No. 19-1143

In the Supreme Court of the United States

FMC CORPORATION, PETITIONER

v.

SHOSHONE-BANNOCK TRIBES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the two exceptions articulated in *Montana* v. *United States*, 450 U.S. 544 (1981), include a threshold requirement that any regulation stem from a tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations.

2. Whether the court of appeals erred in upholding tribal jurisdiction over petitioner's storage of hazardous waste on its fee land within respondent's reservation under the two *Montana* exceptions.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. Factual Background

Petitioner FMC Corporation owns fee land near Pocatello, Idaho, within the boundaries of the Fort Hall Reservation of respondent Shoshone-Bannock Tribes, a federally recognized Indian tribe. Pet. App. 4a-5a, 56a. For over 50 years, petitioner operated an elemental phosphorus plant on that land. *Id.* at 4a-5a. The production process generated millions of tons of hazardous waste, which is stored in ponds and buried tanker cars at the site and also contaminates the loose soil and

groundwater at the site. *Id.* at 1a, 5a. The waste is ignitable, carcinogenic, and radioactive. *Id.* at 36a. The waste stored in the ponds also produces phosphine gas, which is both flammable and extremely toxic. See *id.* at 38a.

1. In 1990, the Environmental Protection Agency (EPA) placed petitioner's facility on the National Priorities List (NPL) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* See 55 Fed. Reg. 35,502, 35,507-35,509 (Aug. 30, 1990). CERCLA authorizes the federal government to act unilaterally or to collaborate with other parties (including tribes) to remediate contaminated sites. See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004); 42 U.S.C. 9604(a), 9606(a), 9626. To facilitate the exercise of this authority, CERCLA established a "Superfund" that "may be used to clean up releases of hazardous substances" at sites listed on the NPL. *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 359-360, 374 (1986); see 42 U.S.C. 9611(a).

Once EPA initiates a formal investigation of a site, a potentially responsible party is barred from "undertak[ing] any remedial action at the facility unless such remedial action has been authorized by [EPA]." 42 U.S.C. 9622(e)(6). Ultimately, EPA "shall select a remedial action that is protective of human health and the environment." 42 U.S.C. 9621(b)(1). If the remedial action permits hazardous materials to remain on-site, EPA must review the selected remedy at least every "5 years" to "assure that human health and the environment are being protected." 42 U.S.C. 9621(c).

On June 8, 1998, EPA issued a "record of decision" (ROD) under CERCLA selecting a remedial plan for

petitioner's facility. C.A. E.R. (ER) 912-918 (capitalization and emphasis omitted). The ROD required petitioner to take a variety of steps to contain the waste generated by its plant, including the "capping [of] contaminated soils, extraction of contaminated ground water, and [implementation of] monitoring and institutional controls." ER 915. EPA determined that "[t]he selected remedy is protective of human health and the environment," but would be subject to periodic reevaluation. ER 917.

2. Around the same time that EPA issued the CERCLA ROD, it informed petitioner of its intent to bring an enforcement action for violations of a separate federal statute, the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* See Pet. App. 6a. Unlike CERCLA, which is fundamentally reactive, RCRA is prophylactic, and provides for "comprehensive" regulation of hazardous wastes "from cradle to grave," in accordance with "rigorous safeguards and waste management procedures." *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 331 (1994); see 42 U.S.C. 6903(5), 6921-6925. Because RCRA does not authorize EPA to approve tribes to implement their own waste programs in lieu of the federal program, the agency generally implements RCRA programs in Indian country itself.

EPA alleged that petitioner violated a host of RCRA requirements pertaining to permitting, waste disposal and storage, and groundwater monitoring. See generally Complaint, *United States* v. *FMC Corp.*, No. 98-cv-406 (D. Idaho Oct. 16, 1998). The parties entered into settlement talks, in which respondent participated. See *United States* v. *Shoshone-Bannock Tribes*, 229 F.3d

1161, 2000 WL 915398, at *1 (9th Cir. 2000) (Tbl.), cert. denied, 532 U.S. 1019 (2001).

The parties' settlement discussions contemplated that petitioner would obtain any necessary tribal permits, and petitioner accordingly submitted a permit application to respondent in August 1997 for the construction of three new waste ponds at the site. See ER 1126. The application expressly reserved objections to tribal jurisdiction. See ER 1250. When respondent replied that it would "not accept the application" with the jurisdictional reservation, C.A. Supp. E.R. (SER) 7, petitioner resubmitted its application with a letter "consenting to the jurisdiction" of respondent "with regard to the zoning and permitting requirements as specified in the current" land-use guidelines. ER 1125. Petitioner later confirmed more broadly that "[i]n connection with the land use permit, we did agree that we would consent to tribal jurisdiction in that area." SER 6.

While discussions were ongoing, respondent revised its governing fee schedule for hazardous waste storage and disposal, which provided that fees would be "deposited in the Shoshone-Bannock Hazardous Waste Management Program fund." ER 1019. Rather than accede to what it viewed as unacceptably high fees, petitioner negotiated a compromise. In May 1998, the parties agreed that petitioner would pay a one-time, $1 million "start up" fee, as well as a $1.5 million annual fee "for every year thereafter." ER 1045-1046. After further exchanges, the parties agreed that the fee would apply not only while the three ponds were "in operation," ER 1047, but would also "cover[ ] the plant" and "would continue to be paid for the future even if the use of [the three ponds] was terminated in the next several years," ER 1049.

EPA subsequently filed a complaint in district court along with a consent decree resolving EPA's claims. The decree required petitioner to implement a variety of remedial measures and spend a total of approximately $170 million, including nearly $12 million in civil penalties—the largest-ever civil penalty under RCRA at that time. See generally Consent Decree, *United States* v. *FMC Corp.*, No. 98-cv-406 (D. Idaho July 13, 1999); EPA, *FMC Corporation, Inc. Hazardous Waste Settlement*, https://www.epa.gov/enforcement/fmc-corporation-inc-hazardous-waste-settlement.

The consent decree did not take a position on whether respondent possessed jurisdiction to regulate petitioner's waste management activities at the site. See ER 1151 ("This Consent Decree shall not be construed as a ruling or determination of any issue related to any federal, state, tribal, or local permit, if required in order to implement this Consent Decree."). But it did provide that "[w]here any portion of the Work requires a federal, state, or tribal permit or approval," petitioner must take the "actions necessary to obtain all such permits or approvals." ER 1150. That language required petitioner to secure tribal permits to the extent required under other bodies of law.

The district court approved the decree over objections by respondent. See *United States* v. *FMC Corp.*, No. 98-406, 1999 WL 35808875, at *1 (D. Idaho July 13, 1999). The court of appeals affirmed, holding that "the record discloses a diligent assertion of RCRA claims by the government, a fair and extensive consultation with [respondent], and a reasonable settlement reached at arm's length between the government and [petitioner]." *Shoshone-Bannock Tribes*, 2000 WL 915398, at *1.

3. In 2001, following entry of the consent decree, a sudden rise in energy prices led petitioner to close the facility. Pet. 7-8. Petitioner then "stopped making its annual payments to [respondent], and refused to apply for certain tribal permits." *United States* v. *FMC Corp.*, 531 F.3d 813, 815 (9th Cir. 2008).

Despite the fact that the plant is no longer active, EPA has remained heavily involved in overseeing management of the existing waste at the site. Between 2006 and 2010, phosphine gas releases from waste-storage ponds were repeatedly detected, Pet. App. 39a, and EPA responded by directing petitioner to take response actions to monitor, contain, and treat the releases. See *id.* at 39a-42a.

Then, in 2012, EPA adopted an Interim ROD Amendment (IRODA) under CERCLA to "replace[]" the 1998 ROD. ER 941. EPA determined that "[a]ction is necessary to reduce infiltration of surface water into elemental phosphorus and metals-contaminated soils and subsequent migration of contaminants beyond" petitioner's fee land. ER 940. The IRODA requires interim remedial actions designed to "be protective of human health and the environment," including soil caps to manage subsurface waste, a system for extracting and treating contaminated groundwater, and a gas-monitoring program. ER 941-943. Because the IRODA is only an interim measure, a final ROD will be issued in the future. ER 944; SER 118.

B. Procedural History

1. Following petitioner's refusal to reapply for the relevant permits or pay the accompanying fee, respondent filed a motion for clarification in federal district court, arguing that the consent decree required petitioner to apply for the relevant tribal permits. See

United States v. *FMC Corp.*, No. 98-cv-406, 2006 WL 544505 (D. Idaho Mar. 6, 2006), vacated, 531 F.3d 813 (9th Cir. 2008). The district court agreed. *Id.* at *7. Petitioner then applied for the requisite permit, while objecting to tribal jurisdiction. See ER 1253-1284.

On appeal, the Ninth Circuit reversed on the ground that respondent was not a third-party beneficiary of the consent decree. See *FMC Corp.*, 531 F.3d at 821. Nevertheless, petitioner's counsel "represented to the court that [petitioner] understands that it has the obligation to continue, and will continue, with the current tribal [permit] proceedings to their conclusion." *Id.* at 824. The court accepted that statement as "binding on FMC." *Ibid.*

In the permit proceeding, the tribal land-use commission determined that tribal law required petitioner to obtain a special use permit for waste storage at the site, and imposed the previously agreed-upon annual fee of $1.5 million. See ER 338, 346-347. Petitioner administratively appealed that determination to the Fort Hall Business Council, which affirmed. See ER 331, 341.

2. Petitioner then appealed to the tribal courts, challenging tribal jurisdiction. This Court has held that an Indian tribe generally lacks jurisdiction over nonmembers on fee land within its reservation, subject to two exceptions. 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." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). Second, a tribe may "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 Tribal Court affirmed the business council's decision in part. See Pet. App. 225a-245a. It held that petitioner was subject to tribal jurisdiction, ER 318, but that tribal law did not authorize the imposition of the $1.5 million fee. See Pet. App. 242a-245a.

The Tribal Court of Appeals affirmed in part and reversed in part. Pet. App. 136a-224a. It held that petitioner was subject to tribal jurisdiction under the first *Montana* exception and that the $1.5 million fee was authorized by tribal law. *Id.* at 155a, 173a, 177a; see also ER 115. And after conducting an evidentiary hearing, it found petitioner subject to tribal jurisdiction under the second *Montana* exception, as well. Pet. App. 92a-110a. The court held that petitioner owed $19.5 million in unpaid fees from 2002 to 2014, and $1.5 million in annual fees going forward. *Id.* at 3a.

3. Petitioner filed suit in federal district court to enjoin enforcement of the tribal judgment. The court concluded that tribal jurisdiction lay under both *Montana* exceptions. Pet. App. 76a-83a. But it ultimately enforced the tribal judgment under the first exception alone, on the ground that respondent had failed to explain why the amount of the annual fee was necessary to address the threat the tribe faced under the second *Montana* exception. See *id.* at 85a-86a.

The court of appeals affirmed, concluding that the tribal court judgment was enforceable under both *Montana* exceptions. See Pet. App. 1a-55a. As to the first exception, the court held that petitioner formed the requisite "consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and

entered into [a] permit agreement with the Tribes, requiring annual use permits and an annual $1.5 million permit fee to store" waste on the reservation. *Id.* at 30a. In the court's view, "[t]he conduct that the Tribes seek to regulate through the permit fees at issue—the storage of hazardous waste on the Reservation—arises directly out of this consensual relationship." *Ibid.*

As to the second exception, the court of appeals cited "extensive" evidence of "toxic, carcinogenic, and radioactive substances" at the site that "'imperil the subsistence or welfare' of the tribal community." Pet. App. 35a-36a (quoting *Montana*, 450 U.S. at 566). The court reasoned that federal regulation of the site diminished, but did not eliminate, those risks. *Id.* at 44a-45a. And it concluded that the $1.5 million annual fee had a sufficient nexus to the threat because it was lower than the fees charged by private waste facilities. *Id.* at 46a.

DISCUSSION

"The sovereignty that the Indian tribes retain is of a unique and limited character." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Although tribes possess inherent sovereign authority to set conditions on entry on their land, preserve tribal self-government, and control internal relations, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), they generally lack jurisdiction to regulate the activities of "nonmembers on non-Indian fee land within the reservation," *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 659 (2001). That general rule is subject to two exceptions: a tribe may regulate certain activities of nonmembers who enter consensual relationships with the tribe or its members, and it may regulate nonmember activities within the reservation that pose a serious

threat of harm to the tribe. *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981).

Petitioner incorrectly contends that, before a court may apply either of the *Montana* exceptions, it must first determine that a particular exercise of tribal jurisdiction stems from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations. Those principles do not represent a strict threshold requirement that a court must find satisfied. But principles of inherent authority and sovereign self-government—which recognize the need for a tribe to protect its members, land, resources, and health and welfare—undergird the *Montana* exceptions and inform both their scope and application.

Here, the court of appeals' analysis of *Montana*'s two exceptions was incomplete in certain respects. Nevertheless, the court's central conclusion that petitioner was subject to tribal jurisdiction was likely correct, and review by this Court of the precise bases for and scope of the tribe's jurisdiction is not warranted because those issues have not been sufficiently developed in the course of the proceedings. Moreover, any tension in the courts of appeals is nascent, and this case would not be a good vehicle for addressing general issues concerning application of the *Montana* exceptions, given the unusual circumstances underlying the dispute. In the view of the United States, further review is not warranted.

I. THE COURT OF APPEALS' APPLICATION OF *MONTANA* WAS INCOMPLETE IN CERTAIN RESPECTS

A. Tribal Sovereign Interests Form The Foundation Of The Two Exceptions

Although an Indian tribe's sovereign powers are "unique and limited," *Wheeler*, 435 U.S. at 323, tribes retain "inherent sovereign authority" to preserve fundamental characteristics of self-government by protecting their land and members, as well as the health and economic welfare of the tribe. *Plains Commerce*, 554 U.S. at 337. Petitioner contends (Pet. 13-14) that a challenged regulation can be sustained only if a court first makes an independent determination that the regulation directly implicates specifically articulated interests, even when it otherwise falls within the terms of the *Montana* exceptions. Petitioner raised this argument below (Pet. 16 n.3), but the court of appeals did not directly address it. In any event, petitioner is incorrect. Rather than imposing a "threshold limitation," Pet. 16, tribal sovereign interests underlay the two *Montana* exceptions and inform both their application and scope.

In support of its interpretation, petitioner relies heavily on *Plains Commerce*. Pet. 13-14. Although *Plains Commerce* contains language suggesting a threshold requirement, see 554 U.S. at 337 ("Even [when the nonmember consents], the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."), other precedents adopt a different characterization. In *Nevada* v. *Hicks*, 533 U.S. 353 (2001), for example, the Court characterized tribal jurisdiction under *Montana* not as an exception to a tribe's presumptive lack of jurisdiction over nonmembers on fee land, but rather as an "exception" to

the general principles of inherent sovereignty later discussed in *Plains Commerce*. *Id.* at 359 n.3. If the *Montana* framework constitutes an *exception* to those principles, they do not serve as a threshold limitation on *Montana*'s application. These differing descriptions reflect the simple fact that *Montana* is an "opinion," "not a statute" susceptible to precise textual interpretation. *Id.* at 372. As a result, the proper interpretive approach is to look to the Court's body of case law as a whole, rather than isolating particular passages from individual opinions.

Read as a whole, this Court's precedents indicate that general principles of inherent tribal sovereignty provide the foundation for the *Montana* exceptions, rather than serving as an independent requirement for their application. The aspects of retained tribal sovereignty that petitioner highlights—setting conditions on "entry" to tribal lands, protecting "self-government," and controlling "internal relations," *Montana*, 450 U.S. at 557, 564—reflect the focus of tribal jurisdiction on tribal members, land, resources, and health and welfare. The limited activities falling within the *Montana* exceptions are regulable precisely because they directly affect those interests, despite the fact that such activities involve the conduct of nonmembers on fee land. See, *e.g.*, *Plains Commerce*, 554 U.S. at 334-335 ("The logic of *Montana* is that certain activities on non-Indian fee land * * * may intrude on the internal relations of the tribe or threaten tribal self-rule."); *Montana*, 450 U.S. at 564-565.

Given the character of the sovereign interests that "give rise" to the two *Montana* exceptions, *Plains Commerce*, 554 U.S. at 341, those exceptions are properly understood to set important limits on tribal regulation

of nonmembers and to require a connection between any regulation of nonmembers and the interests of the tribe and its members. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 459 (1997) (noting that background principles of tribal sovereignty are "[k]ey to [the second exception's] proper application"); *Plains Commerce*, 554 U.S. at 330 ("These exceptions are 'limited' ones and cannot be construed in a manner that would 'swallow the rule.'") (citations omitted). Properly applied, the exceptions ensure the requisite connection to tribal sovereignty by requiring tribal jurisdiction to bear "a nexus" to a relevant consensual relationship, *Atkinson*, 532 U.S. at 656, or to address activities or threats that would not just "injure the tribe" in some sense, but would "'imperil'" the tribal interests described above. *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

Principles of tribal sovereignty may also assist in identifying the scope of the two exceptions when a court is confronted with circumstances departing from the mine-run *Montana* case. In *Plains Commerce*, for example, the tribe sought to regulate "a non-Indian's sale of non-Indian fee land." 554 U.S. at 330. The Court ruled that regulation fell outside the scope of the *Montana* exceptions, which pertain only to "nonmember *conduct* inside the reservation," not the sale of fee land. *Id.* at 332. In drawing this distinction, the Court explained that "regulation of the sale of non-Indian fee land" that had passed out of Indian ownership as the result of a congressional allotment—unlike "certain forms of nonmember behavior"—"cannot be justified by reference to the tribe's sovereign interests." *Id.* at 335-336. In short, although tribal sovereign interests do not impose a separate threshold limitation on the *Montana*

exceptions, those exceptions should be read in light of the tribal interests they are designed to protect.

B. The Court Of Appeals' Application Of The Two *Montana* Exceptions Was Correct In Part But Did Not Fully Address The Relevant Issues

1. This case does not fit neatly with prior first-exception cases

The first *Montana* exception permits a tribe to "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." *Montana*, 450 U.S. at 565. This "exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656. Although the first exception arguably applies here, this case is not a natural fit with the Court's prior first-exception precedents. But even if the first exception were inapplicable, the facts here could alternatively be analyzed under a model of direct consent.

Petitioner's ongoing waste-storage activity takes place entirely on fee land. Much of that activity predated the permit agreement at issue, and was not itself based on any underlying commercial agreement or other arrangement with respondent. The court of appeals therefore located the requisite consensual relationship under *Montana*'s first exception in the permit agreement and petitioner's consent to tribal jurisdiction as part of the permitting process. See Pet. App. 6a, 30a. Because petitioner voluntarily entered the permitting agreement, and continued tribal regulation of the site has a "nexus" to that relationship, *Atkinson*, 532 U.S. at

656, the court of appeals held that this case falls within the first exception, Pet. App. 30a-31a.

The fact pattern here, however, does not fit neatly into that exception, which principally contemplates the exercise of tribal jurisdiction over underlying commercial relationships between nonmembers and a tribe or its members. See, *e.g.*, *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (upholding tribal "power to tax transactions occurring on trust lands and significantly involving a tribe or its members") (cited in *Montana*, 450 U.S. at 566); see *Strate*, 520 U.S. at 457 ("*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind.") (citation omitted). In that scenario, the tribe regulates activities arising out of the underlying relationship, such as by imposing a tax on the sale of goods. See, *e.g.*, *Plains Commerce*, 554 U.S. at 338 ("The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate *those* transactions.") (emphasis added). That situation contrasts with the one here, involving an assertion of jurisdiction over petitioner's waste storage on its own fee land, based on petitioner's interactions with respondent in its governmental capacity as regulator, rather than as a market participant.

Although this case does not fit comfortably into *Montana*'s first exception as conceived in prior cases, that is not to say the courts below erred in finding tribal jurisdiction based on the agreement formed in the permitting process. But that agreement may be better assessed under a theory of direct consent to jurisdiction, rather than under the first *Montana* exception, which is grounded in a tribe's inherent authority to regulate

the activities of nonmembers who have entered into underlying commercial agreements or similar arrangements with the tribe or its members.

In *Plains Commerce*, the Court suggested that direct consent to tribal authority may form an additional basis for tribal jurisdiction. There, tribal members argued that a nonmember "consented to tribal court jurisdiction over [a] discrimination claim by seeking the assistance of tribal courts in serving a notice to quit" the disputed premises in connection with a state-court proceeding. 554 U.S. at 341. The Court did not address that argument under the first exception or ask whether the nonmember had entered a "consensual relationship[ ]" with the tribal court. *Montana*, 450 U.S. at 565. Instead, it inquired whether the nonmember's conduct was sufficient to constitute consent to tribal jurisdiction, but found it was not. *Plains Commerce*, 554 U.S. at 342; see *id.* at 337 (noting that nonmember may consent "either expressly or by his actions"). Although the arguments in that case differed in certain respects from those presented here, *Plains Commerce* nevertheless informs the way consent might best be analyzed.

Assertions of jurisdiction based on a nonmember's direct consent to tribal authority may differ from assertions of jurisdiction over the commercial relationships described in *Montana*. Under the first exception, a tribe is empowered to regulate any activities that have a "nexus" to the relevant relationship. *Atkinson*, 532 U.S. at 656. In a case of direct consent, however, a tribe might be limited to operating within the scope of the consent or enforcing an express agreement the parties have entered into to resolve differences about the tribe's exercise of its jurisdiction.

Here, the potential analytical distinctions between *Montana*'s first exception and a theory of direct consent may not be consequential. The court of appeals expressly found that "FMC consented to tribal jurisdiction" during negotiations over the permit, and further "agreed to * * * an annual use permit fee of $1.5 million to cover FMC's storage of its hazardous waste on the Reservation." Pet. App. 6a-7a; see *id.* at 30a. At least with respect to the annual $1.5 million fee, which appears to represent the primary point of dispute between the parties, see Pet. 1, the court effectively enforced the terms of the agreement as the court understood it—rather than, for example, allowing respondent to rely on petitioner's consent to jurisdiction or the permit agreement to impose additional forms of regulation beyond those terms. This case therefore does not present a suitable vehicle for exploring any distinctions between the first exception and direct consent. And disputes about the precise scope of petitioner's consent in the complex and unusual circumstances of this case would not warrant the Court's review.

2. The court of appeals erred in part in its analysis of the second* Montana *exception

The second *Montana* exception permits tribal jurisdiction "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." *Montana*, 450 U.S. at 566. Although this exception enables a tribe to "protect its members from noxious uses that threaten tribal welfare or security," *Plains Commerce*, 554 U.S. at 336, it does not confer a general police power, see *Atkinson*, 532 U.S. at 657 n.12. Instead, an exercise of tribal jurisdiction falls within the second

exception only if the magnitude of the actual or potential harm is substantial and the tribal regulation is appropriately tailored to address that harm. See *Plains Commerce*, 554 U.S. at 341.

The court of appeals correctly found that the harm threatened by petitioner's toxic waste is sufficiently serious to trigger tribal jurisdiction. See Pet. App. 36a. "The record contains extensive evidence of toxic, carcinogenic, and radioactive substances at the FMC site." *Ibid.* EPA classifies those substances as "[p]rincipal threat wastes," which are "those source materials considered to be highly toxic or highly mobile that generally cannot be reliably contained or would present a significant risk to human health or the environment should exposure occur." *Id.* at 37a (citation omitted). Significantly, the threat posed by this waste extends off-site. See, *e.g.*, *id.* at 21a-22a ("Arsenic and phosphorus from the site are continuously flowing in the groundwater from FMC's land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms.") (citation omitted), 107a ("[T]his threat extends * * * to members of the Shoshone-Bannock Tribes throughout the Reservation."). And petitioner does not appear to dispute that, if containment failed, the harm to respondent could be catastrophic. See *id.* at 22a, 103a.

But the Ninth Circuit misconceived the tailoring aspect of the analysis. In the court's view, "[t]here is nothing * * * requiring the Tribes to show that the $1.5 million annual use permit fee be spent on supplemental measures, beyond those now being taken by the EPA, to protect against hazards posed by FMC's hazardous waste." Pet. App. 47a. It concluded the regulation was reasonable because the tribe "charge[d] less than the

open market fee for" what it regarded as "comparable activity," namely, private waste storage. *Id.* at 47a-48a.

The question, however, is not whether the scope of tribal regulation would be reasonable in the abstract or in some other context, but whether it has a sufficient nexus to the character and likelihood of the specific harm the tribe confronts. See, *e.g.*, *Atkinson*, 532 U.S. at 659 (holding that regulation must be "*necessary* to vindicate" tribal interests) (emphasis added); *Plains Commerce*, 554 U.S. at 341 (similar). Federal regulation bears on this inquiry to the extent it addresses the risks a tribe faces. Specifically, tribal regulation must be reasonably tailored to the risks in light of measures taken by other governmental actors. See *Montana*, 450 U.S. at 566 n.16 (taking state regulation into account in analyzing second exception); *Hicks*, 533 U.S. at 371.

Although EPA seeks to implement remedies that are "protective of human health and the environment," 42 U.S.C. 9621(b)(1); see 42 U.S.C. 6924(a), remediation required by EPA at the site was not complete during the relevant period (and is still not complete), and respondent has a substantial interest in monitoring the site and taking steps to prepare for the contingency of a containment failure. See Pet. App. 22a; see, *e.g.*, SER 216-294 (describing substantive permitting requirements). But even if respondent's permitting regime is itself tailored to the threat, and setting any relevance of consent to one side, it is unclear on this record whether the $1.5 million fee has an appropriate nexus to the cost of the permitting regime. Compare Pet. App. 7a (court of appeals) (discussing tribal regulations allocating permit fees to the "reasonable and necessary costs of administrating the Hazardous Waste Management Program") (citation omitted), with *id.* at 85a (district court) ("[T]he

Tribes have never explained why an annual fee of $1.5 million is necessary to provide that supplemental protection."). The court of appeals erred by failing to ask the right question as to nexus.

II. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW AT THIS TIME

The *Montana* framework plays an important role in calibrating tribal jurisdiction over nonmembers, and there appears to be some imprecision in the case law over the relationship between general principles of tribal sovereignty and the *Montana* exceptions. But any tension in the circuits is nascent, and the facts of this case are highly idiosyncratic. Further review is not presently warranted.

A. Any Tension In The Circuits Is Nascent

Petitioner contends that the circuits are in conflict over whether the *Montana* exceptions include a threshold requirement that tribal jurisdiction "stem[] from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations." Pet. ii; see Pet. 17-19. Although the decisions petitioner identifies are in some tension with the decision below, they are materially distinguishable in key respects and do not reflect a concrete conflict that would warrant this Court's review.

In *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125 (8th Cir. 2019), oil and gas companies challenged tribal jurisdiction to adjudicate claims brought by tribal members for royalties owed from drilling operations conducted on their individual trust allotments. *Id.* at 1129. The Eighth Circuit held that the tribal court lacked jurisdiction, reasoning that "plaintiffs' claim for relief is based on federal law" given the "comprehensive

[federal] regulatory scheme." *Id.* at 1135, 1137. And it held "that, at least where non-members are concerned, tribal courts' adjudicative authority is limited (absent congressional authorization) to cases arising under tribal law." *Id.* at 1135.

In the alternative, the Eighth Circuit held that the tribe lacked legislative jurisdiction under the *Montana* exceptions. *Kodiak Oil & Gas (USA) Inc.*, 932 F.3d at 1137. The court stated that "[t]he *Montana* exceptions apply only to the extent they are 'necessary to protect tribal self-government or to control internal relations,'" and concluded that tribal jurisdiction was unnecessary to serve those ends in light of federal regulation. *Id.* at 1138 (quoting *Hicks*, 533 U.S. at 359). But it is unclear whether the court intended those principles to serve as a threshold limitation or simply a touchstone for ascertaining the scope of the exceptions. And the court's reasoning with respect to *Montana* is difficult to untangle from its first alternative holding that comprehensive federal regulation "preempted" and "left no room" for tribal law. *Id.* at 1137. The court thus appears to have concluded that federal law displaced inherent tribal sovereignty altogether in the context of that case, akin to *Plains Commerce*.

In *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), cert. denied, 575 U.S. 983 (2015), the plaintiffs (citizens of Illinois) took out loans from payday lending companies (all owned by, or doing business with, a tribal member). *Id.* at 768-769, 772. They sued for violations of state law in connection with the loans. *Id.* at 768. The defendants argued that the loan agreements' forum-selection clauses required any litigation to be conducted in tribal courts. *Id.* at 781. The Seventh Circuit ruled that the tribal courts lacked jurisdiction

under *Montana* because the plaintiffs had not engaged in any on-reservation conduct, and *Montana* only "permit[s] tribal regulation of nonmember *conduct inside the reservation*." *Id.* at 782 (quoting *Plains Commerce*, 554 U.S. at 332).

The defendants in *Jackson* also contended that jurisdiction was appropriate based on a theory of direct consent. See 764 F.3d at 783; see also *id.* at 769 & n.1. Consistent with the analysis above, see pp. 15-17, *supra*, the court of appeals assessed that argument separately from the *Montana* framework. *Jackson*, 764 F.3d at 783. The court reasoned that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court," and rejected tribal jurisdiction on the ground that it did not "'stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Id.* at 783 (quoting *Plains Commerce*, 554 U.S. at 337) (emphasis omitted). But again, because the case involved what the court found to be only off-reservation conduct by nonmembers, it is meaningfully different from the situation presented here.

B. The Unusual Circumstances Here Also Weigh Against Review

The unusual circumstances of this case would also make it less than an ideal vehicle for considering the scope of the *Montana* exceptions. As to the first exception, the decision below turned in substantial part on the unique course of dealings between these two parties, including petitioner's decision—apparently motivated by its desire to obtain a consent decree in the specific circumstances of this case, see Pet. App. 78a—to consent to tribal jurisdiction over its toxic waste in the absence

of any underlying commercial relationship with respondent concerning that waste. Petitioner and its amici suggest that the court of appeals' decision has broad implications because it treats mere compliance with tribal regulatory measures as consent to perpetual tribal jurisdiction. See, *e.g.*, Retail Litig. Ctr. Amicus Br. 9-10. The United States agrees that the implications of a nonmember's conduct or consent to tribal jurisdiction must be assessed in the circumstances of a particular case, rather than under any per se rule. But the decision below does not implicate the more ambiguous examples of consent that petitioner and its amici hypothesize, given the court of appeals' finding that petitioner expressly "consented to tribal jurisdiction." Pet. App. 6a.

As to the second exception, the case lies at the intersection of federal regulatory and tribal jurisdiction. The extensive involvement of EPA, reflecting the serious risks posed by the storage of toxic waste, informs the basis for tribal jurisdiction. And that involvement also affects the appropriate scope of the tribal regulation in a manner that is not present in the mine-run *Montana* case concerning standalone tribal regulation. For these reasons as well, review by this Court is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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