No. _____

IN THE
Supreme Court of the United States

LYNN D. BECKER,
Petitioner,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION; UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; UTE ENERGY HOLDINGS, LLC,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may force a non-consenting, non-Indian plaintiff to exhaust his claims in tribal court when the defendant tribe has expressly consented by contract to federal or state court jurisdiction and waived both sovereign immunity and tribal exhaustion.

2. Whether a state court may adjudicate a contractual dispute between a tribe and a non-Indian where the tribe has provided specific contractual consent to state court jurisdiction; or instead, whether the Constitution or laws of the United States prohibit such exercises of state court jurisdiction unless the State has assumed general civil jurisdiction over tribal territory under Sections 1322 and 1326 of Title 25.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page except for the Hon. Barry G. Lawrence, District Judge, Utah Third Judicial District Court.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings in the U.S. Court of Appeals for the Tenth Circuit:

Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv., No. 13-4172 (CA10) (Oct. 21, 2014)

Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv., No. 16-4175 (CA10) (Aug. 25, 2017)

Ute Indian Tribe v. Lawrence, No. 16-4154 (CA10) (Nov. 7, 2017)

Becker v. Ute Indian Tribe of Uintah & Ouray Rsrv., Nos. 18-4030 & 18-4072 (CA10) (Aug. 3, 2021)

Becker v. Ute Indian Tribe of Uintah & Ouray Rsrv., Nos. 18-4030 & 18-4072 (CA10) (Jan. 12, 2022) (denying rehearing)

Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence, No. 18-4013 (CA10) (Jan. 6, 2022)

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PETITION FOR A WRIT OF CERTIORARI

When an Indian Tribe agrees to resolve disputes with a counterparty in federal or state court, "[t]o refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination." *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 815 (CA7 1993). That is precisely what the Tenth Circuit did in the two decisions below.

The Court of Appeals denied Petitioner Lynn Becker a federal or state forum for his contractual dispute with Respondent Ute Indian Tribe of Uintah and Ouray Reservation ("the Tribe"), notwithstanding the parties' express choice of forum and notwithstanding the Tribe's express waiver of "tribal exhaustion"—a doctrine this Court articulated in *National Farmers Union Insurance Companies* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985). *See also Nevada* v. *Hicks*, 533 U.S. 353, 369 (2001). The Tenth Circuit thus deepened one circuit split and created another. And it erected barriers to commerce that will harm Tribes' self-determination and self-government and discourage economic development if left uncorrected.

Years ago, the Tribe retained Becker to develop and market the Tribe's oil and natural gas reserves. In their contract, the Tribe unambiguously agreed that disputes would be litigated in federal or state court—rather than tribal court—and provided multiple guarantees to that effect: (1) the Tribe waived sovereign immunity for disputes arising from the Agreement, App.59-60; (2) the Tribe expressly waived tribal exhaustion and agreed to submit to the jurisdiction of

the U.S. District Court for the District of Utah, or alternatively, any court of competent jurisdiction, App.60; and (3) the parties agreed that "all disputes arising [from the contract] shall be subject to, governed by and construed in accordance with the laws of the State of Utah." App.59.

Notwithstanding this clarity, when a dispute arose, the Tribe fought Becker's efforts to bring his claims first in federal court and later in state court. The Tribe instead sought to force Becker to exhaust his claims in tribal court. And in the two decisions below, the Tenth Circuit blessed the Tribe's tactics.

In the first decision, the Court of Appeals held that Becker was required to exhaust his claims in tribal court. The court recognized that, in the Agreement, the Tribe had consented to federal or state court jurisdiction and waived both sovereign immunity and tribal exhaustion. But the court nevertheless held that tribal exhaustion was required. The Tenth Circuit thus deepened an acknowledged circuit split over "whether contractual forum-selection clauses escape application of the [tribal exhaustion] doctrine." *Ninigret Dev. Corp.* v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (CA1 2000).[1] This established split now stands at 3-2: The First, Second, and Tenth Circuits apply the doctrine notwithstanding a Tribe's clear waiver of exhaustion and agreement to submit to another forum, while the Seventh and Eighth Circuits honor a Tribe's agreement.

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[1] *See also Bank One, N.A.* v. *Shumake*, 281 F.3d 507, 515 n.32 (CA5 2002) (describing the split without taking a position).

In its second decision, the Tenth Circuit held that Utah courts—where Becker filed suit after the federal court declined jurisdiction—lacked jurisdiction over the dispute. Notwithstanding the Tribe's contractual consent, the court concluded that Utah courts could not exercise civil jurisdiction over this *specific* contractual dispute absent tribal consent to *general* civil jurisdiction under 25 U.S.C. § 1322(a), provided through a special election under § 1326. The Tenth Circuit thus split from the Eighth Circuit and several state courts over whether a Tribe may contractually consent to state-court jurisdiction in specific cases. *See Oglala Sioux Tribe* v. *C & W Enterprises, Inc.*, 542 F.3d 224 (CA8 2008).

These important issues affect non-Indians, Tribes, and tribal members alike. If allowed to stand, the Tenth Circuit's approach renders even the clearest contractual waiver illusory. Nothing about the tribal exhaustion doctrine or principles of tribal sovereignty requires such an inequitable result. This case presents an excellent vehicle for the Court to provide guidance on the adjudication of contracts between Tribes and non-Indians. This Court should grant the petition.

OPINIONS BELOW

The Tenth Circuit's opinion in Case Nos. 18-4030 & 18-4072 is reported at 11 F.4th 1140 and reproduced at App.52. The district court's memorandum decision and order is reported at 311 F.Supp.3d 1284 and reproduced at App.78.

The Tenth Circuit's opinion in Case No. 18-4013 is reported at 22 F.4th 892 and reproduced at App.1. The district court's memorandum decision and order is reported at 312 F.Supp.3d 1219 and reproduced at App.86.

JURISDICTION

The Court of Appeals entered its judgment in Case Nos. 18-4030 & 18-4072 on August 3, 2021 and denied Becker's timely rehearing petition on January 12, 2022. The Court of Appeals entered judgment in Case No. 18-4013 on January 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 3 of the U.S. Constitution, the "Commerce Clause," provides that "Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * * ." U.S. CONST. art. I, § 8, cl. 3.

Section 1322 of Title 25 provides that "[t]he consent of the United States is hereby given to any State not having jurisdiction over civil causes of action * * * to which Indians are a party which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe * * * such measure of jurisdiction over any or all such civil causes of action arising within such Indian country * * * to the same extent that such State has jurisdiction over other civil causes of action * * * ." 25 U.S.C. § 1322(a).

Section 1326 of Title 25 provides that "State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose." 25 U.S.C. § 1326.

STATEMENT OF THE CASE

A. Tribal Sovereignty

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority'" subject to "plenary and exclusive" control by Congress. *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). As dependent nations, Tribes generally enjoy the "right of internal self-government" including "the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978).

This Court has articulated two ways in which tribal sovereignty limits federal and state court jurisdiction. First, since "tribal courts are important mechanisms for protecting significant tribal interests," *Wheeler*, 435 U.S. at 332, federal courts should abstain from deciding certain claims against Tribes until tribal remedies have been exhausted. This Court first articulated this "tribal exhaustion" doctrine in *National Farmers Union Insurance Companies* v. *Crow*

Tribe of Indians, 471 U.S. 845 (1985). There, a tribal member obtained a default judgment in tribal court for injuries sustained in an accident on the school property within reservation boundaries. *Id.* at 847. Rather than appealing, the school district and its insurer sued in federal court to enjoin further tribal proceedings. *Id.* at 848.

The Court held that the "question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians" "should be conducted in the first instance in the Tribal Court itself." *Id.* at 855–56. The Court emphasized Congress's "policy of supporting tribal self-government and self-determination," which "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856. The Court pointed to additional prudential considerations. Exhaustion would promote "the orderly administration of justice in the federal court" because a tribal court could develop a "full record * * * before either the merits or any question concerning appropriate relief is addressed" and "rectify any errors it may have made." *Id.* at 856–57. And the rule would "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction," which would "provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. The Court thus concluded that "[e]xhaustion of tribal court remedies" was a prerequisite to the suit. *Id.*

The Court addressed tribal exhaustion again in *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987). After losing in tribal court, an insurer sued in

federal court seeking a declaration that it had no duty to defend or indemnify its insured for an accident on the reservation. *Id.* at 12–13. The Court clarified that exhaustion was required "[i]n diversity cases, as well as federal-question cases" because "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16. The Court further held that "exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review." *Id.* at 17.

This Court has since recognized limits on the tribal exhaustion doctrine, including where: (1) "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; (2) "the action is patently violative of express jurisdictional prohibitions"; (3) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction"; or (4) "the exhaustion requirement would serve no purpose other than delay." *Hicks*, 533 U.S. at 369 (quotation omitted).

Second, tribal sovereignty limits federal and state court jurisdiction because Tribes enjoy the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills Indian Cmty.*, 572 U.S. at 788 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). Suits against tribal members in state court involving on-reservation conduct are thus generally barred by tribal sovereign immunity. *Williams* v. *Lee*, 358 U.S. 217, 223 (1959). But as this Court has long recognized, a Tribe may be "subject to suit * * * where Congress has authorized the suit or the tribe has waived its immunity." *C & L Enterprises, Inc.* v.

Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 416 (2001) (quoting *Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)).[2]

This Court has also held that a Tribe may contractually waive immunity and submit to state court jurisdiction if its waiver is "clear." *C & L Enterprises*, 532 U.S. at 418. In *C & L Enterprises*, the Court held that a Tribe had waived sovereign immunity and consented to state court jurisdiction when it agreed to a contract containing arbitration and choice-of-law provisions. *Id.* at 423. The Court explained that the arbitration provision "require[d] resolution of all contract-related disputes between the parties by binding arbitration" and specified that the American Arbitration Association rules would govern. *Id.* at 419. Those rules, and the arbitration provision itself, provided that a judgment upon the award "may be entered * * * in accordance with applicable law in any court having jurisdiction thereof." *Id.* The contract's choice-of-law provision stated that the contract was "governed by the law of the place where the Project [wa]s located," which was Oklahoma. *Id.* And Oklahoma gave its courts jurisdiction to enforce arbitration awards. *Id.* at 419–420. On these facts, the Court was "satisfied" that the Tribe had "waived, with the requisite clarity, immunity from the suit C & L brought [in state court] to enforce its arbitration award." *Id.* at 418.

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[2] *See also Bay Mills Indian Cmty.*, 572 U.S. at 789 ("[W]e have time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver).") (cleaned up).

B. Becker's Contract with the Tribe

In 2001, the Tribe adopted a new approach to managing its natural resources. By referendum, the Tribe decided to transform its "management of the Tribe's assets, revenues and expenses from a passive to an active management methodology, targeting * * * optimal use and deployment of its resources to increase and diversify revenues for the benefit of the Tribe and the Membership." App.55, 175.

Petitioner Lynn Becker would play an important role in that transformation. Becker owns a natural resources development firm based in Colorado. In the early 2000s, he started helping the Tribe develop its reserves, including by creating databases and mapping systems. App.56. In 2004, the Tribe's Business Committee voted unanimously to hire Becker to manage the Tribe's Energy and Minerals Department. *Id.*

In April 2005, the Business Committee unanimously adopted Resolution 05-147 to formalize the Tribe's relationship with Becker. *Id.* The resolution attached a copy of Becker's Independent Contractor Agreement ("Agreement"); it further stated that "Becker should be engaged pursuant to the terms and conditions of the * * * Agreement" and that the "Business Committee hereby agrees to enter into the * * * Agreement." App.61.

The Agreement described Becker as a "Contractor * * * serving as Land Division Manager of the Energy and Minerals Department" and listed his duties as including implementation of the "restructuring and de-

velopment of the Tribal Energy and Minerals Department as set forth in Tribal Ordinance 03.003." App.56, 140. In exchange for his services, Becker would "receive a beneficial interest of two percent (2%) of net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC (and net of any administrative costs of Ute Energy Holdings) ('Contractor's Interest')." App.57. Becker would also receive a 2% interest in certain other "projects involving the development, exploration and/or exploitation of minerals in which the Tribe has any participating interest and/or earning rights, or similar commercial interests." App.58.

The Agreement also contains several provisions making clear that disputes would be resolved in federal or state court, rather than in tribal court.

First, the Tribe waived sovereign immunity for disputes arising from the Agreement:

> If any Legal Proceeding * * * should arise between the Parties hereto, the Tribe agrees to a limited waiver of the defense of sovereign immunity * * * in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. For purposes of this Agreement, a "Legal Proceeding" means any judicial, administrative, or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement.
>
> * * * The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of

> fact and law and the award of appropriate remedies in any Legal Proceeding.

App.59-60.[3]

Second, the Tribe waived tribal exhaustion and agreed to submit to any court of competent jurisdiction:

> The Parties hereto *unequivocally submit to the jurisdiction of the following courts*: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts also lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts. The court or courts so designated shall have, to the extent the Parties can so provide, original and exclusive jurisdiction, concerning all such Legal Proceedings, and *the Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.*

App.60 (emphasis added).

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[3] The Tribe's waiver of sovereign immunity further "extend[ed] to any arbitration and all review and enforcement of any decision or award of the panel so convened in the court or courts so designated." App.61.

Third, the parties agreed that Utah law would govern and reiterated their choice of a nontribal forum: "This Agreement and all disputes arising hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah. All disputes arising under or relating to this Agreement shall be resolved in the United States District Court for the District of Utah." App.59.

On the same day that the Agreement was executed, all six members of the Tribe's Business Committee signed Resolution 05-147, which declared that the "Business Committee hereby agrees to enter into the * * * Agreement." App.61. Becker worked on oil and natural gas exploration projects for the Tribe for another two-and-a-half years, until he resigned under the terms of the Agreement on October 31, 2007. *Id.*

C. Proceedings Below

In February 2013, Becker sued the Tribe in federal district court in Utah alleging that the Tribe had not paid all he was owed under the Agreement. Notwithstanding the clarity of the Agreement, the litigation would continue for nearly a decade; span actions in federal, state, and tribal court; and yield several published Tenth Circuit opinions.

Becker's first federal suit alleged breach of contract and related claims but was dismissed for lack of federal question jurisdiction. *See Becker* v. *Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 770 F.3d 944 (CA10 2014) ("*Becker I*").

In December 2014, Becker sued the Tribe in Utah state court. App.62. The Tribe moved to dismiss and asserted sovereign immunity. Although the Tribe conceded that its Business Committee passed a resolution adopting the Agreement, the Tribe argued that the sovereign immunity waiver had not been properly ratified. App.62-63. The Utah trial court denied the Tribe's motion to dismiss, and the Utah Court of Appeals dismissed the Tribe's appeal for lack of a final, appealable order. App.63.

After discovery in state court, the Tribe moved for summary judgment, arguing that the court lacked jurisdiction, that Becker's action was preempted by federal law, and that the action infringed on the Tribe's sovereignty. *Id.* The court denied the motion. *Id.* The Utah Court of Appeals and the Utah Supreme Court both summarily denied review. App.64. The Utah district court scheduled a trial date but that was later stayed pending the federal suits at issue here. *Id.*

In June 2016, a year-and-a-half after Becker sued in state court, the Tribe filed a federal action to enjoin the state action. The Tribe named both Becker and the Utah judge presiding over Becker's case; it sought a declaratory judgment that the Utah courts lack jurisdiction, the Agreement was void under federal and tribal law, and the Tribe did not waive sovereign immunity. App.5; *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 541 (CA10 2017).

Then, in August 2016, three-and-a-half years after the litigation began, the Tribe initiated an action in its own tribal court. App.64. The Tribe sought declara-

tions that the Agreement was void *ab initio* under federal and tribal law, and that the Tribe's contractual waiver of sovereign immunity was not validly executed under tribal law. App.64-65.

Becker filed a fresh federal suit in September 2016 to enjoin the tribal court action and enforce the plain terms of the Agreement. App.65. The Tribe counterclaimed and moved to dismiss. App.66. The district court granted Becker's request for a preliminary injunction against the tribal court proceedings and dismissed the Tribe's counterclaims. *Id.* The court held that the Tribe clearly waived tribal exhaustion and that sending Becker to tribal court "would serve no purpose other than delay."[4] *Id.* On appeal, the Tenth Circuit affirmed in part and reversed in part, vacating the preliminary injunction. *Becker* v. *Ute Indian Tribe of the Uintah & Ouray Reservation*, 868 F.3d 1199, 1201 (CA10 2017) ("*Becker II*").

On remand, Becker again sought an injunction against the tribal court proceedings, citing intervening rulings in state court, and the Tribe moved for summary judgment and its own injunctive relief. App.68. In February 2018, the district court denied both parties' requests for injunctive relief and held that the tribal court should "address in the first instance whether it has jurisdiction to hear the dispute."

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[4] *Accord Strate* v. *A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997) (explaining that tribal exhaustion "must give way" if "it would serve no purpose other than delay" because the tribal court would lack authority to resolve the case); *Hicks*, 533 U.S. at 369 (same).

App.69. The court ordered the parties to report the ultimate resolution in tribal court (including any appeal). *Id.*

The district court then issued final decisions in both pending federal cases on April 30, 2018: In the Tribe's suit to enjoin state court proceedings, the court issued an 83-page opinion denying injunctive relief against the state court action. App.83. Incorporating that opinion by reference in Becker's suit to enjoin tribal court proceedings, the district court *sua sponte* issued an order holding that the Tribe's contractual waiver of exhaustion was "substantially likely to be valid under both federal and tribal law" and granting Becker a preliminary injunction against tribal court proceedings. App.80-81.

The district court made three critical determinations:

First, the Utah courts had jurisdiction based on the Tribe's consent. The court acknowledged that it would take a special election to "permanently authorize the state to assume global [civil or criminal] jurisdiction over a tribe" under 25 U.S.C. §§ 1322(a), 1326.[5] App.108. But those procedures for assuming *general* civil jurisdiction

[5] Congress has authorized "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume" such jurisdiction "with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption." 25 U.S.C. § 1322(a). A tribe consents "by a majority vote of the adult Indians voting at a special election held for that purpose." 25 U.S.C. § 1326.

do not "foreclose 'selective tribal consent to state exercise of jurisdiction.'" App.109. The court noted that, in *C & L Enterprises*, this Court "held that a sufficiently clear contractual waiver of tribal immunity, combined with a state statute accepting jurisdiction over contracts involving arbitration, was sufficient for a state court to exercise civil jurisdiction," even though Oklahoma had "never accepted general civil jurisdiction over Indians" under Section 1322(a). App.112-13. Since Utah law accepts jurisdiction over Indians subject to consent[6] and the Tribe had consented to state court jurisdiction by contract, the court held that the Utah courts could exercise jurisdiction. App.104-118.

Second, the court rejected the Tribe's challenges to the Agreement. The court held that Becker's 2% interest was not a transfer of federal trust property requiring approval of the Secretary of the Interior based on an exhaustive examination of the Tribe's operating agreements, resolutions, and the Agreement. App. 148-72. The court further rejected the argument that the Agreement was invalid under tribal law, since tribal ordinances, decisions, and patterns of practice all confirmed that the Business Committee validly approved the Agreement's waivers by passing Resolution 05-147, which expressly incorporated the Agreement. App.173-97.

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[6] *See* Utah Code Ann. § 9-9-201 ("The state of Utah hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, country, and lands or any portion thereof within this state in accordance with [§ 1322(a)], to the extent authorized by that act and this chapter.") (footnote omitted).

Third, and finally, given its other findings, the district court concluded that the Tribe validly waived tribal exhaustion. App.197-200.

The Tribe appealed both district court rulings, resulting in the two Tenth Circuit decisions challenged here: *Becker III* and *Becker IV*.

In *Becker III*, arising from Becker's suit to enjoin tribal proceedings, the Tenth Circuit required exhaustion of tribal remedies. App.54. The court held that, out of "respect for tribal self-government and self-determination," federal courts must defer to tribal courts on "the questions the Tribe has raised regarding the validity of the Agreement, as well as the threshold question of whether the Tribal Court has jurisdiction over the parties' dispute." App.72. The court was "not persuaded * * * that any of the narrow exceptions to the tribal exhaustion rule apply here." *Id.* The court held that the Agreement's express waiver was irrelevant because "the Tribe [had] asserted nonfrivolous challenges" to its validity. App.73.

In *Becker IV*, which arose from the Tribe's suit to enjoin state proceedings, the Tenth Circuit held that the Utah courts lacked jurisdiction. App.3. The court held that federal law, not the Agreement, controlled the issue of tribal consent. The court thus considered (1) whether Becker's claims fell within the Tribe's civil jurisdiction; and (2) if so, whether Congress had authorized state court jurisdiction. App.8-10.

After determining that Becker's claims arose on the reservation, the court concluded that Utah courts

lacked jurisdiction because Utah had not validly assumed general civil jurisdiction under §§ 1322(a) and 1326. The court pointed to language in Section 1326 providing that "[s]tate jurisdiction acquired pursuant to *this subchapter* * * * shall be applicable in Indian country *only where* the enrolled Indians within the affected area * * * accept such jurisdiction' by holding a special election." App.19-20 (quoting § 1326) (emphasis in original). The court reasoned that "[t]he use of the limiting term 'only' conveys that a special election is a necessary event that must occur before a state court may assert § 1322 jurisdiction." App.20. Noting no evidence "that the Tribe ever held a special election accepting Utah's assumption of § 1322 jurisdiction," the court held that Utah state courts lacked jurisdiction. App.18-19.

The Tenth Circuit distinguished *C & L Enterprises* as a case "concern[ing] issues of sovereign immunity," rather than subject-matter jurisdiction. App.24. Thus, "even if the Agreement waives tribal sovereign immunity, that waiver does not resolve whether the Utah state court has subject-matter jurisdiction over Becker's case." App.25. The court reiterated that the question of whether Utah courts had jurisdiction "depends instead on whether the requirements of § 1322 and § 1326 are met." *Id.*

Judge Briscoe dissented. She faulted the majority for "mak[ing] no mention of" the Agreement's reference to state court litigation, especially when "the only reasonable inference that can be drawn from reading the contractual language is that the parties intended for any disputes to be heard in the Utah state courts" if a federal forum were unavailable. App.45.

Judge Briscoe also explained that the majority erred because § 1322 "addresses only suits involving individual Indians, not Tribes." App.46. Thus, "§ 1322 simply does not address * * * the jurisdictional issue that this case actually poses, i.e., whether a Tribe, by way of a written agreement with a non-Indian, may selectively agree to subject itself to state court jurisdiction and state law for disputes arising out of the agreement." *Id.* Judge Briscoe would have let the Utah courts address *that* question in the first instance, but emphasized the federal interest in "promoting Indian self-governance and autonomy." App.48 (quoting *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 884 (1986) ("*Three Affiliated Tribes I*"). Under that rubric, she "'fail[ed] to see how the exercise of state-court jurisdiction' over Becker's claims against the Tribe "interfere[d] with the right of" the Tribe 'to govern [itself] under [its] own laws.'" App.48 (quoting *Three Affiliated Tribes of Fort Berthold Rsrv.* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984) ("*Three Affiliated Tribes II*") (last two alterations in original).

In short, Judge Briscoe believed that "the majority's holding [was] directly contrary to the principles of Indian autonomy and self-governance because it prohibit[ed] a Tribe from affirmatively choosing, in the context of a commercial contract with a non-Indian, to subject itself to state jurisdiction and state law for disputes arising out of the contract." App.48.

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle to resolve two important questions that have divided the Courts of Appeals, and the Court should grant review to do so.

I. The Courts of Appeals Are Divided on Two Important Questions Involving Contractual Disputes with Tribes.

This petition presents two cert-worthy issues on which the lower courts are divided: First, the Tenth Circuit has deepened a recognized split, now 3-2, on the question whether tribal exhaustion applies when a Tribe contractually waives it and consents to suit in a nontribal court. The Tenth Circuit has also created a split with the Eighth Circuit and several state courts on the question whether a state court may exercise jurisdiction over a contract dispute with a non-Indian where the Tribe has consented by contract to state-court jurisdiction.

A. The Tenth Circuit's Decision in *Becker III* Deepens a Recognized Split over the Application of the Tribal Exhaustion Doctrine to Contracts that Select a Nontribal Forum.

The Courts of Appeals have acknowledged that "[t]here is a difference of opinion * * * as to whether contractual forum-selection clauses escape application of the [tribal exhaustion] doctrine." *Ninigret Dev. Corp.* v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (CA1 2000); *see also Bank One, N.A.* v. *Shumake*, 281 F.3d 507, 515 n.32 (CA5 2002)

(describing the split without taking a position). With the Tenth Circuit's decision below, the circuits are now squarely divided 3-to-2 on that question.

The Tenth Circuit required Becker to exhaust tribal remedies notwithstanding that "the Agreement expressly purported to waive the Tribe's sovereign immunity and to have all disputes settled in a non-Indian court by way of Utah state law." *Becker III*, 11 F.4th at 1149–50. The Tribe also expressly waived tribal exhaustion. The court refused to enforce those unambiguous provisions "[o]ut of respect for tribal self-government and self-determination," concluding that "the threshold question of whether the Tribal Court has jurisdiction" should "be resolved in the first instance by the Tribal Court itself." *Id.* at 1150.

The Second Circuit likewise rejects contractual exceptions to the tribal exhaustion doctrine. In *Basil Cook Enterprises, Inc.* v. *St. Regis Mohawk Tribe*, 117 F.3d 61 (CA2 1997), a tribe contracted with a nontribal corporation to operate a gaming establishment on its reservation. The parties' agreement waived the tribe's sovereign immunity and provided for disputes to be settled by arbitration. *Id.* at 63. When a dispute arose, a district court denied the corporation's motion to compel arbitration, and the Second Circuit affirmed. The court noted that, absent one of the narrow exceptions articulated in *National Farmers* and *LaPlante*, tribal exhaustion was required. *Id.* at 66. Notwithstanding the tribe's waiver of sovereign immunity and arbitration provision, the Second Circuit concluded that the corporation could not establish one of those narrow exceptions and thus had to exhaust tribal remedies. *Id.* at 65–68.

The First Circuit takes a consistent approach. In *Ninigret*, that court considered whether a nontribal construction company was excused from exhaustion based on a contractual arbitration provision. The contract provided that—instead of bringing disputes in tribal court—any dispute "shall be first presented to the Tribal Council for resolution" and, if there were no resolution, "the Tribal Court * * * [would] appoint an Arbitration Board." 207 F.3d at 30. Any arbitration award would then be "enforceable under prevailing arbitration law." *Id.* The First Circuit refused to enforce contractual modifications to the tribal exhaustion doctrine. It began by acknowledging the split of authority on "whether contractual forum-selection clauses escape application of the doctrine." *Id.* at 33. Although the court admitted that "the question is close," it reasoned that *National Farmers* dictated that "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract." *Id.*

But the Seventh and Eighth Circuits take the opposite approach, holding that tribal exhaustion is not required where a contract provides for a different method of dispute resolution.

In *Altheimer & Gray*, the Seventh Circuit held that a nontribal manufacturing company did not need to exhaust tribal remedies because the tribe had waived sovereign immunity and consented to federal and state jurisdiction. 983 F.2d at 814–15. The tribe expressly agreed to "waive all sovereign immunity in

regards to all contractual disputes," that the contract was "executed and interpreted in accordance with the laws of the State of Illinois," and that all parties "agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.* at 807. The court held that compelling exhaustion would not further comity with tribal courts because "the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum." *Id.* at 815. It added: "If contracting parties cannot trust the validity of choice of law and venue provisions, [the tribal entity] may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught." *Id.*

And in *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (CA7 2015), the Seventh Circuit reaffirmed its position, even in the face of a challenge to the validity of a contract. There, the tribe obtained bond instruments from a nontribal brokerage to finance a casino development. *Id.* at 189. Several instruments contained waivers of sovereign immunity and provided for disputes to be resolved under Wisconsin law in either federal or state court. *Id.* The tribe tried to distinguish *Altheimer* by raising "significant issues of tribal law" and seeking to void the instruments "under tribal law, [federal law], and the tribal constitution." *Id.* at 197. The Seventh Circuit flatly rejected that effort. It held that "the presence of a forum selection clause is dispositive of the exhaustion issue: 'To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination.'" *Id.* at 196

(quoting *Altheimer*, 983 F.2d at 815). It also explained that a general challenge to contract's validity could not negate the forum-selection clause; the tribe would need to prove that the forum-selection clause itself was invalid. *Id.* at 198–99

The Eighth Circuit similarly held that a tribe could not compel exhaustion where its contract provided that, "[i]n the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction." *FGS Constructors, Inc.* v. *Carlow*, 64 F.3d 1230, 1233 (CA8 1995). The court construed the phrase "other court of competent jurisdiction" to include federal courts in South Dakota. *Id.* It held that "[n]o provision in the agreement gave these defendants the right to override a plaintiff's choice of forum * * * . Since [the tribe] agreed to be sued in the federal district court of South Dakota, [they] are not privileged to force the dispute into the tribal court." *Id.*; *see also Enerplus Res. (USA) Corp.* v. *Wilkinson*, 865 F.3d 1094, 1097 (CA8 2017) ("The tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause in their agreement."). That contract contemplated suit in tribal court, but the court still held that it foreclosed requiring exhaustion.

The circuits are squarely divided on whether a nontribal party must exhaust tribal remedies when a tribe agrees by contract to submit to a nontribal forum. All circuits agree that respect for tribal sovereignty is paramount. But they have reached irreconcilable conclusions about what that means when a tribe waives immunity and consents to nontribal

jurisdiction. The Court should grant certiorari to resolve this established conflict.

B. *Becker IV* Created a Split on Whether Contractual Consent Suffices for State Court Jurisdiction over a Contractual Dispute with a Tribe.

The Tenth Circuit's decision in *Becker IV* created a split with the Eighth Circuit and several state courts over a tribe's ability to consent to state court jurisdiction over a contractual dispute and conflicts with this Court's decision in *C & L Enterprises*.

Tribal sovereign immunity generally bars state courts from adjudicating claims against Tribes arising from on-reservations conduct, *see Williams*, 358 U.S. at 223, but not when "Congress has authorized the suit or the tribe has waived its immunity," *C & L Enterprises*, 532 U.S. at 416 (quoting *Kiowa*, 523 U.S. at 754).

A tribe may waive sovereign immunity and submit to state court jurisdiction. In *C & L Enterprises*, this Court held that the tribe waived immunity when it entered a contract with arbitration and choice-of-law provisions. 532 U.S. at 415. The arbitration clause provided that "[a]ll claims or disputes * * * arising out of or relating to the Contract * * * shall be decided by arbitration in accordance with the" rules of the American Arbitration Association and that the "award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id.* A choice-of-law provision stated that the

"contract shall be governed by the law of the place where the Project is located." *Id.* The Court concluded that the tribe had clearly waived immunity and that the "choice-of-law clause makes it plain enough that a 'court having jurisdiction' to enforce the award in question is the Oklahoma state court in which C & L filed suit." *Id.* at 418–19. Oklahoma had never assumed general jurisdiction over the tribe under 25 U.S.C. § 1322(a).

Faithfully applying *C & L Enterprises*, the Eighth Circuit held that a tribe is bound by its contractual agreement to submit to state court jurisdiction. In *Oglala Sioux Tribe* v. *C & W Enterprises, Inc.*, 542 F.3d 224 (CA8 2008), a construction company signed four contracts with a tribe to build roads on the reservation. Three contracts expressly provided for arbitration and stated that, in the event a federal court lacked jurisdiction, "the award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof." *Id.* at 226. After arbitration, the parties filed separate actions: the contractor in South Dakota state court to affirm the award, the tribe in federal court to enjoin the award. *Id.* at 228.

The Eighth Circuit refused to enjoin the state court action. It determined that the tribe waived sovereign immunity by agreeing to arbitration in three contracts and by participating in the arbitration and failing to raise a sovereign immunity defense as to all four. *Id.* at 230–31. The court held that South Dakota courts had jurisdiction because the contracts incorporated the American Arbitration Association's rules, which

provided that "[p]arties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.* at 232. The Eighth Circuit reasoned that, "[w]hen it agreed to arbitrate disputes and incorporated the AAA's claim resolution procedures into the contracts, and when it participated in the South Dakota arbitration, the Tribe acquiesced in the arbitrator's decision, placing jurisdiction over the award in South Dakota's courts."[7] *Id.*

The Eighth Circuit's decision harmonizes with state court decisions addressing the same question. For example, the Supreme Court of Washington expressly noted that the state had not assumed jurisdiction under § 1322(a) but nonetheless held that its state courts could exercise jurisdiction over a contractual dispute between a tribe and a non-Indian company because the tribe contractually consented to that arrangement. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 333 P.3d 380, 382–383 & n.2 (Wash. 2014) (en banc). Other state courts have reached the same outcome. *See, e.g.*, *Meyer & Assocs., Inc. v. Coushatta Tribe of Louisiana*, 992 So. 2d 446,

[7] *C & L Enterprises* involved Oklahoma courts, which had not assumed jurisdiction under § 1322(a). *See Okla. Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993) ("Oklahoma did not assume jurisdiction pursuant to [§ 1322(a)]."); *Sheffer* v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 366 (Ok. 2013) (same). Similarly, the South Dakota courts at issue in *C & W Enterprises* had not assumed jurisdiction under § 1322(a). *See Sage* v. *Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482 (S.D. 1991).

450 (La. 2008); *Bradley v. Crow Tribe of Indians*, 67 P.3d 306, 311–12 (Mont. 2003).

The Tenth Circuit's decision below in *Becker IV* stands in stark contrast. Over Judge Briscoe's dissent, the court focused on whether the Tribe had consented the Utah state courts' exercise of general jurisdiction over the Tribe. 22 F.4th at 903–07. It held that, because Petitioner's claims arose on the Tribe's reservation and the Utah courts never assumed general civil jurisdiction under 25 U.S.C. § 1322(a), the Utah state courts lacked jurisdiction to adjudicate the dispute. *Id.* at 907. The court treated §§ 1322(a) and 1326 as exclusive means through which a state court could obtain jurisdiction over a Tribe's contractual dispute. While the court recognized that its approach was inconsistent with this Court's decisions in *C & L Enterprises*, it purported to distinguish that decision as "concern[ing] issues of sovereign immunity," and "not resolv[ing] whether the Utah state court has subject-matter jurisdiction over [Petitioner's] case," *id.* at 906—even though the Oklahoma courts would have lacked jurisdiction in *C & L Enterprises* under the majority's theory.

Judge Briscoe, dissenting, would have taken the same approach as the Eighth Circuit. She emphasized "the only reasonable inference that can be drawn from reading the contractual language"—namely, "that the parties intended for any disputes to be heard in the Utah state courts" if federal jurisdiction were lacking. *Id.* at 915. The majority's reliance on § 1322(a) was further wrong because the statute "addresses only suits involving individual Indians, not Tribes." *Id.* "[Section] 1322 simply does not address * * * the

jurisdictional issue that this case actually poses, i.e., whether a Tribe, by way of a written agreement with a non-Indian, may selectively agree to subject itself to state court jurisdiction and state law for disputes arising out of the agreement." *Id.* Judge Briscoe believed that "the majority's holding [was] directly contrary to the principles of Indian autonomy and self-governance." *Id.* at 916.

The split here is as stark as can be. The Eighth Circuit has held, consistent with this Court's precedent, that a Tribe may consent to state court jurisdiction in a particular case, and state courts have taken the same approach. The Tenth Circuit held below that consent must come through the special election procedures of 25 U.S.C. § 1326. The Court should grant review to resolve this issue too.

II. The Court Should Grant Review to Resolve Irreconcilable Conflicts Among the Lower Courts.

Beyond the conflicts, there are several reasons why the Court should grant certiorari in these cases and provide clear guidance on when a Tribe is bound to honor its contractual commitments to resolve disputes in a nontribal forum.

First, the issues are recurring. Tribal exhaustion has been, and will continue to be, litigated extensively. Since this Court announced the doctrine in *National Farmers* and *LaPlante*, it has addressed its scope only twice and not once in the last 20 years. *See El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999); *Hicks*, 533 U.S. 353. But that scarcity of instruction hardly

demonstrates that questions are rare. In the past few Terms alone, this Court has been asked to decide: whether tribal exhaustion applies to state courts, *see* Petition for a Writ of Certiorari, *Harvey* v. *Ute Indian Tribe of Uintah and Ouray Reservation*, 2018 WL 1327120 (Mar. 7, 2018); whether tribal exhaustion is required when there is no pending tribal proceeding, *see id.*; and whether a non-Indian is required to exhaust when she agreed to do so by contract but never physically entered the reservation, *see* Petition for a Writ of Certiorari, *Western Sky Financial* v. *Jackson*, 2015 WL 678189 (Feb. 13, 2015). And that is just scratching the surface. Over 20 years ago, the First Circuit acknowledged a split on the question, *see Ninigret Dev. Corp.*, 207 F.3d at 33, which has only gotten worse.

Whether a tribe may contractually consent to state court jurisdiction also arises frequently. This Court decided one such case in *C & L Enterprises*, concluding that an arbitration agreement waived the tribe's immunity and allowed enforcement in state court. But that case is hardly an outlier. Federal and state courts, both before and since, have grappled with the question whether a tribe agreed by contract to submit to state court jurisdiction. *See, e.g.*, *Altheimer*, 983 F.2d at 815; *Stifel, Nicolaus & Co.*, 807 F.3d at 198; *C & W Enterprises*, 542 F.3d at 231–33; *Becker IV*, 22 F.4th at 907; *Campo Band of Mission Indians* v. *Superior Ct.*, 137 Cal. App. 4th 175, 185 (2006); *Meyer & Assocs.*, 992 So. 2d at 450; *Outsource Servs. Mgmt.*, 333 P.3d at 381–82.

Second, the questions are exceptionally important. Sovereign immunity waivers and forum-selection

clauses are ubiquitous in contracts between tribes and non-Indians. This petition cites many examples, but federal and state courts routinely encounter cases involving contractual disputes between non-Indians and tribes. Those provisions have "real world objective[s]" and "consequences." *C & L Enterprises*, 532 U.S. at 422. Courts interpret contracts "with a view to effecting the objects and purposes of the [parties] thereby contracting." *Rocca* v. *Thompson*, 223 U.S. 317, 331–32 (1912); *cf. AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011). But if courts frustrate expectations about forum and jurisdiction to resolve contractual disputes, tribal economies suffer the deleterious effects. *See, e.g.*, *Altheimer*, 983 F.2d at 815 ("If contracting parties cannot trust the validity of choice of law and venue provisions, [the tribal entity] may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught."). Compelled exhaustion also implicates the due process rights of the non-consenting, non-Indian party who is forced to litigate "in an unfamiliar court." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 459 (1997).

These issues also affect vast sectors of tribal commerce. In 2017, the Department of Agriculture estimated that tribes sold $3.5 billion in agricultural products.[8] Natural resource development on reservations accounted for over

[8] *See* U.S. Dep't of Agric., American Indian/Alaska Native Producers (2017), https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_AmericanIndianAlaskaNative_Producers.pdf.

$1 billion in royalties and revenues in 2021.[9] And Indian gaming revenues were a staggering $27.8 billion in 2020.[10] Uncertainty about the enforceability of waivers and consents threatens to disrupt fruitful commerce between non-Indians and tribes in these and many other areas.

Third, this case is an excellent vehicle. The waivers and consents here are much clearer than in other similar cases. The parties used a belt, suspenders, and safety pins for good measure. Even as it declined to enforce the Agreement, the Tenth Circuit acknowledged that "it [was] undisputed that the Agreement expressly purported to waive the Tribe's sovereign immunity and to have all disputes settled in a non-Indian court by way of Utah state law." *Becker IV*, 11 F.4th at 1149–50. This case raises pure questions of law that were dispositive in foreclosing Becker's avenues for relief in federal or state court. And the Court has reasoned lower court opinions that address both sides of the issues.

Fourth, the decisions below undermine tribal sovereignty and self-governance, which are the cornerstones of the tribal exhaustion and immunity doctrines. *See Bay Mills Indian Cmty.*, 572 U.S. at 788. The parties negotiated the Agreement at arms-length, and the Agreement was drafted by the Tribe's

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[9] *See* U.S. Dep't of the Interior, Natural Resources Revenue Data (filtered to show revenue data for FY 2021), https://revenuedata.doi.gov/query-data/?dataType=Revenue&landType=Native%20American.

[10] *See* News Release, National Indian Gaming Commission (Aug. 17, 2021), https://www.nigc.gov/news/detail/2020-indian-gaming-revenues-of-27.8-billion-show-a-19.5-decrease

"experienced law firm that specializes in Indian law and oil and gas law." App.154 n.37. As Judge Briscoe observed, the Tenth Circuit decision in *Becker IV* "prohibits a Tribe from affirmatively choosing * * * to subject itself to state jurisdiction and state law" and is thus "contrary to the principles of Indian autonomy and self-governance." 22 F.4th at 916.

III. The Decisions Below Are Wrong.

The Court should also grant review because the Tenth Circuit erred.

A. Tribal Exhaustion Is Not Required.

The Tenth Circuit was wrong to hold that Becker must exhaust tribal remedies. A tribe may waive its immunity and submit to state court jurisdiction provided the waiver is "clear." *C & L Enterprises*, 532 U.S. at 418. And "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Atl. Marine Const. Co.* v. *U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 63 (2013).

Nothing here justifies departure from the ordinary rule that forum-selection clauses are controlling, particularly not the prudential considerations this Court has cited in support of tribal exhaustion. Congress's "policy of supporting tribal self-government and self-determination" does not favor exhaustion. *National Farmers*, 471 U.S. at 856. If supporting tribal self-government and self-determination means anything, it means honoring the Tribe's commitment to an arms-length transaction, drafted by the Tribe's attorneys, whereby the Tribe agreed to litigate in a nontribal forum.

See Stifel, Nicolaus & Co., 807 F.3d at 196; *Altheimer*, 983 F.2d at 815.

Nor is "the orderly administration of justice" served here "by allowing a full record to be developed in the Tribal Court." *National Farmers*, 471 U.S. at 856. The Tenth Circuit did not rely on that rationale, and rightly so. There is no advantage to developing a tribal court record where the Agreement contains a clear waiver of sovereign immunity and tribal exhaustion, as the Tenth Circuit acknowledged.

The final prudential concern—allowing tribal courts to "provide other courts with the benefit of their expertise," *id.* at 857—does not change things. Tribal courts have no special expertise in interpreting a contract governed by state law that would compel deference to their adjudication in the first instance.[11]

That a Tribe might raise "nonfrivolous challenges" to the validity of a contract does not mandate litigation in a tribal forum. This Court declined to address a similar challenge in *C & L Enterprises*, while holding that the tribe waived its immunity and consented to Oklahoma state court jurisdiction. 532 U.S. at 423 n.6. Moreover, a forum-selection clause "is understood not merely as a contract provision, but as a distinct contract in and of itself—that is, an agreement

[11] The Court of Appeals further erred by ignoring uncontroverted record evidence establishing that the tribal court lacked jurisdiction over Becker's claims, *see* Exhibit A, No. 2:16-cv-00579, Dkt. 105-1 (D. Utah), such that exhaustion "would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14; *see also Hicks*, 533 U.S. at 369.

between the parties to settle disputes in a particular forum—that is separate from the obligations the parties owe to each other under the remainder of the contract." *Marra* v. *Papandreou*, 216 F.3d 1119, 1123 (CADC 2000); *accord Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).[12]

The Tenth Circuit was wrong to render the Agreement's waivers and consents illusory and to force the dispute into tribal court.

B. The Utah Courts Have Jurisdiction.

The Tenth Circuit erred when it held that Utah state courts lacked jurisdiction to adjudicate Becker's contract claims.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit *or the tribe has waived its immunity*." *Kiowa*, 523 U.S. at 754 (emphasis added). "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises*, 532 U.S. at 418. The Tribe waived immunity and consented to state court jurisdiction. That should be the end of the matter.

The Tenth Circuit avoided that straightforward conclusion by focusing whether the Tribe consented to Utah's exercising *general* civil jurisdiction under § 1322(a), rather than whether the Tribe consented to

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[12] *See also Scherk* v. *Alberto–Culver Co.*, 417 U.S. 506, 519 n. 14 (1974) (explaining that a forum-selection clause within a contract alleged to be the product of fraud is enforceable as long as the clause itself was not a result of fraud).

jurisdiction to Becker's *specific* case. Utah state courts have not assumed general civil jurisdiction over the Tribe under § 1322(a), but that is irrelevant. The Tribe waived immunity by contract and agreed to submit to federal jurisdiction or, alternatively, state jurisdiction. The Tenth Circuit held that "[w]aiving sovereign immunity simply renders a party amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum." *Becker IV*, 22 F.4th at 906. But the Tribe's contractual consent, separate from its waiver of immunity, confirms that Utah state courts have jurisdiction.

In *C & L Enterprises*, this Court enforced an arbitration clause governed by the laws of Oklahoma (where an award would be confirmed) even though Oklahoma has never assumed jurisdiction under § 1322(a). *See Okla. Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993) ("Oklahoma did not assume jurisdiction pursuant to [§ 1322(a)]."); *Sheffer* v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 366 (Ok. 2013) (noting same). The Court was satisfied that the tribe had consented to jurisdiction by agreeing to arbitration and choice-of-law provisions and held that Oklahoma courts could affirm the award.

Section 1322(a) provides one means for state courts to acquire jurisdiction over one category of cases. But it does not bar a Tribe from consenting to jurisdiction in a specific case. Furthermore, as Judge Briscoe noted, § 1322(a) may not apply to tribal *entities* at all. The statute says only that a State may assume jurisdiction "over civil causes of action between *Indians* or to which *Indians* are parties." 25 U.S.C. § 1322(a) (emphasis added).

Since § 1322(a) does not diminish a tribe's ability to consent to a nontribal forum in a specific dispute, the Tenth Circuit should be reversed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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