No. 21-1340

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Petition presents two splits that Respondents argue are not squarely presented. But in both cases, they misapprehend how this case comes to the Court.

Respondents acknowledge (Opp. 15, 20) that lower courts are divided over whether to require exhaustion when a Tribe contracts for a non-tribal forum. They agree (Opp. 15, 18) that, in at least the Seventh Circuit, "a *valid* agreement [will] foreclose tribal court exhaustion," while "the First, Second, and Tenth Circuits would still require exhaustion." The Courts of Appeals acknowledge the same split. *See Bank One, NA* v. *Shumake*, 281 F.3d 507, 515 n.32 (CA5 2002); *Ninigret Dev. Corp.* v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (CA1 2000).

They nevertheless claim (Opp. 14) the split is irrelevant because "the alleged agreement is void *ab initio*." That is wrong on the merits. But more importantly, it is not how the case comes to the Court. The district court *rejected* the Tribe's contract challenges. *See* App. 172, 200. The Tenth Circuit then held, "without ruling on the merits," App. 74, that those issues had to be exhausted in tribal court, *see* App. 72–74. This case thus squarely presents the acknowledged split on tribal exhaustion.

It also presents the split over state-court jurisdiction based on selective contractual consent. Some lower courts, interpreting this Court's decision in *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001), hold that a Tribe's selective consent (by contract) to litigate in

state court, like the district court below, *see* App. 104–118, and the Eighth Circuit in *Oglala Sioux Tribe* v. *C & W Enterprises, Inc.*, 542 F.3d 224, 232 (CA8 2008). Judge Briscoe, dissenting, would have applied that principle here. *See* App. 46. But the Tenth Circuit majority reached the opposite conclusion: selective consent by contract is illusory because a special election under 25 U.S.C. § 1326 is the *sine qua non* of a state court's civil jurisdiction. *See* App. 23.

Respondents claim (Opp. 22) that Petitioner's position "hinges upon an improper conflation of * * * the question of subject matter jurisdiction on the one hand and sovereign immunity on the other hand." But again, that argument misapprehends how the case comes to the Court. The district court held not only that the Tribe had validly waived immunity, but also that the Utah courts could exercise subject-matter jurisdiction based on selective consent. *See* App. 95–118. The Tenth Circuit did not invoke tribal immunity but held that 25 U.S.C. §§ 1322, 1326 impliedly precluded subject-matter jurisdiction. *See* App. 16–27.[1]

Both questions are thus squarely presented. And they merit this Court's review. The judge-made rules for channeling cases in and out of tribal court have vexed the lower courts for a long time. The first split here was acknowledged over two decades ago. Under Respondents own telling (Opp. 1–2), tribal exhaustion is a difficult and "treacherous" doctrine that "cannot

[1] Judge Briscoe dissented on this point, noting that "§ 1322 has no relevance to the question of whether the Utah state courts have civil jurisdiction over the Tribe with respect to disputes arising out of the Agreement." App. 47.

be decided simplistically." But far from undermining review, the uncertainty these judicially crafted rules have created for courts and for Tribes' contractual counterparties weighs strongly in favor of certiorari.

This Court recently called for the Solicitor General's views on another petition (involving the same Tribe) that raised questions about tribal exhaustion. *See* Petition for a Writ of Certiorari, *Harvey* v. *Ute Indian Tribe of Uintah & Ouray Reservation*, No. 17-1301, 2018 WL 1327120 (Mar. 7, 2018). The Solicitor General's response underscores the need for this Court's review, explaining that "[t]here is * * * no categorical prohibition against state-court adjudication of suits that implicate tribal interests." U.S. Br. 13. And although the government said that *Harvey* was not a suitable vehicle for clarifying that doctrine, *see id.* at 8–11, no similar problems are present here, *see* Pet. 32. At a minimum, the Court may benefit from soliciting the views of the Solicitor General here too.

I. The Lower Courts Are Divided and Confused.

Respondents admit (Opp. 20) that the Circuits are divided over whether the tribal exhaustion doctrine applies to contract disputes involving *valid* forum-selection clauses and even acknowledge that this issue "might merit consideration." They claim (Opp. 13), however, that it is not implicated here because their contract with Petitioner was "unlawful and void (and, the Tribe alleges, fraudulent)." Of course, Petitioner disagrees.

But this merits argument is beside the point. As explained further below, *see infra* II.A, the district court rejected the Tribe's challenges to contract validity on the merits, *see* App. 120, 172, 200, and the Tenth Circuit required tribal exhaustion *before* reaching those issues, which it directed to the tribal court in the first instance, *see* App. 72–74. This Court too can address whether tribal exhaustion applies to contract disputes involving forum-selection clauses without reaching the merits of contract validity.[2]

The Seventh Circuit would have decided this case differently. Respondents agree (Opp. 18) that, in the Seventh Circuit, "a *valid* agreement [will] foreclose tribal court exhaustion." Thus, unlike the Tenth Circuit, the Seventh Circuit would have either (i) declined to require tribal exhaustion in light of the forum-selection clause, or at least, (ii) adjudicated the contract challenges before requiring exhaustion.

Nor would the Seventh Circuit allow the Tribe to compel exhaustion merely by "assert[ing] nonfrivolous challenges to the validity of the Agreement." App. 73. Respondents show (Opp. 18–19) that, where a Tribe challenges contract validity, the Seventh Circuit addresses those challenges on the merits. And in both *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803

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[2] The Court has options: it can reverse, holding that tribal exhaustion does not apply to a valid forum-selection clause, and leave it to the Tenth Circuit on remand to review the district court's ruling on contract validity; or it can simply affirm the district court's analysis. Either way, the Court would resolve the circuit split, protect the rights of Tribes' non-Indian counterparties, and promote Tribes' interests in stable contract rules.

(CA7 1993), and *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (CA7 2015), the court rejected the challenges and enforced the forum-selection clause.

Respondents also disagree (Opp. 16–18) with the Fifth Circuit's view that the Eighth Circuit falls on the Seventh Circuit's side of the split. *Cf. Bank One, N.A.* v. *Shumake*, 281 F.3d 507, 516 n.32 (CA5 2002). Petitioner submits that the Fifth Circuit was correct. More recently than any case Respondents cite, the Eighth Circuit reaffirmed that "tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause." *Enerplus Res. (USA) Corp.* v. *Wilkinson*, 865 F.3d 1094, 1096 (CA8 2017). Respondents' cases also involved a unique feature: the parties assumed the National Indian Gaming Commission could adjudicate contract validity, yet the Eighth Circuit disagreed. *See Bruce H. Lien Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412, 1417 (CA8 1996). Regardless, even if the Eighth Circuit has an intra-circuit split, that only further counsels in favor of this Court's review and guidance.

The same goes for state-court jurisdiction, where the Tenth Circuit lamented that this Court "has never set out a precise standard for determining whether a lawsuit or claim arose in Indian country," App. 10, and where the lower courts reach opposite conclusions on the efficacy of selective tribal consent.

Respondents try to distinguish these cases (Opp. 27–29) by pointing to differences in the claims involved. But none is germane. The relevant point is that some courts, including the district court below,

see App. 104–118, and the Eighth Circuit in *Oglala Sioux Tribe* v. *C & W Enterprises, Inc.*, 542 F.3d 224, 232 (CA8 2008), hold that a state court may exercise subject-matter jurisdiction based on the Tribe's selective consent.[3] Judge Briscoe, dissenting, agreed. *See* App. 46. But the majority concluded that contractual consent is always illusory because a special election is required. *See* App. 23.

The Tenth Circuit misinterpreted federal law, and this Court should grant review to reverse. But whatever answers this Court might reach, its guidance is still much needed on these issues.

II. The Decisions Below Are Wrong.

The Tenth Circuit erred in holding that federal law precludes Petitioner from litigating his claims in the contractually agreed-upon forum. Its rulings are manifestly wrong and should be reversed—not only to do justice for Petitioner, but also to promote the long-term interests of Tribes and their non-Indian counterparties through stable contract enforcement.

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[3] Respondents do not contest that state courts take the same view. *See Meyer & Assocs., Inc.* v. *Coushatta Tribe of Louisiana*, 992 So. 2d 446, 450 (La. 2008); *Bradley* v. *Crow Tribe of Indians*, 67 P.3d 306, 311–12 (Mont. 2003). They try to distinguish one case (Opp. at 28) as "a plain vanilla breach of contract case" not involving trust assets. *See Outsource Services Management, LLC* v. *Nooksack Bus. Corp.*, 333 P.3d 380 (Wash. 2014). But that too rests on a contract-validity distinction that was irrelevant to the Tenth Circuit's reasoning.

A. Tribal Exhaustion Does Not Apply.

The Tenth Circuit held, "without ruling on the merits," App. 74, that Petitioner must exhaust his claims in tribal court. *See* App. 72–74. But where a Tribe agrees to litigate in a non-tribal forum, the comity interests underlying the tribal exhaustion doctrine favor *enforcing*, rather than ignoring, the Tribe's agreement. *See Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 815 (CA7 1993) ("To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination.").

Respondents do not seriously argue otherwise and in fact contend this case is *not* about "'tribal self-government and self-determination.'" Opp. 30 (quoting Pet. 21).[4] But even if that were so, the other relevant considerations *also* weigh in favor of enforcing the Tribe's agreement to litigate in a non-tribal forum.

Principles of contract law favor enforcing these provisions. This Court has made clear that "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); *accord M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) ("The choice of

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[4] Curiously, Respondents accuse Petitioner (Opp. 30) of "distort[ing] the record" by claiming that these interests motivated the Tenth Circuit. But the Court of Appeals said so in language Respondents quote (Opp. 20) ten pages earlier: "Out of respect for tribal self-government and self-determination, we conclude that the questions the Tribe has raised * * * must be resolved in the first instance by the Tribal Court itself * * * ." App. 72.

that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."). And it is equally clear that a Tribe can contractually waive sovereign immunity and submit to state-court jurisdiction. *See C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

The rights of non-Indian parties favor enforcement of the contractual agreement. This Court's "case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 445 (1997). As Respondents emphasize (Opp. 12–13), "'[a] tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.'" *Id.* at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-66 (1981)). But a non-Indian does not consent to tribal jurisdiction by entering a contract that expressly disclaims it. Respondents would claim the benefit (Opp. 12) of Petitioner's "consensual agreement with the Tribe" to justify tribal jurisdiction under *Montana*, while disavowing a key condition of that consent.[5] This Court has never endorsed that approach, and it would defy common sense and basic fairness to do so.

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[5] Contrary to Respondent's characterization (Opp. 12), Petitioner was not a "tribal employee" but an independent contractor—as the Tenth Circuit recognized. *See* App. 57.

Respondents' principal rejoinder (Opp. 13–21, 29–34) is the alleged invalidity of the contract. They point (Opp. 30) to a February 28, 2018, ruling in which the Tribal Court purported to declare the contract invalid. But again, that is a red herring. The Tenth Circuit required tribal exhaustion "without ruling on the merits," App. 74; it held that the tribal court should address contract validity in the first instance, *see* App. 72–74. In other words, exhaustion was required *regardless* of contract validity. Thus, the alleged invalidity of the contract does not justify the Tenth Circuit's decision, which did not rely on it.

In any event, the record does not undermine the validity of the contract. The district court squarely addressed this below. It "consider[ed] in full the validity and terms of the Becker Independent Contractor Agreement," App. 120, and "conclude[d] that Becker's 2% 'net revenue' interest in distributions * * * is not restricted trust property," App. 172. The court further rejected Respondents' tribal law arguments and "concluded that the Tribal Court's February 28 Opinion should not be given preclusive effect." App. 200.[6] Since the Tenth Circuit required exhaustion without reaching the merits, *see* App. 72–74, it did not address the district court's reasoning.

[6] The Tribal Court's order is thus not "the first and only court ruling as to the Agreement's validity" and does not "carr[y] preclusive effect." (Opp. 31.)

B. The Utah Courts Have Jurisdiction.

The Utah courts also have jurisdiction based on the Tribe's contractual consent to state-court litigation.[7] Petitioner and Respondents agree (Opp. 22) that tribal sovereign immunity and subject-matter jurisdiction are "separate legal doctrines and inquiries." Petitioner has not conflated them; the point is that neither precludes his state-court action.

"[T]ribal sovereign immunity," as Respondents concede (Opp. 23), "is a defense that can be waived." They expressly waived it here. *See* App. 90–91. Respondents do not invoke sovereign immunity, so the remaining issue is subject-matter jurisdiction.

Neither the Tenth Circuit nor Respondents has claimed that *state law* would prevent the Utah courts from exercising jurisdiction. "A state court's jurisdiction is general, in that it 'lays hold of all subjects of litigation between the parties within its jurisdiction * * * .'" *Nevada* v. *Hicks*, 533 U.S. 353, 367 (2001) (quoting The Federalist No. 82, p. 493 (C. Rossiter ed. 1961)). That leaves whether anything in *federal law* precludes the Utah courts from exercising jurisdiction. This Court looks for clear congressional direction before imposing limits on "States' inherent jurisdiction." *Id.* at 365. Nothing imposes such a limit.

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[7] Again, the Court may resolve this question—whether selective contractual consent suffices for state-court jurisdiction—without resolving contract validity, though Petitioner believes that issue can be resolved easily in his favor.

The Tenth Circuit held that Congress impliedly precluded state-court jurisdiction through 25 U.S.C. §§ 1322(a), 1326. *See* App. 16–27. Those sections establish a mechanism for States to "assume, with the consent of the tribe," general jurisdiction over "civil causes of action arising within * * * Indian country," 25 U.S.C. § 1322(a), and specify that Tribes must consent by special election, *see id.* § 1326; *accord Kennerly* v. *Dist. Ct. of Ninth Jud. Dist. of Mont.*, 400 U.S. 423, 429 (1971); *Williams* v. *Lee*, 358 U.S. 217, 222 (1959).

But establishing a mechanism (even an exclusive mechanism) for States to assume *general* jurisdiction over civil cases arising from Indian country does not imply that States cannot assume *specific* jurisdiction where a Tribe consents to suit in state court. *Cf. Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (describing the "different" limitations the Due Process Clause places on state courts' exercise of *general* jurisdiction versus *specific* jurisdiction over out-of-state defendants); *Fisher* v. *Dist. Ct. of Sixteenth Jud. Dist. of Montana, in & for Rosebud Cnty.*, 424 U.S. 382, 389 (1976) (indicating that a contacts analysis like that used in personal jurisdiction cases can be relevant to tribal cases).

Indeed, this Court has said that "[n]othing in the language or legislative history of [§ 1322] indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction,'" as Judge Briscoe emphasized below. App. 48 (quoting *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g*, 467 U.S. 138, 150 (1984)). Further, this regime "addresses only suits involving individual Indians, not Tribes"; it says nothing about where "a Tribe, by way

of a written agreement with a non-Indian, * * * selectively agree[s] to subject itself to state court jurisdiction * * * for disputes arising out of the agreement." App. 46.

No federal statute *expressly* precludes state-court jurisdiction either. Respondents argue (Opp. 25) that "Congress * * * prohibit[ed] the extension of state law and authority inside of Indian country," citing 18 U.S.C. §§ 1151, 1152. But those provisions govern "the punishment of offenses in * * * Indian Country," *id.* § 1152—*i.e.*, *criminal* law, not contract disputes. *See, e.g.*, *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 205–07 (1987). This Court has sometimes inferred Congress's intent to displace state-court jurisdiction where it might "undermine the authority of the tribal courts over Reservation affairs and * * * infringe on the right of the Indians to govern themselves." *Williams* v. *Lee*, 358 U.S. 217, 223 (1959). But as previously explained (Pet. 1, 31–32; *supra* p.4), concerns about tribal self-determination favor *enforcing* the forum-selection clause—not ignoring it. And this Court has more recently looked for specific statutory direction before restricting "States' inherent jurisdiction." *Nevada*, 533 U.S. at 365.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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