construed in a manner that would swallow the rule" or "severely shrink it") (internal citations and quotation marks omitted). The Petition for Writ of Certiorari filed by FMC (see Pet. 17-19) correctly explains that the Ninth Circuit's broad use of the *Montana* exceptions conflicts with the approaches in other circuits, such as *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019) and *Jackson* v. *Payday Fin., LLC*, 764 F.3d 765, 783 (7th Cir. 2014), *cert. denied*, 575 U.S. 983 (2015).

As a practical matter, the two *Montana* exceptions must be limited in scope and application to ensure proper respect for the interests of both tribes and non-tribal

entities. Otherwise, the narrow exceptions would defeat (or at least, severely shrink) *Montana's* core principle that non-Indians on non-Indian fee lands are not subject to tribal jurisdiction.[5] In triggering both exceptions in this case, the Ninth Circuit failed to properly interpret and apply this Court's jurisprudence under *Montana*, as set forth below.

A. The first *Montana* exception is inapplicable where the relationship between the Indian tribe and nonmember is not truly "consensual" through "commercial" arrangements

In *Montana*, this Court recognized that, although Indian tribes generally lack the authority to regulate nonmember activity on non-Indian fee land, a tribe may regulate "the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through *commercial* dealing[s], contracts, leases, or other arrangements." 450 U.S. at 565 (concluding that nonmembers who entered non-Indian fee land on the tribe's reservation to hunt and fish did not enter into a consensual relationship with the tribe) (citations omitted) (emphases added). This Court has made clear that the first *Montana* exception is cabined to truly *consensual commercial* arrangements. See, *e.g.*, *Strate* v. *A-1 Contractors*, 520 U.S. 438, 457 (1997); *Plains Commerce*, 554 U.S. at 334-335 (referencing a "business enterprise

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[5] See Jane M. Smith, Congressional Research Service, *Tribal Jurisdiction over Nonmembers: A Legal Overview*, at 6-10 (2013) (explaining that this Court has interpreted the first *Montana* exception "narrowly" and that "Federal courts have rarely found tribal jurisdiction based on a nonmember's consensual relationship," and the second exception "appears to be very limited and will be applied only in cases in which the tribe's survival is threatened by nonmember conduct"), available at https://fas.org/sgp/crs/misc/R43324.pdf.

employing tribal members" and "commercial development"—without referencing any non-commercial examples—as activities on non-Indian fee lands that might trigger the *Montana* exceptions).

This Court expressly limited the first *Montana* exception to "commercial" contexts: "through commercial dealing[s], contracts, leases, or other arrangements." 450 U.S. at 565; see *Lockhart* v. *United States*, 136 S. Ct. 958, 965 (2016) (discussing the series-qualifier canon, which "requires a modifier to apply to all items in a series when such an application would represent a natural construction"). The first three nouns in this series—"dealing[s], contracts, leases"—are clearly *commercial in nature*, and it is more logical to construe the final noun in the series—"*other arrangements*"—as referring to "commercial arrangements" as opposed to "any arrangements." See *Lagos* v. *United* States, 138 S. Ct. 1684, 1688 (2018) (*noscitur a sociis*). This view is also reinforced by the cases, all of which involve commercial dealings of one kind or another, cited by *Montana* immediately following this language. See *Williams* v. *Lee*, 358 U.S. 217 (1959) (sale of goods); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904) (livestock grazing on tribal lands pursuant to contracts with tribe members); *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905) (trading goods within reservation); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (cigarette sales). However, the Ninth Circuit rejects this plain reading of the first *Montana* exception. See *Smith* v. *Salish Kootenai Coll.*, 434 F.3d 1127, 1137 n.4 (9th Cir. 2006) (rejecting "commercial" as a required aspect for this exception).

Regardless of whether the first *Montana* exception applies exclusively in commercial contexts, the nonmember must have entered the relationship with the tribe at issue in the case on a "consensual" basis, and the

tribe's *assertion of jurisdiction* cannot be the basis for that consent. In *Strate*, this Court affirmed the Eighth Circuit's *en banc* decision, which held that a tribal court lacked subject matter jurisdiction over a personal injury dispute between two nonmembers. See *Strate*, 520 U.S. at 443-445. *Strate* noted that the first *Montana* exception was inapplicable because the conduct at issue—personal injury—was tortious in nature and thus did not rise to the level of a "consensual relationship" between a nonmember and a tribe. See *id.* at 457. Settling a tribe's assertion of regulatory authority (by, for example, obtaining a permit or even paying a fee to dispose of waste on one's own non-Indian fee lands) is not the type of *consensual commercial relationship through commercial arrangements* required by *Montana*'s first exception for the tribe to then exercise complete authority, including adjudicatory authority. Otherwise, an *assertion* of regulatory authority could quickly become a device for finding jurisdiction.

B. The second *Montana* exception is inapplicable where the conduct, such as the environmental concerns addressed here by EPA, does not threaten tribal self-government

Given the number of Superfund sites across the United States and other areas with environmental concerns, the Ninth Circuit's approach poses a serious risk of harm to communities and businesses throughout Indian country. A recent report by the Government Accountability Office (GAO) lists more than 80 EPA Superfund sites "with Native American interest."[6] And though studies on this topic appear scarce, dozens of Superfund sites are

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[6] See also GAO Report, Superfund: EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes, at 35-36 (Jan. 2019), available at https://www.gao.gov/assets/700/696541.pdf (listing more than 80 EPA Superfund sites with Native American interest).

undoubtedly located within or near Indian reservations. Additionally, many environmental contexts would allow tribes, under the approach taken by the Ninth Circuit to the second *Montana* exception, to assert jurisdiction over nonmember activities on non-Indian fee lands: for example, solid waste sites regulated under the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 *et seq.*); spills regulated under the Oil Pollution Act (33 U.S.C. §§ 2701 *et seq.*); and many others.[7] Indeed, pollution of all kinds can be characterized—often rightly so—as a "threat" to a tribe and its members. A threat alone, however, is not enough to trigger the second *Montana* exception, which only applies if the tribe demonstrates that "the conduct of non-Indians on fee lands within its reservation . . . 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 (citations omitted) (emphasis added). To trigger the second exception, the conduct by the nonmember "must do more than injure the tribe, it must *imperil the subsistence of the tribal community*." *Plains Commerce*, 554 U.S. at 341 (citation and internal quotation marks omitted) (emphasis added). The assertion of tribal power must be "necessary to avert catastrophic consequences." *Ibid.* (citation omitted).

The environmental risks posed by the waste on the FMC site, though very real and significant if left unregulated, do not rise to this level of catastrophic threat.

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[7] *Amici* do not contest the right of tribal governments to require permits and reasonable fees for the storage of waste *on lands held by the tribe*. See *Montana*, 450 U.S. at 557 (explaining that tribes may regulate activities of nonmembers on "land belonging to the Tribe or held by the United States in trust for the Tribe"). But here, the Tribes imposed costly permitting requirements due to environmental concerns arising from the disposal of waste on lands owned in fee by nonmembers.

That is especially true where EPA has taken, and continues to take, regulatory action under federal law to address the same concerns for which the Tribes assert regulatory control. Here, the "threats" asserted by the Tribes and other stakeholders are properly addressed through the mechanisms created by Congress for this purpose.

This Court's plurality decision in *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*—rendered just eight years after *Montana*—sheds light on limited circumstances where the second exception should apply. 492 U.S. 408 (1989). The Court reversed the Ninth Circuit, which had held that "denying the Yakima Nation the right to zone fee land would destroy its capacity to engage in comprehensive planning, so fundamental to a zoning scheme." *Id.* at 421 (internal quotation marks and alterations omitted).

In this Court's controlling opinion,[8] Justice Stevens focused on the distinction between the "open" and "closed" areas of land. On the one hand, tribal jurisdiction over the closed area, which was mostly forested land, was necessary to "preserve the character of this unique resource by developing their isolated parcels without regard to an otherwise common scheme." *Id.* at 441. Justice Stevens noted that allowing tribal regulation of the fee lands inside the pristine "closed area" did "not interfere with any significant state or county interest." *Id.* at 444. On the other hand, Justice Stevens reasoned that the open area, which was already commercially developed,

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[8] No single opinion in *Brendale* garnered a majority. The Ninth Circuit has stated that Justice Stevens' opinion, joined by Justice O'Connor, is "controlling." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1303 (9th Cir. 2013) (applying the approach set forth in *Marks* v. *United States*, 430 U.S. 188, 193-195 (1977) to plurality opinions).

was not subject to tribal regulation. See *id.* at 445-447. Justice Stevens found that the open area "no longer maintains the character of a unique tribal asset." *Id.* at 446. Consequently, the Tribe lacked authority to regulate the open area. See *ibid.*

For purposes of evaluating the *Montana* exceptions, the FMC site is certainly more analogous to the developed open area in *Brendale* than the pristine closed area. See *Plains Commerce*, 554 U.S. at 333-334 (explaining that *Brendale* only allowed tribal zoning on "nonmember fee land isolated in the heart of a closed portion of the reservation") (alteration omitted). The FMC site and surrounding areas carry significant local governmental interest, particularly due to the economic importance of this industrial area to the regional economy and the nearby local government-owned airport and industrial park. Federal and state highways crisscross this portion of the reservation in an otherwise industrialized and developed area.

Though heavily industrialized and commercialized, the FMC site is sequestered and set away from the general population, and is under the longstanding and close oversight of EPA. EPA's current requirements in the environmental record of decision (known as the "IRODA" document)[9] "will be protective of human health and the environment." Pet. App. 19a (quoting IRODA at v). Though the Ninth Circuit stated that certain of the waste ponds on the site have not been capped, see *id.* at 38a, those ponds have been capped. See IRODA at p. 46-47

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[9]IRODA refers to the "Interim Amendment to the Record of Decision," which was issued by EPA in 2012 and discussed at length in the Ninth Circuit's decision. A copy of the IRODA is available at http://fmcidaho.com/wp-content/uploads/Final_IRODA_9-27-2012.pdf.

("The RCRA ponds were closed and capped in accordance with the requirements of the 1999 RCRA Consent Decree and are subject to RCRA Post Closure requirements."). This is consistent with the district court's acknowledgement that the FMC site currently poses no risk to humans. See *FMC Corp.* v. *Tribes*, No. 4:14-CV-489-BLW, 2017 WL 4322393, at *8 (D. Idaho Sept. 28, 2017) ("FMC's evidence established without rebuttal that despite the toxicity of the waste, no measurable harm had yet occurred to humans or water quality, and the EPA's containment program would prevent any future harm.").

The waste on the FMC site has been there for years, and the Tribes have failed to demonstrate how there has been a meaningful exacerbation of the problem such that tribal jurisdiction is essential. Via EPA, the federal government has taken, and continues to take, extensive action to protect human health and the environment with regard to the site. Accordingly, the Tribes' perceived threat is far from catastrophic and does not support the second *Montana* exception.

Though the Tribes should be found to lack regulatory jurisdiction over the FMC site, the Tribes have been provided and continue to have substantial opportunities for engagement in the FMC site remediation process. The Tribes and nearby communities have been deeply involved in the EPA-led site remediation process, and in no way has the FMC site threatened to undermine self-government by the Tribes. As stated in EPA's Unilateral Administrative Order (UAO) for the FMC Site, "EPA has consulted with the Shoshone Bannock Tribes of the Fort Hall Indian Reservation," UAO at 3, and EPA has entered a cooperative agreement with the Tribes concerning the FMC site and extensively engaged with the Tribes on development of the Record of Decision along with the Remedial Design and Remedial Action plans. UAO at 6-8, 12-13, 19-20. And with regard to the FMC site

remediation, the Tribes have been afforded by EPA a "reasonable opportunity to review and comment on all plans, reports or other deliverables or other written submissions to EPA prior to any EPA decision thereon." UAO at 30-31; see also IRODA at 132-163 (responding to Tribes' comments on the proposed plan for remediating the FMC site). These facts further show that the second *Montana* exception does not apply here.

II. THE NINTH CIRCUIT'S EXPANSIVE VIEW OF THE MONTANA EXCEPTIONS SWALLOWS THE GENERAL PRINCIPLE, WHILE ALSO IMPEDING FEDERAL, STATE, AND LOCAL JURISDICTION AND THREATENING ECONOMIC HARM TO COMMUNITIES AND BUSINESSES LOCATED ON NON-INDIAN FEE LANDS NEAR OR WITHIN INDIAN RESERVATIONS

The petition asks this Court to clarify when an Indian tribe may assert regulatory jurisdiction over nonmembers based on the nonmembers' activities on non-Indian fee lands located within the reservation. The implications of this issue are significant for communities and businesses located throughout Indian country.

The United States currently recognizes 573 Indian tribes [10] and has set aside more than 330 Indian reservations, with Indian tribes currently holding over 56 million acres of land, though substantially less than their ancestral lands encompassed. See National Congress of Indian Americans, *Tribal Nations and the United States: An Introduction*, at 26 (updated Feb. 2020), available at http://www.ncai.org/about-tribes. Some Indian reservations are comprised of "trust lands" (*i.e.*, those lands held in trust by the federal government for the benefit of the tribe) and "fee lands" held by the tribe, its

[10] See 84 Fed. Reg. 1,200 (Feb. 1, 2019) (annual publication of federally recognized tribes).

members, or nonmembers. *Ibid.* Federal land allotment laws and policies over the last two centuries have resulted in many Indian reservations with lands that are "scattered, fractionated, and intermixed with lands" held by nonmembers. *Id.* at 28. As this Court has recognized, "[T]here is simply no suggestion in the legislative history [of the Indian allotment acts] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. . . ." *Montana*, 450 U.S. at 560 n.9. Additionally, many communities, businesses, and other nonmembers are located on non-Indian fee lands outside, but close to, reservation boundaries and are affected in a variety of ways by tribal regulatory actions. This situation is common across the United States, especially in the West. See *Plains Commerce*, 554 U.S. at 328 ("[T]here are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes."). As such, the implications of the Ninth Circuit decision below, if left in place, are significant for non-Indian localities and businesses.

Similarly, the 544,000 square mile Fort Hall Reservation is comprised mostly of lands held by the Tribes or in trust by the federal government, but approximately 3% of the lands within this reservation are held in fee by nonmembers. As important, many communities and businesses exist in very close proximity to the boundaries of the Fort Hall Reservation. This includes Pocatello (population over 56,000), Chubbock (population over 15,000), and American Falls (population over 4,000), among others. Major roads—including Interstate 86 and Interstate 15—cross directly through the Fort Hall Reservation.

The FMC site, which is part of the larger Eastern Michaud Flats Superfund site, is located adjacent to Interstate 86 within, but on the outer boundary of, the

Fort Hall Reservation in an industrialized and developed area. Apart from the FMC site, the immediate vicinity of this border area of the reservation includes an active phosphate-ore processing facility, sand and gravel mining operation, fuel tank facility, and a wastewater treatment plant.

The Pocatello Regional Airport and Business Park, which is crucial to the local and regional economy in southeast Idaho, is itself located on non-Indian fee lands within the boundaries of the Fort Hall Reservation. This airport serves the cities of Pocatello and Chubbuck and the rest of the region with flight service to Salt Lake City (connecting to other destinations worldwide) and offers general aviation services. The Pocatello Regional Airport and Business Park provides business sites for job creation and expansion of the region's economy.

Amici have great respect for the Shoshone-Bannock Tribes and their desire for a safe, healthy, and prosperous community for their members. But *Amici* are deeply concerned by the Ninth Circuit's approach to tribal jurisdiction under the *Montana* exceptions. The Ninth Circuit expanded tribal jurisdiction over nonmembers on non-Indian lands to circumstances where an Indian tribe's relationship with nonmembers is not truly "consensual" and "commercial," and where environmental "threats" are used to justify Indian tribe regulatory authority even though the federal government is actively addressing the environmental concern through the EPA.

More particularly, the Ninth Circuit's broad interpretation of tribal jurisdiction risks placing a variety of activities occurring on land owned or controlled by local governments within the boundaries of the Fort Hall Reservation under the regulatory jurisdiction of the Tribes. This same concern applies throughout the country where businesses, including those that are members of the Chamber, operate on non-Indian fee lands within Indian

reservations. Fee lands held by nonmembers near or within the boundaries of an Indian reservation are subject to the jurisdiction of the federal, state, and local governments where nonmembers have the opportunity to participate in government. This arrangement, which has been relied upon by tribes and non-tribes alike, ensures a clear delineation of jurisdictions, reduces the potential for inter-governmental disputes, promotes a stable tax base, and facilitates economic development. However, the Ninth Circuit's opinion here incorrectly expands the narrow *Montana* exceptions and undermines the jurisdictional paradigm that usually governs these circumstances. The Ninth Circuit's decision adversely impacts the ability of these communities to establish and retain businesses, as commercial interests will be concerned about regulatory uncertainty and burdens caused by overlapping and duplicative tribal and non-tribal jurisdictions. This Court's framework in *Montana* was created to avoid such outcomes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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