No. 19-1143

IN THE
Supreme Court of the United States

FMC CORPORATION,
Petitioner,
v.
SHOSHONE-BANNOCK TRIBES,
Respondent.

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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QUESTIONS PRESENTED

1. Whether the Ninth Circuit omitted a necessary finding from the legal framework for assessing tribal jurisdiction.

2. Whether the Ninth Circuit correctly applied the settled grounds for tribal jurisdiction under *Montana* v. *United States*, 450 U.S. 544 (1981), to the unique facts of this case.

RELATED PROCEEDINGS

To counsel's knowledge, there are no related proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

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INTRODUCTION

After generating toxic waste on the Respondent Shoshone-Bannock Tribes' (the "Tribes") Reservation for over fifty years, Petitioner FMC Corporation reached a compromise with the Tribes. In connection with storing over 22 million tons of its radioactive and carcinogenic waste within the Reservation, FMC agreed in writing to compensate the Tribes, who bear the risks of the waste, by paying $1.5 million in fees annually.

FMC now regrets that written agreement, and for nearly two decades has refused to uphold its end of the bargain, seeking instead to enlist the help of the

federal judiciary in nullifying it. FMC thus tries to spin this as a case of tribal jurisdiction run amok.

It is not. Having created one of the most volatile and hazardous waste sites in the country, FMC consented to Tribal jurisdiction over land-use permitting and negotiated with the Tribes for a reasonable annual fee that the Tribes use to manage the risks to tribal land, health, welfare, and cultural practices from FMC's land use. When FMC sought to break that arrangement unilaterally, the tribal court enforced the agreement according to its terms, exercising the jurisdiction to which FMC had consented. Faithfully applying this Court's settled framework for assessing tribal jurisdiction as set out in *Montana* v. *United States*, 450 U.S. 544 (1981), and subsequent cases, the decision below affirmed the Tribes' jurisdiction given FMC's express agreement and the extraordinary threat posed by FMC's toxic waste. As this Court recently reaffirmed, a "tribe may quite legitimately seek to protect its members from noxious uses" of fee land "that threaten tribal welfare or security." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008).

It is therefore no surprise that, to make this case seem as if it merits this Court's attention, FMC resorts to a battery of mischaracterizations. In the first question presented, it imagines a holding that does not exist in the decision below, and then conjures a split based on that imaginary holding. In the second question presented, it asks this Court to overturn meticulous factual findings supported by a voluminous record. And, throughout, FMC feints

towards spectral issues that are not within the scope of either question presented.

The petition should be denied.

STATEMENT

A. FMC's Polluting Activities Within The Fort Hall Reservation

1. The Shoshone-Bannock Tribes are a federally recognized Indian tribe. Pet. App. 4a. Under the terms of "the Fort Bridger Treaty of 1868, 15 Stat. 673, and related executive orders, the Tribes today have sovereign authority over the Fort Hall Reservation." *Id.* The Reservation spans 840 square miles in southeastern Idaho, and ninety-seven percent of it "is tribal land or land held in trust by the United States." *Id.* The Portneuf River flows through the Reservation. *Id.* at 71a. The Tribes rely on the river, and the Fort Hall Bottoms along its northern bank, for "subsistence fishing, hunting and gathering." *Id.* The area is also vital to the Tribes' "historical[ ] * * * cultural practices, including the Sundance." *Id.*

2. For over 50 years, from 1949 until 2001, Petitioner "FMC Corporation and its predecessors owned and operated an elemental phosphorous production plant"—the largest in the world. *Id.* at 4a-5a. "Virtually all of" the plant sits on "fee land" owned by FMC "on the Fort Hall Reservation." *Id.* at 5a.[1] During its operational years, "FMC obtained or

[1] FMC asserts that the Reservation was allotted under the General Allotment Act. Pet. 4. In fact, allotment occurred under the Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, § 1, ¶¶ 4-5, 25 Stat. 687, 688.

mined raw materials for its plant from tribal and allottee lands on the Reservation." *Id.* And for that entire period, FMC used its fee lands as a dumpsite for its phosphorus production wastes. *See id.*

Today, although the surface of FMC's site may appear tranquil in photographs, *cf.* Pet. 8, that is an illusion: Over 22 million tons of hazardous waste contaminates FMC's site. Pet. App. 5a. "The waste is radioactive, carcinogenic, and poisonous." *Id.* at 1a. And the "rolling hills" beneath which it is stored, Pet. 8, are perched above the Portneuf River and the Fort Hall Bottoms, C.A. E.R. 969.

Much of the waste sits in "storage ponds" that "continue to generate lethal amounts of phosphine gas that accumulate beneath the pond covers," Pet. App. 5a, 43a, which is "both acutely and chronically dangerous to people in the area," *id.* at 40a (internal quotation marks omitted). At certain quantities, "a few breaths can render a person unable to walk or talk, and can result in extreme harm or eventual death." *Id.* at 39a. At higher concentrations, phosphine gas has the potential to explode. *Id.* Over the last fifteen years, dangerous levels have repeatedly escaped from the ponds. *Id.* at 39a-43a. Some of the ponds are lined to prevent waste from contaminating the groundwater, but others are not. *Id.* at 5a.

In addition, millions of tons of "loose soil," "groundwater," and rocky "slag" are contaminated with elemental phosphorous, arsenic, and gamma radiation. *Id.* at 5a, 36a. Like its gaseous cousin, elemental phosphorous "is highly toxic by ingestion, inhalation, and skin absorption." *Id.* at 37a (internal quotation marks omitted). It also "is likely to cause skin burns upon contact" and "will spontaneously

burst into flames when exposed to the air." *Id.* (internal quotation marks omitted); *see also id.* at 38a (describing the statement of a witness "who testified that he [saw] ducks spontaneously ignite as they took off from FMC's phosphorous containment ponds") (internal quotation marks omitted). Levels of elemental phosphorous contamination on this site exist "at a scale unprecedented anywhere in the United States." *Id.* at 36a (internal quotation marks omitted). Elemental phosphorous and arsenic "are continuously flowing in the groundwater from FMC's land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms." *Id.* at 71a.

That is not all. "Somewhere between twenty one and thirty railroad tanker cars * * * are buried on the property." *Id.* at 5a. FMC used those rail cars to transport "hazardous [phosphorous] sludge." *Id.* at 100a. Because FMC found it too dangerous for its employees to clean the cars for reuse, FMC simply "buried the tankers without cleaning them." *Id.* No one knows how corroded these tankers are, "and it is possible that they either have or will corrode to the point of leakage." *Id.* "There is no lining underneath the tanker cars * * * ." *Id.* at 5a.

The current management plan calls for this waste to remain on the Reservation indefinitely. *Id.* at 22a.

B. EPA Action And Tribal Permits

1. In 1990, the Environmental Protection Agency listed FMC's site as a Superfund site, marking it as one "of the nation's worst hazardous waste sites." *Id.* at 5a (internal quotation marks omitted). That designation triggered regulation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Most pertinent here, it

initiated EPA's process of formulating a "Record of Decision," or formal documentation of the hazards on the site and plan for mitigating the dangers posed by the waste. *See id.* at 17a-18a. EPA did not finalize its initial Record of Decision for the FMC site until 1998. *See id.*

In the meantime, "EPA charged FMC with violating" the Resource Conservation and Recovery Act (RCRA) by violating federal regulations concerning "the disposal of solid and hazardous waste." *Id.* at 6a.[2] FMC sought to "avoid litigation," and "began negotiations with the EPA over the terms of a possible Consent Decree that would settle the RCRA suit." *Id.* "Though not a formal party, the Tribes participated in the negotiations." *Id.* The proposed resolution "required construction of a treatment facility and additional waste storage ponds on FMC's fee land on the Reservation." *Id.* "As a condition to obtaining the Consent Decree, the EPA required FMC to obtain relevant permits from the Tribes." *Id.*; *see also* Consent Decree, *United States* v. *FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho July 13, 1999). This condition "was a major factor in [FMC] reaching an agreement with the EPA." Pet. App. 62a.

2. The "relevant permits" were set out in the Tribes' Land Use Policy Ordinance, which required a construction permit for the treatment facility and storage ponds "and a use permit for storage of the

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[2] CERCLA focuses on cleaning up existing hazardous waste and RCRA seeks to reduce or mitigate the potential for future waste. *See Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

hazardous waste." *Id.* at 6a. Negotiations regarding the permits began in July 1997. In the course of negotiations, FMC's Senior Vice President and General Counsel confirmed by letter to the Tribes that "'[i]n connection with the land use permit, we did agree that we would consent to tribal jurisdiction in that area.'" *Id.* at 6a-7a; C.A. S.E.R. 6.

The following spring, the Tribes "considered and then adopted amended" written guidelines regarding the appropriate annual permit fee under the Ordinance "for storage of hazardous waste on the Reservation." Pet. App. 7a. As amended, the guidelines called for "an annual fee of $5.00 per ton" of waste. *Id.* "Money from use permit fees was to be 'deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund,' and to be used 'to pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program.'" *Id.* (quoting Amendments to Chapter V: Fort Hall Land Use Operative Policy Guidelines, § V-9-2(B) (1998)).

"FMC estimated that the $5 per ton storage fee would cost over $110 million per year" given the sheer volume of waste it had produced. *Id.* "[A]nxious to obtain the permit," and thereby obtain the Consent Decree, *id.* at 87a, "FMC sought to negotiate a compromise with the Tribes" to avoid the full permit amount, *id.* at 7a.

Those negotiations bore fruit when "FMC agreed to a one-time fee of $1 million and an annual use permit fee of $1.5 million to cover FMC's storage of its hazardous waste on the Reservation." *Id.* Under the terms of the agreement, memorialized in a series of letters between FMC and the Tribes, the $1.5 million annual fee would continue "even if FMC capped and

closed the eleven hazardous waste ponds that were subject to the RCRA Consent Decree." *Id.*; *see also* C.A. E.R. 1047, 1049, 1053. "FMC never attempted to negotiate" an end date for the use fee, or to condition the fee on the operational status of FMC's plant. Pet. App. 87a.

3. "Within just a few months of resolving the permit issues, FMC reached agreement with the EPA on the RCRA Consent Decree." *Id.* at 62a. This "sweetheart deal" for FMC "allowed [it] to dump the toxic mess it had created in the EPA's lap by paying a small fine of $11.9 million along with a few million dollars in construction commitments." *Id.* at 87a.

FMC paid the agreed-upon $1.5 million annually without issue from 1998 until 2001. *Id.* at 9a. In December 2001, FMC ceased "active phosphorous processing operations at the site." *Id.* "When the $1.5 million use permit fee came due in 2002, FMC refused to pay it." *Id.*

The parties attempted to negotiate a resolution. *Id.* After that failed, the Tribes filed a motion seeking enforcement in the RCRA Consent Decree action. *Id.* The district court granted that motion, finding that "[t]he only reasonable interpretation of" the Consent Decree "is that it requires FMC to apply for" the relevant permits. *United States* v. *FMC Corp.*, No. CV-98-0406-E-BLW, 2006 WL 544505, at *4 (D. Idaho Mar. 6, 2006). After that ruling, FMC began contesting its obligation to pay before the Tribes' Land Use Policy Commission. Pet. App. 10a-11a.

The Ninth Circuit reversed on procedural grounds: It held that the Tribes lacked third-party standing to enforce the fee through the Consent Decree action. *United States* v. *FMC Corp.*, 531 F.3d 813, 823 (9th

Cir. 2008). Even so, the court recognized FMC's obligation to continue with tribal proceedings. *Id.* at 823-824. Indeed, at oral argument, FMC's counsel "represented to the court that FMC underst[ood] that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion." *Id.* at 824. The Ninth Circuit "accept[ed] that statement from counsel as binding on FMC." *Id.*[3]

C. Tribal Proceedings

1. As it had represented to the Ninth Circuit, FMC contested its obligation to pay the $1.5 million annual fee before tribal authorities. The Tribes' Land Use Policy Commission rejected its challenge, in findings affirmed by the Tribes' governing body, the Fort Hall Business Council. Pet. App. 11a.[4]

FMC appealed the Business Council's decision to the Tribal Court. *Id.* That court exercised jurisdiction and found the permitting fee unenforceable as a matter of tribal law. *Id.* at 244a. Both parties appealed to the Tribal Court of Appeals. *Id.* at 12a.

The case was heard by three judges, none of whom are members of the Shoshone-Bannock Tribes. *Id.* Judge Fred Gabourie is a former California state-court judge and former Chief Judge of the Kootenai Tribe. *Id.* Judge Mary Pearson is a former Chief

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[3] The United States agreed that the Tribes could not enforce the required permit through the Consent Decree action, and that the Tribes were entitled to pursue any "remedies they have under Tribal law." U.S. Amicus Br., *United States* v. *FMC Corp.*, No. 06-35429 (9th Cir. May 14, 2007), 2007 WL 1899170.

[4] The Council also affirmed a one-time fee for demolition activities on the site. Pet. App. 11a.

Judge for the Spokane and Coeur d'Alene Tribes. *Id.* And Judge Cathy Silak is a former Justice of the Idaho Supreme Court. *Id.*

The Tribal Court of Appeals reversed the Tribal Court on the tribal-law issue, finding that the permit fee was authorized and that FMC had to pay the agreed-upon amount. *Id.* at 15a-16a.

To assess tribal jurisdiction, the court looked to the familiar *Montana* framework. *Id.* at 153a. Recognizing the "unique and limited character" of tribal sovereignty, the court acknowledged the "general rule" prohibiting "tribal authority over non-member activity taking place" "on non-Indian fee land" within the Reservation. *Id.* at 154a. And the court recited the "two exceptions" for (1) "the activities of non-members who enter consensual relationships with the tribe or its members" and (2) conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* (quoting *Montana*, 450 U.S. at 565-566).

Applying that framework, the court held that the Tribes had jurisdiction under the "first exception of *Montana*" because "FMC's agreement for payment * * * of the $1.5 million annual permit fee * * * is precisely the type of commercial dealing" covered by that exception, *id.* at 155a, and that FMC had voluntarily agreed to pay the fee, *id.* at 184a. As for the second exception, the court found the record "insufficient" to "determine if" FMC's waste "would threaten or cause a direct impact" on the economic security or "health and welfare" of the Tribes. *Id.* at 157a-158a. The court therefore ordered a hearing regarding the site's potential to "impact or threaten

the Tribes' economic integrity, and health and welfare of Tribal members and Tribal children." *Id.* at 222a.

2. FMC moved to reconsider, citing public remarks of Judges Gabourie and Pearson at the University of Idaho College of Law. *Id.* at 12a, 16a. At the conference, the judges made generalized remarks about judging, emphasizing that "'every court * * * should be impartial' and 'a good opinion comes [from] both sides, both parties.'" *Id.* at 12a-13a. Judge Gabourie criticized this Court's *Montana* line of cases, as well as tribal courts that had deprived this Court of "vital information about the tribes' cultures and traditions." *Id.* at 13a. "Judge Pearson discussed the importance of * * * creating a record," and suggested that the court was working on "a big case * * * so they were saying prayers, reading cases, and 'trying to do . . . the history.'" *Id.* She stressed that they were "'not guaranteeing anybody anything.'" *Id.* at 15a. FMC alleged that these comments exhibited judicial bias. *Id.* at 16a.

A newly constituted panel of the Tribal Court of Appeals—excluding Judges Gabourie and Pearson—denied FMC's reconsideration motion in pertinent part, *id.* at 16a-17a,[5] reaffirming that the court had jurisdiction under the first exception, and that FMC "voluntarily entered into a contract in 1998 with the Shoshone Bannock Tribes for payment of 1.5 million per year," C.A. E.R. 113, 115-116. The court also

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[5] Judges Gabourie and Pearson were replaced by Judge Peter McDermott, a retired Idaho state judge, and Judge Vern Herzog Jr., a practicing attorney. Pet. App. 16a.

"ordered an evidentiary hearing to resolve * * * whether the Tribes had * * * jurisdiction over FMC under the second *Montana* exception." Pet. App. 17a.

3. Before that hearing, EPA issued a new Interim Amendment to the Record of Decision ("IRODA") concerning the toxic waste at FMC's site regulated under CERCLA. *See* EPA, *Interim Amendment to the Record of Decision for the EMF Superfund Site, FMC Operable Unit, Pocatello, Idaho* (Sept. 2012).

The IRODA resulted from "further investigative work," and concluded that there were "additional concerns associated with elemental phosphorous and other contaminants" on the site that required remedial action. IRODA i-ii. Those investigations revealed that "ongoing * * * releases to groundwater and surface water are of greater significance than was recognized" in 1998, including discharges of "arsenic" and other contaminants "at the FMC" site. *Id.* at 16. As a result, "EPA 'no longer considered' its 1998 measures 'protective of human health and the environment,'" Pet. App. 18a (quoting IRODA at v, 14, 52), and ordered that steps be taken to reduce the threat of the "imminent and substantial endangerment to public health, welfare, or the environment" posed by the FMC site. IRODA ii. Those steps included placing protective caps over phosphorus-contaminated areas, covering the radioactive slag with soil, installing "an interim groundwater extraction/treatment system," and implementing a long-term groundwater monitoring system and a gas monitoring program for the CERCLA ponds. *Id.* at iii-iv. EPA expected the IRODA's remedial steps to "reduce[ ]" the risks posed by contaminants at the

FMC site, but it did not suggest those steps would eliminate the risks. *Id.* at 73. Indeed, EPA acknowledged that capping the waste "does not reduce [the] toxicity, mobility, or volume of contaminants." Pet. App. 38a (quoting IRODA 60). EPA also indicated that several steps required future development, including establishing a cleanup level for phosphorus, IRODA 38, 241 tbl. 8 n.d, and implementing a gas monitoring plan, *id.* at 70-71. EPA also "described as 'significant unknowns' the 'horizontal and vertical gradients in the concentrations of elemental phosphorus, the total mass of elemental phosphorus, and the form of elemental phosphorus in the soil,'" Pet. App. 70a (quoting IRODA 83), and acknowledged that conditions remained "highly uncertain" in part because the interim remedy would result in "significant[ ]" alterations to the flow of groundwater, IRODA 18-19. EPA expected that remediation of the contaminated groundwater "could well take more than 100 years." *Id.* at 53.

4. Following the IRODA, the Tribal Court of Appeals held an evidentiary hearing regarding *Montana*'s second exception that lasted approximately two weeks. Pet. App. 17a, 21a.[6] The court issued its

[6] FMC suggests (at 10) it was barred from presenting certain untimely-produced evidence at this hearing. That is misleading: FMC's concern stems from a *different*, earlier hearing concerning an issue of tribal law irrelevant to this petition, which the court decided against FMC on terms that made the evidence immaterial. *See* Tribes' C.A. Opening & Response Br. 53 & n.37. The Ninth Circuit found this issue either "waived" or "self-evidently meritless." Pet. App. 52a.

opinion a month later. *See id.* at 17a.[7]

Based largely on the uncontested findings in the IRODA, *id.* at 20a, the tribal court found that "FMC's activities" had resulted in "an ongoing and extensive threat to human health," *id.* at 97a. The court also cited a 2010 letter from the Idaho Department of Health and Welfare to EPA, calling phosphine gas emissions "an urgent public health hazard to the health of people breathing the air" in the area, *id.* at 99a (internal quotation marks omitted), as well as expert testimony showing the threats from the contamination are "of a catastrophic nature in health and reactions, including death," *id.* at 104a. Additionally, the court found that the contaminated groundwater threatened "subsistence fishing, hunting and gathering by tribal members" as well as tribal "cultural practices, including the Sundance." *Id.* at 101a.

The trial also yielded extensive evidence refuting FMC's claims that "certain methods suggested by the EPA" would "contain[ ]" the "risk." *Id.* at 101a-102a. Despite EPA's involvement "at this site since 1990," the court found that "remedial actions chosen by EPA have not been implemented." *Id.* at 102a. Many remained "in design phase," and even if fully implemented would result only in "containment." *Id.* Other testimony confirmed "that groundwater extraction systems have not been put into place at the FMC site, and that arsenic and phosphorous" were

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[7] Judge John Traylor, a practicing attorney and nonmember of the Tribes, replaced Judge Silak, who was unavailable for the hearing. Pet. App. 17a.

still "actually traveling to the Portneuf River." *Id.* at 101a.

Based on this extensive factual record, the court held that "FMC's fee land continues to present a real, catastrophic threat to the Tribes." *Id.* 107a. And the danger was more than "a mere possibility," *id.*, given the "realized and ongoing destructive effects that contamination from the site is having on tribal members' cultural practices on the Portneuf River," *id.* at 104a, and the "uncontroverted testimony that the activity of FMC has in fact interfered with the customs and traditions of the Shoshone Bannock Tribal Members," *id.* at 107a-108a. The court therefore found the second *Montana* exception satisfied. *Id.* at 108a-109a.

The court imposed a judgment of approximately $20.5 million, reflecting permit fees from 2002 through 2014 and about $1 million in fees and costs. *Id.* at 74a.

D. Federal Proceedings

1. FMC sued the Tribes seeking a declaration that the Tribal Court of Appeals' judgment is unenforceable, claiming that the Tribes lacked both regulatory and adjudicatory jurisdiction and that FMC had been denied due process based on the former panel members' comments. *Id.* at 23a. "The Tribes counterclaimed, seeking" enforcement of the judgment. *Id.*

The District Court found in favor of the Tribes. *Id.* at 56a. It found tribal jurisdiction appropriate under the first *Montana* exception based on the "consensual relationship" arising from the "series of letters" in which "FMC agreed to obtain a Tribal permit to do the work necessary to comply with the Consent decree," which FMC then confirmed "by signing the

Consent Decree" requiring those permits. *Id.* at 78a. The court rejected FMC's claim of "duress," finding that the Tribes had merely taken "advantage of their bargaining leverage, a long-standing practice in the sharp-elbowed corporate world in which FMC does business every day." *Id.* That leverage, moreover, was not a result of the Tribes' actions, but the federal government's "insisting that FMC obtain Tribal permits." *Id.* In the end, "[t]his was a simple business deal, not the product of illegal duress or coercion." *Id.*

Turning to the second exception, the court found that the contaminants at FMC's site "pose a constant and deadly threat to the Tribes" and "a real risk of catastrophic consequences should containment fail." *Id.* at 81a. "This is the type of threat that falls within *Montana*'s second exception." *Id.* 83a. As a matter of comity, however, the court declined to rest on the second exception absent a more specific showing of the fee's intended use. *Id.* at 86a.

The court then rejected FMC's due process arguments, finding any bias cured when a panel excluding the judges in question "independently came to the same conclusion." *Id.* at 84a.

2. The Ninth Circuit unanimously affirmed, holding the tribal judgment enforceable under both *Montana* exceptions.

Regarding the first exception, the court explained that "consent may be established" either "expressly or by [the nonmember's] actions" if the nonmember "should have reasonably anticipated that [its] interactions might trigger tribal authority." *Id.* at 30a (internal quotation marks omitted). Both of those circumstances existed here. *Id.* Like the District

Court, the Ninth Circuit rejected FMC's claims of coercion, finding it was simply motivated by its "strong interest in * * * settl[ing] the RCRA suit" brought by EPA "on favorable terms." *Id.* at 31a.

The court then turned to the second *Montana* exception. It agreed with the District Court's findings that FMC's waste "'threatens or has some direct effect on the political integrity, the economic security, or the health and welfare' of the Tribes to the extent that it 'imperil[s] the subsistence or welfare' of the Tribes." *Id.* at 36a (quoting *Montana*, 450 U.S. at 566).

It also rejected FMC's contention that EPA's actions had abated the threat. *Id.* at 44a-45a. Indeed, the court determined that FMC's brief had "misrepresent[ed] what the EPA wrote" on that subject: Although FMC claimed that EPA had found its remedial prescriptions "*fully* protective of human health and the environment," in fact EPA did "not us[e] the word 'fully'" and "specif[ied] that the remedial measures are 'interim.'" *Id.* at 19a (internal quotation marks omitted).[8]

Examining the nexus between the permit fee and the threat, the court took "it as a given that there must be some nexus between a basis for jurisdiction under *Montana* and a tribal action taken in the

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[8] The IRODA indicates that, as a theoretical matter, containment can be "fully" effective, *see* IRODA 83, 107, 133, but does not find that its interim remedies would be. The nearest it comes is with respect to the rail cars, but even then the finding is an "expect[ation]" grounded in assumptions, and EPA specifies that "additional actions" may be considered if those assumptions prove wrong. *Id.* at 154.

exercise of that jurisdiction." *Id.* at 46a. Here, that nexus was satisfied by evidence indicating "that the Tribes have spent approximately $1.5 million annually on measures to monitor and mitigate the dangers posed by FMC's hazardous waste." *Id.* at 47a. The court also noted that "commercial hazardous waste disposal facilities" might charge between 10 and 50 times as much per ton as the amount prescribed by tribal guidelines—an amount itself many times higher than the $1.5 million FMC agreed to pay. *Id.*

Finally, the court rejected FMC's due process claim. Finding no bias, it cited "a long tradition of lower court judges criticizing [this] Court on issues of constitutional law [and other areas]." *Id.* at 51a (quoting *In re Charges of Judicial Misconduct*, 769 F.3d 762, 785 (D.C. Cir. 2014)). Accepting FMC's argument, the court explained, would require "federal and state judges * * * to recuse themselves with some frequency." *Id.* In any event, any bias was "eliminated" by the "differently reconstituted panel." *Id.* at 52a. The court was similarly unmoved by FMC's charges of systemic bias in tribal courts, noting that empirical evidence and its own experience refuted those claims. *Id.* at 52a-55a.

FMC sought rehearing, which the full court denied with no noted dissent. *Id.* at 90a-91a.

REASONS FOR DENYING THE PETITION

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT CERTIORARI.

In the first question presented, FMC asks whether "the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenev-

er a *Montana* exception is met, or whether * * * a court must also determine that the exercise of such jurisdiction stems from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations." Pet. i-ii.

FMC's request faces a fatal threshold obstacle: The decision below held no such thing. On the contrary, the Ninth Circuit carefully documented the manifold threats to the Tribes' environmental and cultural resources posed by FMC's waste, and concluded that those "constitute threats to tribal *self-governance*, health, and welfare." Pet. App. 34a (emphasis added). This case is therefore an inappropriate vehicle to determine whether such a finding is necessary—at best, such an opinion would be advisory, since the Ninth Circuit *actually made* the finding that Petitioner requests. And, shorn of Petitioner's rhetoric, the claim of a split with the Seventh and Eighth Circuits falls away.

In any event, FMC is wrong that this Court's precedent requires an independent, "threshold" finding of a direct link to tribal self-governance or internal relations. Pet. 16. The better reading is that those principles undergird the two canonical *Montana* exceptions.

A. The First Question Requests An Advisory Opinion Based On A Mischaracterization Of The Decision Below.

The first question presented rests on a false premise. According to FMC, the decision below held that "satisfying a *Montana* exception *is* enough to trigger tribal jurisdiction—regardless of whether the regulation at issue stems from the tribe's inherent sovereign authority to preserve tribal self-government or

control internal relations." *Id.* at 19.

The court made no such holding. Tellingly, FMC does not—because it cannot—quote any language from the opinion adopting the legal principle on which it seeks review and reversal. If anything, FMC implicitly acknowledges that such a holding is nowhere to be found. *See id.* at 16 (claiming that the court below "disregarded" its argument rather than issued a contrary holding).[9]

What FMC fails to mention is that the decision below *expressly* made the finding that it seeks. The court found that FMC's 22 million tons of toxic waste pose an active threat to tribal health and welfare, water resources, and cultural practices, Pet. App. 18a-23a, 34a-45a, and concluded that such threats "constitute threats to tribal *self-governance*, health and welfare," *id.* at 34a (emphasis added). Because FMC failed to challenge that finding in the petition—instead ignoring it—FMC has forfeited the opportunity to do so. Besides, the Ninth Circuit's finding is well supported by the voluminous record. Pet. App. 18a-23a, 34a-45a; *supra* pp. 3-5, 12-15; *cf. Plains Commerce*, 554 U.S. at 334-335 (listing "commercial development" as one example of nonmember conduct that might "threaten tribal self-rule"). Contaminated groundwater flows into the Portneuf

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[9] The Fifth Circuit's opinion in *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), is a useful contrast. That court held that this Court's precedents do not "require an additional showing that one specific relationship * * * threaten[s] self-rule." *Id.* at 175 (internal quotation marks omitted). That kind of language is missing from the decision below.

River—a resource essential to the Tribes' subsistence and cultural practices—and phosphine gas and other accumulated waste threatens catastrophic consequences with the potential to strain tribal resources to the breaking point. *Supra* pp. 3-5, 12-15. Nor are EPA's actions to date sufficient to fully address the threat, as EPA's own findings recognize. *Supra* pp. 14-15; IRODA 15-18.

The Ninth Circuit's express finding that the Tribes' jurisdiction *was* linked to self-governance rules out FMC's argument that the court below *implicitly* held that tribal jurisdiction is appropriate "regardless of" the need "to preserve tribal self-government." Pet. 16, 19, 24. Nor is there anything to FMC's charge that the Ninth Circuit has repeatedly ignored the connection between tribal jurisdiction and self-governance. In an opinion decided just a few months before this one, the Ninth Circuit quoted—verbatim—the language FMC invokes. *See Knighton* v. *Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 903 (9th Cir. 2019) (quoting *Plains Commerce*, 554 U.S. at 337), *cert. denied*, 140 S. Ct. 513 (2019) (mem.).

Because the Ninth Circuit found that FMC's conduct threatens tribal self-governance, FMC is also wrong to claim this issue is "outcome determinative." Pet. 16. On the contrary, any opinion would be advisory: If this Court granted certiorari and answered the first question in the affirmative, nothing would change because the necessary finding is already in the opinion below.

At bottom, FMC is frustrated that the Ninth Circuit did not respond more directly to an argument it made. *Id.* at 15-16 & n.3. But this Court "reviews

judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). FMC's frustration is no basis for this Court to render an advisory opinion about how the Ninth Circuit should have phrased its finding concerning tribal self-government. *Cf. Rita* v. *United States*, 551 U.S. 338, 356 (2007) ("Sometimes a judicial opinion responds to every argument; sometimes it does not * * * .").

B. The Decision Below Does Not Split With Any Other Circuit.

FMC claims a split with two other circuits, the Seventh and the Eighth. Pet. 17-18. But there is no conflict: The claim of a split depends on the misreading of the Ninth Circuit's decision described above. *See id.* at 18-19. Because the court below found that FMC's conduct threatens the Tribes' self-governance, it did not split with any decision requiring such a finding.

If FMC claims that the Seventh and Eighth Circuits would have disagreed with the Ninth Circuit's finding of the requisite connection on this record, even a cursory review of the cited cases shows that does not follow. First, the entire discussion of the *Montana* exceptions in *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125 (8th Cir. 2019), is dictum, because the court had *already* found tribal jurisdiction lacking for a different reason. *Id.* at 1136-1137. Setting that aside, however, the facts were very different. *Kodiak* involved disputed oil royalties allegedly owed to individual members of a tribe; there was no evidence, as there is here, that the tribe's health, welfare, or cultural practices were threatened. *Id.* at 1130. Indeed, *Kodiak* recognized that "[t]ribal court[s]" may have a role in "enforce-

ment of tribal laws relating to public health and safety and environmental protection." *Id.* at 1138.

And although the Eighth Circuit found that the "complete federal control of oil and gas leases on allotted lands" rendered tribal jurisdiction unnecessary, *id.*, that determination rested on more extensive federal control than EPA exercised here. There, "the entire relationship [was] mediated by the federal government," *id.*—in fact, the United States had "issued" the relevant lease, which "required approval by the" Bureau of Indian Affairs, *id.* at 1130, and collected and disbursed the disputed royalties, *id.* at 1136. Here, EPA has consistently recognized a role for tribal regulation, *supra* pp. 6-9 & n.3, and noted that its own measures to date are "interim" and do not completely address the threats posed by FMC's waste, *supra* pp. 12-13.

The Seventh Circuit's decision in *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), is even further afield. That case did not involve "*any* activities inside the reservation," which made it unnecessary to consider the extent of a tribe's inherent authority within a reservation. *Id.* at 782 (citing *Plains Commerce,* 554 U.S. at 332). Instead, the case concerned a suit by non-Indians against a payday lending operation. *Id.* at 768. The Seventh Circuit declined to determine whether the payday lending operation constituted a member of the tribe. *Id.* at 782 n.42. *Jackson* is nothing like this case.

C. *Plains Commerce* Did Not Change the Law And Impose a Threshold Requirement On The *Montana* Exceptions.

FMC's mischaracterization of the opinion below and the lack of any split are reason enough for the

Court to deny certiorari. *See* Sup. Ct. R. 10. But FMC is also wrong on the merits.

FMC derives its "threshold" requirement, Pet. 16, from a single sentence in *Plains Commerce*. *See* 554 U.S. at 337.[10] Read in context, that sentence did not require a formal finding of a threat to tribal self-government or internal relations anytime the *Montana* exceptions are invoked. *See Dolgencorp*, 746 F.3d at 175. The better reading is that the Court was explaining the theoretical foundations of the *Montana* exceptions. That reading draws support from *Montana* itself, which is the origin of the language FMC invokes from *Plains Commerce*. *Montana*, 450 U.S. at 564. In *Montana*, the Court explained that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." *Id.* And it then articulated the two exceptions to that rule that have governed tribal jurisdiction for the last forty years. *See id.* at 565-566. Any remaining doubt is dispelled by *Nevada* v. *Hicks*, which confirmed "that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred" in the two exceptions. 533 U.S. 353, 360-361 (2001). Nowhere did *Plains Commerce* purport to alter this settled law.

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[10] Elsewhere, FMC criticizes the Ninth Circuit for looking to a different "passing observation" in the same case. Pet. 14. FMC offers no explanation for resting its case on this "passing observation" in *Plains Commerce*, while discounting another.

Ultimately, however, these are questions for another day. Here, the Ninth Circuit made the finding that FMC seeks. That disposes of the first question presented.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT CERTIORARI.

The second question presented is really two questions lumped in one: whether the Ninth Circuit erred in applying *both* the first and second *Montana* exceptions to the highly particularized facts of this case. Because either exception is sufficient to sustain the judgment, the Court would need to address both, and reverse on both, to avoid rendering an advisory opinion. In other words, this second question presented asks this Court to engage in splitless error correction twice-over. The Court should follow its usual practice and decline that invitation.

A. The Court Would Have To Engage In Splitless Error Correction Twice To Avoid An Advisory Opinion.

The lack of a split with respect to either *Montana* exception exposes FMC's request for error correction for what it is. Petitioner does not claim a split with respect to the first exception. *See* Pet. 20-23. And its half-hearted claim (at 27) on the second is easily dismissed. As the petition suggests, *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians* involved only the "financial consequences" of intangible bonds—there was no evidence of a physical threat to the tribes or their essential natural resources. 807 F.3d 184, 209 (7th Cir. 2015). And *Belcourt Pub. Sch. Dist.* v. *Davis*, 786 F.3d 653 (8th Cir. 2015), involved discrete wrongdoing alleged by a handful of employees of a

school district, *Belcourt Pub. Sch. Dist.* v. *Davis*, 997 F. Supp. 2d 1017, 1019 (D.N.D. 2014). Neither of those cases remotely resembles the environmental and cultural threats posed by *22 million tons* of highly toxic waste.

Even if the Ninth Circuit's analysis with respect to one exception warranted review, it would make little sense to do so in this case. It only takes one *Montana* exception to sustain jurisdiction. Thus, unless this Court addresses *both* exceptions and reverses as to each, any opinion on a single exception would be purely advisory. *See* Pet. 23 (agreeing that only one exception is necessary). Constitutional and prudential considerations counsel against that course. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (noting "an advisory opinion" has been "disapproved by this Court from the beginning"); *United Pub. Workers of Am. (C.I.O.)* v. *Mitchell*, 330 U.S. 75, 89 (1947) ("federal courts * * * do not render advisory opinions"). This is not gamesmanship on the part of the Tribes or the Ninth Circuit—that both exceptions apply merely reflects that this is not a close case.

B. The Ninth Circuit Did Not Err With Respect to Either Exception, And This Case Is A Poor Vehicle For Addressing Both.

On top of everything else, the Ninth Circuit did not err with respect to the *Montana* exceptions. And the idiosyncratic facts of this case would hamper this Court's review of either.

1. The first exception authorizes tribes to "regulate * * * 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. The agreement may be "express[ ]" or evident from the nonmember's "actions." *Plains Commerce*, 554 U.S. at 337.

In 1998, FMC entered into an express, commercial agreement to pay $1.5 million annually to the Tribes as long as FMC's waste remained within the Reservation. Pet. App. 30a. In the course of negotiations, FMC expressly agreed to tribal jurisdiction in connection with that permitting fee. *Id.* at 6a-7a. As both courts below found, that agreement was consensual. *Id.* at 31a-32a, 78a-79a. Although EPA's actions gave the Tribes a bargaining advantage, *see id.*, bargaining power need not be equal for an agreement to be valid and consensual. On the contrary, commercial contracts between parties with unequal power are enforced every day. *See, e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991) (agreements to arbitrate valid despite frequently "unequal bargaining power" between parties).

FMC protests that this case does not resemble the example cases listed by this Court after it articulated the first exception in *Montana*. That is wrong: *Morris* v. *Hitchcock* "uph[e]ld[ ] tribal taxes on nonmembers grazing cattle on Indian-owned fee land within tribal territory," and *Buster* v. *Wright* involved "a permit tax on nonmembers for the privilege of doing business within the reservation." *Plains Commerce*, 554 U.S. at 332-333 (describing *Morris*, 194 U.S. 384, 393 (1904), and *Buster*, 135 F. 947, 950 (8th Cir. 1905)). This regulation is in the same vein: FMC conducted business within the Reservation, and the resulting waste has impacted Indian land.

Indeed, the permit fee here is much more limited than the regulations in *Morris* and *Buster*. It does not apply for merely "doing business" and addresses impacts far more significant than grazing cattle.[11]

FMC also complains that the agreement cannot be terminated, but that is an incomplete description: The agreement cannot be *unilaterally* terminated. That is generally true of contractual arrangements.[12] The critical question is whether the nonmember could avoid tribal regulation by adjusting its conduct *ex ante*, not whether it can unilaterally withdraw after the fact. This is not, as FMC fears (at 21), the "Hotel California": It is an ordinary hotel, at which you must pay the rate you agreed to for the stay you booked. Here, FMC agreed to continue payments "beginning on June 1, 1999, and for every year thereafter." C.A. E.R. 1046; *see id.* at 1049, 1053;

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[11] *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 n.4 (2001), reaffirmed that *Buster* provides "guidance * * * as to the type of consensual relationship contemplated by the first exception," even as it questioned a different aspect of *Buster*.

[12] FMC claims that Idaho law permits a party to unilaterally terminate a contract that "does not specify its duration." Pet. 22 n.6. Not so: The case FMC cites discusses *Oregon* law, and refers only to contracts that do not specify a *minimum* duration. *See Zidell Expls., Inc.* v. *Conval Int'l Ltd.*, 719 F.2d 1465, 1473-74 (9th Cir. 1983). Idaho law provides that a contract of unspecified duration is "valid for a reasonable time" and may not be terminated unilaterally if "otherwise agreed." Idaho Code § 28-2-309(2). Here, the Tribes sought clarification that FMC would not unilaterally discontinue payments "in the next several years," and FMC agreed. C.A. E.R. 1049, 1053. In any event, this Court has never suggested that the "agreement" necessary to support tribal jurisdiction is subject to the formal requirements of state contract law.

Pet. App. 86a-87a.

Nor did the Ninth Circuit endorse an "in for a penny, in for a pound" regime. Pet. 22 (alteration and internal quotation marks omitted). By the express terms of the agreement, FMC was "in for" a $1.5 million annual fee. The tribal court did not rely on the agreement to find jurisdiction over an unrelated "area," as the Court contemplated when it coined that phrase. *Atkinson*, 532 U.S. at 656.

Although FMC suggests (at 22) the Ninth Circuit was wrong to consider whether it should have "reasonably anticipated" tribal jurisdiction, that consideration was not dispositive. The "express[ ]" agreement with the Tribes was sufficient to support the judgment, regardless of the course of dealing. Pet. App. 30a. In any event, reasonable expectations are an appropriate consideration: As FMC recognizes (at 14), this Court said so in *Plains Commerce*. 554 U.S. at 338.

Finally, this is a poor vehicle to take up the first *Montana* exception given the federal government's involvement in this case. As FMC admits, the RCRA Consent Decree is "a reasonable settlement reached at arm's length between the [federal] government and FMC." FMC C.A. Opening Br. 10 (quoting *United States* v. *Shoshone-Bannock Tribes*, 229 F.3d 1161, 2000 WL 915398, at *1 (9th Cir. 2000)). That Decree contemplated FMC obtaining applicable tribal permits, which FMC did after consenting to tribal jurisdiction. *Supra* pp. 6-8. These unusual facts counsel against certiorari.

2. The second *Montana* exception applies when "the conduct of non-Indians on fee lands within [a] 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. "The conduct must * * * 'imperil the subsistence' of the tribal community," *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566), or "be necessary to avert catastrophic consequences," *id.* (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232, n.220 (2005 ed.)).

The decision below found such a threat based on the factual findings of the Tribal Court of Appeals and EPA, expert testimony, and the record as a whole. Pet. App. 36a. Every judge to have examined this record agrees. *Id.* at 36a, 80a-83a, 104a-109a.

The threat is not "speculative." There is ongoing damage to the Portneuf River and the Fort Hall Bottoms, which are necessary for "subsistence fishing" and cultural and religious practices. *Supra* p. 3; IRODA 4. And, although that is significant enough, there is also a very real possibility of sudden and unpredictable calamity as a result of so much toxic waste, *supra* pp. 16-18, which includes "lethal amounts of phosphine gas that accumulate beneath the pond covers," Pet. App. 43a. Monitoring is key to averting such a catastrophe, but it is "'completely inadequate'" at the FMC site, *id.* (quoting expert testimony), and there is no early warning system in place, *id.* The Tribes are entitled to take reasonable steps to prepare before disaster strikes. *Id.* at 107a; *see also Plains Commerce*, 554 U.S. at 341.

EPA's actions have not eliminated the threat. FMC misstated EPA's own conclusions on that front to the Court below, Pet. App. 19a-20a, and it continues to obscure the facts before this Court. As the IRODA makes clear, existing monitoring systems are

inadequate.[13] Even if the IRODA measures are fully implemented, additional risks and uncertainty remain. *Supra* pp. 12-15; IRODA 18-19, 73.[14]

Contrary to FMC's representation (at 26), the Ninth Circuit *did* require the Tribes to show a nexus between the threat and the exercise of jurisdiction, and found a nexus on the facts of this case. Pet. App. 46a-48a. The money was earmarked for the Tribes' hazardous waste management program. *Supra* p. 7. And there is record evidence that the Tribes spent at least this much monitoring and addressing the threat. Pet. App. 47a; *see also* C.A. S.E.R. 8-14. The court below also properly looked to the cost of commercial waste disposal as a benchmark: Although the Tribes are not taking the waste for disposal, they are hosting the waste on the Reservation indefinitely, meaning they are subject to some of the same effects as a storage facility. Moreover, the Tribes are *not* charging a similar fee; they are charging much

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[13] To the extent FMC relies on any measures taken since 2014, *see* Pet. 8, 24-25, it has not explained any legal basis for why those developments are relevant to the 2014 tribal judgment.

[14] The United States' brief in the RCRA case, which FMC cites (at 6 n.1) for the proposition that EPA's action "fully" addressed the threat, was penned in 2000, long before the "additional investigations" discussed in the IRODA and expert testimony revealed the shortcomings of EPA's actions in the late 1990s. The same brief recognized that "the Tribes need not rely exclusively on the United States," suggesting regulation would be appropriate under the second *Montana* exception. U.S. Br. at 40, *United States* v. *Shoshone-Bannock Tribes,* No. 99-35821 (9th Cir. Feb. 7, 2000), 2000 WL 33996529 (internal quotation marks omitted).

less. Pet. App. 47a.

Because the threat posed by FMC's waste is so extreme, this case would also be a poor vehicle for addressing the second *Montana* exception. *See id.* at 5a ("FMC's plant was the largest elemental phosphorous plant in the world."); IRODA 83 ("phosphorous contamination" at FMC site is "unprecedented anywhere in the United States"). FMC's continued resistance to the factual findings below exacerbates the problem. Although it claims those disputes are "irrelevant to the legal issues," Pet. 24 n.7, that is wrong: The legal question is whether the threat to the Tribes suffices for jurisdiction. *See Plains Commerce*, 554 U.S. at 341. That is intimately related to the lower courts' assessments of danger that FMC tries to sweep under the rug. Granting certiorari in this case would entail collateral fact-finding and relitigating whether FMC or the courts below correctly report the facts. That is not this Court's role.

III. PETITIONER'S POLICY CONCERNS DO NOT WARRANT CERTIORARI.

A. The Petition Invokes Multiple Irrelevant Issues And Exaggerates The Consequences Of The Decision Below.

1. Perhaps because the petition falls short of the traditional Rule 10 criteria, FMC raises a host of other issues. None would be properly before the Court if it granted certiorari.

First, FMC dedicates extensive space to its due process arguments, even though it has not presented those issues to this Court. That is for good reason: In the main, the supposedly "stunning" comments of Judges Gabourie and Pearson are routine. The

Judges discussed the importance of building a record, reading case law, and researching history. *Supra* p. 11. And although they offered a generalized critique of this Court's precedent, the Ninth Circuit correctly observed that there is a "long tradition" of state and federal judges doing the same. Pet. App. 51a (internal quotation marks omitted). Judges also often write separately to express concern about a particular precedent. That does not require recusal whenever a case relating to that precedent arises.

Second, FMC alludes to the question of "adjudicatory jurisdiction" that divided the Court in *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (mem.) (per curiam). But FMC's petition does not posit any delta between regulatory and adjudicatory jurisdiction, meaning that issue is not presented here.

Third, FMC cites several Ninth Circuit cases involving regulatory jurisdiction on *tribally-owned* land. *See Water Wheel Camp Recreational Area, Inc.* v. *LaRance*, 642 F.3d 802, 810 (9th Cir. 2011) (per curiam); *Window Rock Unified Sch. Dist.* v. *Reeves*, 861 F.3d 894, 898 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018) (mem.). But the court's approach to jurisdiction on tribal land is not implicated in this petition concerning fee land.

Fourth, FMC raises concerns about the requirement to exhaust tribal remedies. Pet. 31. That issue, too, is beyond the scope of the questions presented, since FMC exhausted its tribal remedies here, as its binding representations to the Ninth Circuit obliged it to. *Supra* p. 9.

2. FMC also claims that the decision below will have dire consequences. Those fears derive from

FMC's refusal to acknowledge that the *Montana* analysis is fact-driven, and the reach of the decision below is limited by its extraordinary facts. For example, FMC claims that the decision below ushers in a regime of "unfettered regulatory and adjudicatory jurisdiction," even if an "agreement * * * seeks to limit tribal jurisdiction." Pet. 28. But the judgment was limited to the terms of FMC's agreement with the Tribes, which involved no jurisdictional limitation. Likewise, the decision below does not foreshadow jurisdiction for *any* activity fully contained on fee land. The court's holding rested in large measure on the threat to the surrounding *tribal* land and the Indians residing there. *Supra* pp. 16-17; *cf. Evans* v. *Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1301, 1307 (9th Cir. 2013) (holding that there was not even *plausible* tribal jurisdiction over construction of "a single-family residence" on fee land). As for FMC's own situation, it has other remedies—including renegotiating its business deal with the Tribes, or taking its concerns to Congress.

B. Petitioner's Generalized Objections To The Ninth Circuit And Tribal Courts Are Unfounded.

As FMC's futile efforts to create a split prove, the Ninth Circuit's approach to *Montana* is not aberrant. *See, e.g.*, *Big Horn Cty. Elec. Coop., Inc.* v. *Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (giving the second exception a "narrow construction" for fear it "would effectively swallow *Montana*'s main rule"). The leading quotation that FMC relies on to paint a contrary picture, from Judge Christen, concerns a different legal context: tribal jurisdiction over *tribal* land. *Window Rock*, 861 F.3d at 916 (Christen, J.,

dissenting). It has no relevance to this case. More generally, this Court does not sit to review the general "atmosphere in which an opinion is written." *Black*, 351 U.S. at 298.

Nor is there any basis for FMC's contention that tribal courts are systematically biased against nonmembers. The Ninth Circuit rejected that argument, citing empirical evidence and its "own experience." Pet. App. 54a-55a. More to the point, if there is any truth to FMC's concerns, there will be a more suitable vehicle to address the questions presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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