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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit's decision upholding the Tribes' authority to impose a perpetual, $1.5 million annual fee on a nonmember, FMC, based solely on the presence of waste on its own fee land—as mandated by an EPA-approved remediation plan—directly contravenes this Court's decisions as well as those of other circuits, flouts EPA's repeated determinations that its plan will protect human health and the environment, and dramatically expands the scope of tribal sovereignty over nonmembers on fee land.

Instead of defending the Ninth Circuit's decision on its own terms, the Tribes seek to re-write it. Thus, they claim (at 20) that the first question is not implicated at all, because the Ninth Circuit "*expressly* made the finding" required by this Court's decisions that the regulation at issue is necessary to preserve tribal self-governance. But the Ninth Circuit made no such finding; instead, the Tribes have tried to manufacture it by partially quoting a sentence from a prefatory discussion of *Montana*'s second exception. And once this "express finding" is exposed as a fiction, the Tribes' defense to certiorari crumbles. The Tribes have no answer to the square conflict on this issue, and the Tribes' argument "on the merits" (at 24) just underscores that this issue is indeed presented.

On the second question, the Tribes again try to recast the Ninth Circuit's decision—this time suggesting (at 25-26) it merely involves a routine application of *Montana v. United States,* 450 U.S. 544 (1981). But the Ninth Circuit's decision expands the first *Montana* exception to cover virtually any agreement between a tribe and nonmember—including those forged through the assertion of the

very regulatory authority at issue. And it expands the second exception to cover purely hypothetical risks, even that an EPA-approved plan that has safely contained waste for decades "may fail" (Pet. App. 44a (citation omitted)). The Ninth Circuit's decision radically overhauls the *Montana* framework and construes its exceptions to swallow the rule against tribal jurisdiction over nonmembers on fee land.

The Tribes' response also underscores the conflict with the federal government's own position on critical issues underlying this dispute. For example, the Tribes repeatedly suggest (at 14, 17, 30) that the Ninth Circuit's decision merely tracks EPA's findings. In fact, however, EPA has repeatedly found that EPA's containment plan "is protective of human health and the environment," Pet. 6 & n.1—a finding that is required by law (40 C.F.R. § 300.430(f)(5)(ii)(A)). That finding is confirmed by the fact that, while the waste has been contained for decades, there is no evidence of any "measurable harm" to the Tribes, Pet. at 7; *see* Pet. App. 73a-74a—a fact the Tribes do not deny. *See* Sup. Ct. R. 15.2. Likewise, the United States has already repudiated the Tribes' claims (at 6, 29) that the RCRA consent decree "required" FMC to obtain the permits at issue (*see* Pet. 21 n.5). The Tribes' defense of the decision below is irreconcilable with EPA's findings and the government's position in prior briefs (Pet. 6 n.1).

While the Tribes focus on recasting the decision below to avoid review, the *real* Ninth Circuit decision, as amici explain, will have far-reaching and harmful consequences for the millions of nonmembers who live, work, and do business on or near Indian reservations—and ultimately even for tribes themselves. *See* Br. for Chamber of Commerce, et al.

15-18; Br. for Retail Litigation Center (RLC) 9-11. This Court's review is urgently needed.

ARGUMENT

I. THE FIRST QUESTION PRESENTED WARRANTS REVIEW

A. The Tribes' Attempt To Dodge This Question Fails

On the first question, the Tribes rest (at 20) almost exclusively on the false claim that the Ninth Circuit "*expressly* made the finding" that the tribal regulation is "necessary to protect tribal self-government [or] to control internal relations." *See Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 332 (2008) (quoting *Montana*, *v. United States* 450 U.S. 544, 564). The Tribes pluck this so-called finding from a prefatory sentence in the court's discussion of the second *Montana* exception. The sentence states in full: "Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare." Pet. App. 34a. But that vague statement says nothing about whether (or how) the regulation at issue here is *necessary to protect* tribal self-government. And even the Tribes do not dispute that the Ninth Circuit disregarded this threshold requirement when it ruled that jurisdiction exists under the first *Montana* exception. That alone creates a direct circuit conflict. Pet. 17-19.

An actual analysis of this threshold requirement would have required a discussion of whether the fees were required to effectuate "the right [of the Tribes] to make their own laws and be governed by them," *Nevada v. Hicks,* 533 U.S. 353, 361 (2001); EPA's

extensive role in regulating the waste on FMC's site, *see Montana,* 450 U.S. at 565 (regulation by another sovereign "refute[s]" "[a]ny argument that [tribal regulation] is necessary to . . . tribal self-government"); the fact that the Tribes have governed themselves for more than 70 years alongside FMC's site without imposing these fees, Pet. 7; and the fact that the Tribes have presented no evidence the fees at issue are actually protecting the Tribes, Pet. App. 85a. The Ninth Circuit never examined any of these factors because—as a rule—it does not require any threshold finding that the regulation at issue is necessary to protect tribal self-government.[1]

Any doubt as to whether the Ninth Circuit has adopted a different framework is answered by cases like *Kodiak Oil & Gas (USA) Inc. v. Burr*, where the Eighth Circuit stated that "[t]he *Montana* exceptions apply only to the extent they are 'necessary to protect tribal self-government or to control internal relations'"; demanded the tribe to show that this requirement was met as to *both* of the *Montana* exceptions; and refused to find tribal jurisdiction was necessary to protect tribal self-government because of the federal government's role in regulating the activity at issue. 932 F.3d 1125, 1138-39 (8th Cir. 2019) (citation omitted). The stark contrast between the Ninth Circuit's analysis here—which began and

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[1] The Tribes do not dispute that the Ninth Circuit did not apply this factor in the cases cited in the petition. They point (at 21) to *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 903 (9th Cir.), *cert. denied*, 140 S. Ct. 513 (2019). But there, too, the Ninth Circuit simply applied its flawed "reasonably anticipated" test—*without* actually inquiring whether jurisdiction was necessary to protect self-government. *Id.* at 904.

ended with the *Montana* exceptions—and the Eighth Circuit's analysis in *Kodiak* proves the conflict.

B. This Question Warrants Review

When it comes to the Ninth Circuit's actual decision, the Tribes have little to offer in response.

Their passing swipe (at 22-23) at the conflict fails. As explained, even when the *Montana* exceptions are met, the Seventh and Eighth Circuits only recognize tribal jurisdiction over nonmembers *to the extent necessary* to protect self-government. *See Kodiak*, 932 F.3d at 1138; *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782-83 (7th Cir. 2014), *cert. denied*, 575 U.S. 983 (2015). Thus, in the Eighth Circuit, "[a] consensual relationship alone is not enough" to establish tribal jurisdiction. *Kodiak,* 932 F.3d ar 1138. By contrast, the Ninth Circuit bases tribal jurisdiction *solely* on the *Montana* exceptions—and, thus, a consensual relationship alone *is* enough to trigger jurisdiction. *See* Pet. App. 27a-48a; Pet. 17-19 & n.4; *Jackson*, 764 F.3d at 783 ("[A] nonmember's consent to tribal authority *is not sufficient* to establish the jurisdiction of a tribal court." (emphasis added)).

The conflict with *Kodiak* is especially stark, given the federal involvement in both cases. The Tribes quibble (at 23) that the federal role is less "extensive" here. But EPA has comprehensively regulated the waste on FMC's site. Pet. 5-8. Moreover, the point is that the Ninth Circuit engaged in a fundamentally different analysis—unlike *Kodiak,* it never even factored EPA's extensive regulation of the site into its analysis. This case would have come out differently under *Kodiak*. That conflict merits review.

The Tribes assert (at 20) that FMC cannot "quote any language from the opinion" disclaiming the

requisite threshold inquiry. But the Tribes do not dispute that the Ninth Circuit has refused to enforce a stand-alone requirement that tribal regulation is necessary to preserve tribal self-government. *See* Pet. 14-16. And all the Court has to do is look at what the Ninth Circuit *did* here. It found tribal jurisdiction based *solely* on its analysis of the *Montana* exceptions. The first question asks whether that alone is *enough* to sustain tribal jurisdiction over nonmembers. Pet. i-ii. What the Ninth Circuit said and did thus makes clear this issue is squarely presented.

Finally, the Tribes defend (at 23-25) the Ninth Circuit's rule—arguing that the *Montana* exceptions alone govern. *Plains Commerce* directly refutes this position. *See* 554 U.S. at 337 ("*Even then*, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." (Emphasis added)); Pet. 13-19. But the Tribes' argument "on the merits" (BIO 24) that the Ninth Circuit is *correct* not to enforce any threshold requirement only underscores the need for review.

II. THE SECOND QUESTION PRESENTED WARRANTS REVIEW

A. The Tribes' Attempt To Dodge This Question Fails

On the second question, the Tribes once again try to evade the question by manufacturing a problem of their own imagination—this time suggesting (at 25-26) that the fact both *Montana* exceptions are implicated here somehow precludes review. That is nonsense. Many, if not most, of this Court's *Montana* cases—including *Montana* itself—have addressed both exceptions. *See Plains Commerce*, 554 U.S. at

332-41, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655-59 (2001), *Strate v. A-1 Contractors*, 520 U.S. 438, 456-459; *Montana*, 450 U.S. at 565-67. The Tribes' claim of "error correction" (at 25) also fails. The Ninth Circuit's *Montana* analysis conflicts with the decisions of this Court and other circuits. Pet. 20-29. In any event, given the importance of these jurisdictional issues, this Court frequently grants review in tribal jurisdiction cases even absent a direct circuit conflict—as it did in *Plains Commerce*. The Ninth Circuit's extreme decision here is, if anything, a more compelling candidate for review.

B. This Question Warrants Review

1. This Court has repeatedly held that the first *Montana* exception extends no further than the case examples listed in *Montana*. Pet. 20-21. The Tribes point (at 27-28) to *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905). But those cases involved nonmembers who voluntarily did business on *Indian* land. *Morris*, 194 U.S. at 384-85, 392-93; *Buster*, 135 F. at 950. Here, the Tribes seek to regulate the presence of waste on FMC's *own* fee land—as mandated by EPA. FMC is not seeking to use Indian lands to graze livestock (*Morris*) and does not wish to trade on tribal lands (*Buster*); rather, the Tribes forged the "consensual relationship" that the Ninth Circuit held creates jurisdiction by asserting the very power at issue and threatening FMC with crippling financial penalties. Pet. 7-8. The Ninth Circuit's ruling that such a

relationship confers jurisdiction greatly expands this exception. Chamber of Commerce Br. 8-10.[2]

In response, the Tribes once again rest their defense on a mischaracterization of the Ninth Circuit's decision. They assert (at 2, 27) that FMC "expressly agreed to tribal jurisdiction" (and to a perpetual annual fee), and that the Ninth Circuit merely enforced that agreement "according to its terms." But, in reality, the Ninth Circuit found tribal jurisdiction because "FMC entered a consensual relationship with the Tribes . . . when it negotiated and entered into [a] permit agreement with the Tribes." Pet. App. 30a. It was the existence of that "consensual relationship"—not an effort to enforce any actual contractual provision—that "'trigger[ed]' tribal regulatory authority," in the Ninth Circuit's view. *Id.* at 32a (citation omitted) (alteration added). Thus, the Ninth Circuit never identified the terms of the supposed agreement in its *Montana* analysis.

The Tribes (at 27) cite a sentence in the background section of the opinion (Pet. App. 6a-7a) describing letters concerning a single permit application, which is explicitly addressed to the then-"current" tribal guidelines. ER1125; CA9 FMC Response & Reply 11-14. But nothing in those letters "expressly" agreed to open-ended tribal jurisdiction under *later-enacted* guidelines—which presumably explains why the Ninth Circuit did not rely on it in its *Montana* analysis. Had the Tribes brought a breach-

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[2] The Tribes dispute (at 3 n.1) the particular Act under which FMC's land was allotted, but do not dispute the key point—that the land was transferred to non-Indians in fee under a statutory scheme intended to *extinguish* tribal jurisdiction over the land. *Montana*, 450 U.S. at 559 n.9

of-contract action in state court, they would have been required to prove the existence and breach of an actual contract for perpetual fees. Instead, the Ninth Circuit held that the Tribes had jurisdiction to impose the same thing merely because FMC *entered into* a "consensual relationship" with the Tribes—without requiring the Tribes to prove what FMC actually agreed to. If that is not "In for a Penny, in for a Pound," what is?

The alleged "consensual relationship" here is also fundamentally different than the ones identified in *Montana* in that there is no way out for FMC. According to the Tribes (at 34), FMC must pay the fees *indefinitely*, unless the Tribes or Congress say otherwise. In other words, the Ninth Circuit has transformed the first *Montana* exception from one that covers nonmembers who go on tribal lands and voluntarily choose to do business with tribes (and can voluntarily choose to stop doing so) into a weapon that can be asserted by tribes to manufacture permanent jurisdiction by making aggressive regulatory demands on nonmembers. That ruling is deeply, and dangerously, flawed. *See* Pet. 20-21.[3]

2. The Ninth Circuit's holding on the second *Montana* exception also conflicts with this Court's precedents. This Court has stressed that this exception applies only when jurisdiction is "necessary to avert catastrophic consequences." *Plains Commerce*, 554 U.S. at 341 (citation omitted). Here, however, the Ninth Circuit held that there was jurisdiction because "no matter how well [EPA's] containment system is designed, the system *may* fail."

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[3] The Tribes already have filed suit in tribal court demanding additional fees. CA9 FMC Opening Br. 25 n.2.

Pet. App. 44a (emphasis added). That ruling drastically expands the scope of this exception.

Again, instead of accounting for the Ninth Circuit's actual decision, the Tribes seek to recast it. They assert (at 30) that the second exception is triggered here by "ongoing damage to the Portneuf River and the Fort Hall Bottoms, which are necessary for 'subsistence fishing' and cultural and religious practices." (Citations omitted.) The Ninth Circuit did not, however, rely on any such "damage" to tribal waters; and for good reason—the record refutes any such harm (Pet. App. 73a-74a), much less the kind of *catastrophic* harm required to trigger *Montana*'s second exception. Pet. 25-26. Indeed, it is undisputed that there is no evidence of any "measurable harm" to the Tribes from the waste on FMC's land. Pet. 7.

The Tribes hypothesize (at 30) that there is "a very real possibility of sudden and unpredictable calamity"—but that defense too is nowhere to be found in the Ninth Circuit's opinion. And there is no basis to find that a state-of-the-art containment system designed by the world's foremost expert environmental agency will fail. And sheer speculation that *any* system "may" fail cannot trigger the second *Montana* exception. *See Plains Commerce,* 554 U.S. at 341; *Atkinson Trading,* 532 U.S. at 657 n.12 (must show conduct that "actually 'imperil[s]'" tribe (alteration in original) (citation omitted)).[4]

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[4] The Tribes disingenuously suggest (at 14) that EPA's "uncontested findings" support their position. But the citations are to statements about the waste *if left unregulated*. EPA has repeatedly found that its containment plan *is* protective of human health and the environment—as experience proves.

3. The Ninth Circuit expanded *Montana* in another troubling respect. It held that "nothing" requires the Tribes to show that $1.5 million annual fee is actually being used to address this alleged threat. Pet. App. 47a. Again, instead of defending that ruling, the Tribes misrepresent it, claiming (at 31) that the court actually "found a nexus" based on "evidence that the Tribes spent [the permit fees on] monitoring and addressing the threat." But as the district court found, there is no such evidence. *Id.* at 85a. And the Ninth Circuit expressly stated that it was "not rely[ing]" on any. *Id.* at 46a. Instead, the Ninth Circuit's rule is that a "more than sufficient nexus" can be found based on a back-of-the-envelope comparison to fees charged by companies that *take and dispose of* hazardous waste (which the Tribes have not done). *Id.* Thus, the Ninth Circuit's nexus rule, like the rest of its analysis, is made to manufacture jurisdiction.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

More than 400 of the Nation's 567 Indian tribes are located in the Ninth Circuit (Pet. 4), making the Ninth Circuit's position on tribal sovereignty over nonmembers a matter of singular importance. And, as explained by amici, these concerns are by no means abstract—the Ninth Circuit's radical expansion of *Montana* will have serious, real-world consequences for the many businesses and retail establishments operating within or near tribal lands (even on their own fee lands), and invite jurisdictional conflicts among local, state, and federal governments and tribes. *See* Chamber of Commerce Br. 15-18; RLC Br. 10-11. In particular, the Ninth Circuit's rule could

seriously undercut federal interests by permitting tribal jurisdiction over areas heavily regulated by the federal government, based on a tribe's disagreement with the government's own findings.

Despite the Tribes' attempts to rewrite the Ninth Circuit's decision here, the court's actual decision will have dramatic consequences on the ground.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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June 9, 2020