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

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES

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INTRODUCTION

The United States has sided with the tribal parties in every case decided by this Court applying the framework established by *Montana v. United States*, 450 U.S. 544 (1981). So it is hardly news that the United States would align with the Tribes here in urging the Court to deny review—just as it did in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), in response to the Court's last CVSG in this area. What *is* significant is that, here, the Solicitor General acknowledges multiple crucial errors in the court of appeals' *Montana* analysis finding tribal jurisdiction.

On the first *Montana* exception, the Solicitor General agrees (at 15) with FMC Corporation that this case does not fit within the exception as confined by this Court, because the relationship at issue was "based on petitioner's interactions with respondent in its governmental capacity as regulator, rather than as a market participant." On the second exception, the Solicitor General agrees (at 19-20) with FMC that the Ninth Circuit erred in finding jurisdiction, even though the Tribes failed to show how the perpetual, $1.5 million annual fee at issue was tailored to the alleged threat. Each of those errors greatly expands tribal jurisdiction over nonmembers—in direct contravention of this Court's precedent.

The unjustified expansion of tribal jurisdiction under the *Montana* framework in the circuit that is home to more than two-thirds of the Nation's Indian tribes alone warrants review. But certiorari is further warranted because this case implicates a conflict over the fundamental limits set by *Montana*. The Solicitor General acknowledges (at 20) that there is

"imprecision in the case law" in this critically important area, and "tension" between the decision below and those of other courts of appeals. The Solicitor General's brief only underscores the importance of resolving that conflict. The Solicitor General argues (at 15) that tribal jurisdiction existed based on "direct consent," but both the Seventh and Eighth Circuits have expressly rejected the premise that consent alone is enough to establish tribal jurisdiction. *See Jackson v. Payday Fin., LLC*, 764 F.3d 765, 781-83 (7th Cir. 2014), *cert. denied,* 575 U.S. 983 (2015); *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); FMC Reply 5-6.

The Solicitor General's suggestion that the Court should disregard this confusion—and ignore the fundamental errors he identifies in the decision below—is unpersuasive. Allowing the Ninth Circuit's unprecedented conception of tribal sovereignty over nonmembers to take root will have far-reaching consequences. The petition should be granted.

ARGUMENT

I. THE FIRST QUESTION PRESENTED WARRANTS REVIEW

Notably, the Solicitor General does not embrace the Tribes' failed attempt to dodge the first question presented. FMC Reply 3-4. Instead, he jumps to the merits and argues (at 11-13) that there is no touchstone requirement that the regulation of nonmembers must be necessary to preserve tribal self-government. That is incorrect.

This Court has explicitly stated that the *Montana* exceptions apply only "*to the extent necessary* 'to protect tribal self-government [and] to control internal relations.'" *Plains Commerce Bank v. Long*

Family Land & Cattle Co., 554 U.S. 316, 332 (2008) (alteration in original) (emphasis added) (citation omitted). Underscoring the point, this Court in *Plains Commerce* specifically admonished that "[e]ven" where "the nonmember has consented [to jurisdiction], either expressly or by his actions," "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 337; *see* Pet. 13-15.

The Solicitor General faults FMC (at 12-13) for reading *Plains Commerce* as if the Court meant what it said. But this Court has repeatedly recognized this threshold requirement. *See Nevada v. Hicks*, 533 U.S. 353, 359 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *Montana v. United States*, 450 U.S. 544, 564 n.13 (1981). Moreover, in *Plains Commerce*, this Court took pains to clarify the *Montana* framework in order to eliminate confusion. *See* 554 U.S. at 336-38. The Solicitor General is just seeking to reintroduce that confusion here.

In any event, this Court's guidance is needed to eliminate the confusion in the lower courts on this fundamental question. That confusion is far from "nascent." U.S. Br. 20. The Solicitor General himself recognized that there was "uncertainty" on this issue years ago in his invitation brief in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 6445774, at *25 n.6; *see* Pet. 19 & n.4. The confusion has only grown since. Both the Seventh and Eighth Circuits have enforced this requirement based on their reading of *Plains Commerce*. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 783

(7th Cir. 2014). Yet, the Ninth Circuit has repeatedly ignored this requirement. Pet. 14-15.

The Solicitor General claims (at 21-22) it is "unclear" whether *Kodiak* and *Jackson* actually applied this requirement. Both circuits, however, were emphatic that consent embodied in express agreements—an oil-and-gas lease (*Kodiak*) and a loan agreement (*Jackson*)—was "not enough" to establish jurisdiction under *Montana*. *Kodiak*, 932 F.3d at 1138; *see Jackson,* 764 F.3d at 783. The Solicitor General's effort to dismiss those cases on their facts fails; *Kodiak,* in particular, is directly analogous given the federal government's "extensive involvement" (U.S. Br. 23) in regulating the activities at issue in both cases. FMC Reply 4-5. Moreover, regardless of any factual differences, the *holdings* of those decisions are in clear conflict with the rule applied in the Ninth Circuit. Pet. 14-16.

This fundamental limit on the scope of inherent tribal sovereignty over nonmembers should not vary based on geographic happenstance.

II. THE SECOND QUESTION PRESENTED WARRANTS REVIEW

On the second question presented, the Solicitor General acknowledges that the Ninth Circuit erred on both *Montana* exceptions. That strongly reinforces the need for this Court's intervention.

1. As to the first *Montana* exception, the key issue is whether the exception extends beyond the voluntary commercial relationships in the examples cited in *Montana* to *regulatory* relationships created by the assertion of the tribal jurisdiction at issue. Pet. 20-22; FMC Reply 7-8. Significantly, the Solicitor General agrees (at 14-15) with FMC that the alleged

"consensual relationship" here does *not* fit within the first *Montana* exception based on prior cases. This is dispositive, because this Court has repeatedly stressed that the first exception does not extend beyond the case examples listed in *Montana*. *See Plains Commerce*, 554 U.S. at 332-33; Pet. 20-21; FMC Reply 7-8. The Ninth Circuit's contrary decision fundamentally expands the first *Montana* exception.

Nevertheless, the Solicitor General suggests (at 15-17) that review is not warranted on the basis of a novel "direct consent" theory. That argument should be rejected. For starters, it has been waived. The Tribes have consistently based their assertion of jurisdiction on the *Montana* exceptions and, as to the first exception, the notion that FMC entered into a "consensual relationship" triggering jurisdiction. CA9 Resp. Opening Br. 12-28. That was the question decided by the Ninth Circuit. Pet. App. 29a-34a. Accordingly, that is the only issue the Court needs to address to hold that the Ninth Circuit erred in finding jurisdiction under the first *Montana* exception.

Moreover, there is a reason the Tribes did not make this argument: it fails. As Justice Scalia explained for the Court in *Hicks,* the limits of tribal jurisdiction over nonmembers pertain to *subject matter*—not personal—jurisdiction. 533 U.S. at 367 n.8. Thus, the very consent language in *Plains Commerce* cited by the Solicitor General (at 16) is immediately qualified by the admonition that, even if there is consent, the tribal regulation at issue must still stem from the tribe's "inherent sovereign

authority." 554 U.S. at 337. This, again, shows that the Solicitor General's "direct consent" theory fails.[1]

In any event, FMC never agreed to pay an indefinite, $1.5 million annual fee. Like the Tribes, the Solicitor General elides the distinction between the *disposal* of waste (while the plant was operational) and the *storage* of waste (which, under the EPA-approved containment plan, will be in perpetuity). The Tribes' own guidelines drew that distinction. CA9 ER1017, 1056-58. FMC never agreed to a storage fee. Moreover, as the Solicitor General notes (at 4), FMC's permit application was explicitly confined to the then-"current" tribal regulations, not the *later-enacted* regulations on which the Tribes rely now. FMC Reply 8; *see* CA9 FER6 ¶ 7 (tribal member testimony that permit application covered "limited area of land use permitting over the ponds under the Commission's guidelines in place before August 11, 1997"). Converting FMC's payment of permitting fees while waste was still being generated and disposed at the plant into tribal jurisdiction to extract an annual $1.5 million fee from FMC for as long as the waste remains on FMC's land—in perpetuity—is the epitome of an "in for a penny, in for a pound" regime. Pet. 22.[2]

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[1] In *Plains Commerce,* the Court also rejected the argument that the bank "consented to tribal court jurisdiction" through "litigation conduct." 554 U.S. at 341-42. In doing so, the Court explained that the bank had asserted that "the [tribal] court lacked jurisdiction." *Id.* at 342. Likewise, FMC contested tribal court jurisdiction here. CA9 ER120, 330, 345, 369, 1256.

[2] The Solicitor General also errs (at 17) in arguing that the Ninth Circuit "effectively enforced" the "terms of [an] agreement." The Ninth Circuit held that FMC had entered into a "consensual relationship" triggering the first *Montana*

Yet, to be clear, the question before this Court is legal, not factual, in nature: it is whether the Ninth Circuit correctly held—as a matter of law—that the first *Montana* exception extends to a "consensual relationship" forged through the assertion of the very tribal jurisdiction at issue. In that regard, what matters is the fact that any agreement here was the product of the Tribes' heavy-handed assertion of jurisdiction "as regulator." U.S. Br. 15; *see* Pet. 7. On this point, the Solicitor General agrees (at 15) with FMC that the Ninth Circuit's application of the first *Montana* exception is unfounded. That error alone requires reversal of the Ninth Circuit's holding that the Tribes had jurisdiction under the first *Montana* exception. The Solicitor General's new "direct consent" theory does not change that at all.[3]

2. On the second *Montana* exception, the Solicitor General again admits (at 18-19) that the Ninth Circuit erred—here, in failing to require the Tribes to prove that the $1.5 million annual fee is actually designed to address the alleged threat. That is a crucial error. This Court's precedents require a tribe to show that the regulation at issue "*must be necessary* to avert catastrophic consequences." *Plains Commerce,* 554 U.S. at 341 (citation omitted). But as

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exception. Pet. App. 34a. That explains why the Ninth Circuit never identified the terms of the alleged contract to pay an indefinite, $1.5 million annual fee or applied state contract law to "enforce" any purported agreement (under which a *perpetual* agreement would be unenforceable, Pet. 22 n.6). Had this case been brought as a breach-of-contract action in state court the analysis would have been completely different. Pet. 13 n.2.

[3] As noted, the Solicitor General's new consent theory does, however, underscore the importance of resolving the conflict on the first question presented. *Supra* at 1.

the district court found here, "the Tribes have never explained why an annual fee of $1.5 million is *necessary* to provide [any] supplemental protection" over and beyond that provided by EPA's plan. Pet. App. 85a (emphasis added). Notably, the Solicitor General correctly rejects (at 18-19) the Ninth Circuit's sua sponte attempt to paper over the absence of such evidence by analogizing the mere presence of waste on FMC's own fee land to third-party companies that take and dispose of waste in their own facilities.

That is a sufficient basis to reverse the Ninth Circuit's ruling on the second *Montana* exception. The Ninth Circuit also erred, however, in holding that the highly speculative possibility that the EPA-approved containment system "may fail" triggers that exception to begin with. Pet. App. 44a-45a (citation omitted). Pointing to the threat posed by the waste *if unregulated*, the Solicitor General argues (at 18) that the second exception was met. But the question is not whether the waste poses a sufficient threat *if unregulated*, it is whether waste poses such a threat *as contained by the state-of the-art, $100-million-plus system approved by EPA*. The Solicitor General recognizes (at 19) that the analysis must evaluate "risks in light of measures taken by other government actors." Yet, in discussing the alleged threat, he inexplicably fails to account for the extensive measures EPA has taken. U.S. Br. 18.

Importantly, the Solicitor General repeatedly recognizes that EPA has found that its containment remedy "*is* protective of human health and the environment," as required by federal law. U.S. Br. 2-3 (emphasis added) (quoting CA9 ER917); *see id.* at 19 (quoting 42 U.S.C. § 9621(b)(1)); *see also* Pet. 6 & n.1. The fact that EPA periodically reviews the plan just

confirms that EPA is meeting its statutory duty to protect human health and the environment. The possibility that the plan will be updated provides no reason to conclude that the existing system—contrary to EPA's own findings—*threatens* human health or the environment. Indeed, as the district court found, there is no evidence that any "measurable harm" has occurred to "humans or water quality" from the waste on the site. Pet. App. 73a-74a.[4]

Tellingly, the Solicitor General does not say that the government expects EPA's system to fail or that failure is even remotely likely. The Ninth Circuit's ruling that, despite the expert findings of EPA regarding the remedy, the risk posed by the site is nevertheless sufficient to trigger the second *Montana* exception greatly expands this heretofore, rarely-invoked exception. Further, the court's ruling that a tribe need not show that the regulation at issue is actually tailored to the alleged threat—which the Solicitor General agrees (at 19-20) is wrong—only magnifies the breadth of the Ninth Circuit's error.

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[4] The Solicitor General points (at 18) to possible groundwater migration. But EPA found that the waste "does not pose a risk to human health" when contained under the state-of-the-art system FMC installed and EPA monitors. CA9 ER964. The district court likewise found there is no evidence of any "measurable harm" to "water quality." Pet. App. 74a. In fact, groundwater that enters the Portneuf River meets drinking water standards for arsenic and sampling showed that "off-site groundwater meets federal drinking water quality criteria." CA9 ER855; Pet. App. 73a. Nor has FMC admitted that "the harm to respondent could be catastrophic" "if containment failed," as the Solicitor General surmises (at 18). As history proves, there is no basis to believe there is a "catastrophic" threat to anyone in the area. Pet. 26 (quoting Pet. App. 44a-45a).

III. THIS CASE IS A SUITABLE VEHICLE

The Solicitor General suggests (at 22) that this case is a "less than ideal vehicle," because of its "unusual" facts. But virtually all of this Court's *Montana* cases arise from circumstances that might be regarded as "unusual." Certainly, that was true in *Plains Commerce*. But as here, these cases presented important questions about the scope of tribal sovereignty over nonmembers that extended beyond the circumstances giving rise to the dispute.

Significantly, the Solicitor General fails to identify any actual impediment to deciding either of the questions presented. There is none. Indeed, the first question presented is purely legal and does not depend on the circumstances of this case at all. And, as the Solicitor General's own brief confirms, the second question presented raises issues of general importance as well—e.g., whether the first *Montana* exception extends to regulatory relationships forged by the assertion of the very tribal jurisdiction at issue, and whether the second exception requires a tribe to show that the regulation is actually tailored to the alleged threat. The resolution of those issues would extend far beyond the particular facts of this case.

What *is* different about this case is the unusually extreme nature of the regulation the Tribes seek to impose—an indefinite, $1.5 million annual penalty for the mere presence of waste on FMC's own fee land—as required by the EPA.[5] If the decision below is allowed to stand, it inevitably will incentivize tribes

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[5] As FMC explained—and the Solicitor General ignores—the fact that the Tribes are seeking to regulate FMC's own fee land defeats tribal jurisdiction under the terms of the Allotment Acts as well. Pet. 13; FMC Reply 8 n.2.

to make similar regulatory demands or even increase them, as the Ninth Circuit's decision invites. Pet. App. 47a. The Solicitor General's suggestion that the Ninth Circuit's expansion of *Montana* will go unnoticed in the circuit home to 400 Indian tribes is naïve at best—and belied by amici's discussion of the real-world impacts of the decision below.

* * * * *

This Court always has closely cabined tribal sovereignty over nonmembers, because the exercise of such sovereignty lacks the normal checks—including democratic representation and the structure of the Constitution itself. *Plains Commerce,* 554 U.S. at 337. Unlike the interpretation of positive norms like treaties or statutes explicitly granting authority or protections to tribes, disputes over inherent tribal sovereignty focus on the limits established by this Court's decisions. As the Solicitor General acknowledges, the Ninth Circuit's decision deviates from this Court's precedent in key respects. The upshot is a major expansion of tribal sovereignty over nonmembers in the circuit home to hundreds of tribes. The fact that the Solicitor General has confirmed that the Ninth Circuit breached *Montana*'s limits strongly confirms that this Court's review is needed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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