No. 13-313

IN THE

Supreme Court of the United States

GRAND CANYON SKYWALK DEVELOPMENT LLC,
Petitioner,
v.

GRAND CANYON RESORT CORPORATION, SHERRY COUNTS, PHILBERT WATAHOMIGIE, BARNY IMUS, RONALD QUASULA, SR., RUDOLPH CLARKE, HILDA COONEY, JEAN PAGILAWA, CHARLES VAUGHN AND CANDIDA HUNTER,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case offers the Court an opportunity to resolve a circuit split on the application of the *Montana* doctrine to land held in trust for an Indian tribe – and to clarify that this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) meant precisely what it said. It also presents this Court with a chance to address the application of *Montana v. United States*, 450 U.S. 544 (1981) and the doctrines governing tribal court jurisdiction to situations where the parties conducting business with an Indian tribe have negotiated contracts which include choice-of-forum and mandatory arbitration clauses selecting non-tribal forums as the exclusive methods for resolving disputes – an issue that will affect not only the validity of numerous such contracts but also the prospects for economic development in Indian country more broadly. Finally, the case involves an extraterritorial and sinister use of the eminent domain power to disrupt an arbitration, conceal records, and effectuate the multi-year evasion of payments due on a government contract – acts of bad faith not mean to be shielded by this Court's comity-based tribal court exhaustion doctrine.

Each of these questions is important and certiorari-worthy, and this case provides a solid vehicle for addressing them.

ARGUMENT

I. The Ninth Circuit's brief allusion to the second exception to the *Montana* doctrine, for activities that "imperil the subsistence of the tribal community," was not an additional, alternative holding of the court.

Any analysis of the jurisdiction of a tribal court over non-Indians begins with *Montana v. United States*, 450 U.S. 544 (1981), "the path-marking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). *Montana* held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565, subject to two exceptions: "the activities of nonmembers who enter consensual relationships with the tribe or its members" and "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566.

After first declining to apply *Montana* to this case, the Ninth Circuit hedged its bets by stating that "[e]ven if *Montana* applied, either of its two recognized exceptions could also provide for tribal jurisdiction in this case." Pet. App. 18a. The court then briefly quoted the language of the exceptions from *Montana*, described the history of the contractual relationship between the parties and the character of their negotiations (omitting, however, any reference to the arbitration and choice-of-forum clauses in their contract), and concluded: "Given the consensual nature of the relationship between the parties and the potential economic impact of the agreement, the tribal

court could conclude it has jurisdiction over SNW's dispute with GCSD under either of *Montana*'s exceptions." *Id*. at 19a. Immediately following this sentence, the Ninth Circuit discussed the provisions of the contract in greater detail (still without any reference to the dispute resolution provisions which provide exclusively for arbitration), concluding that "GCSD should have reasonably anticipated being subjected to the Tribe's jurisdiction" and "GCSD consented to be bound by this language when it signed the agreement with SNW." *Id*. at 19a-20a.

The Ninth Circuit's statement that both *Montana* exceptions may have applied is explicitly based on the court's finding that the parties entered into a contractual relationship, and all the court's supporting analysis is addressed to the issue of the contractual relationship between the parties. The Ninth Circuit's off-hand, half-sentence reference to the second *Montana* exception does not constitute a full, third alternative holding of the court.

Nor could it, since this Court has stated that for this second exception to apply, "[t]he conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008). The Ninth Circuit did not state, let alone hold, that GCSD's conduct somehow "imperil[ed] the subsistence of the tribal community." *Id.* The court did not address GCSD's conduct at all, beyond its decision to sign a contract with a tribal enterprise.[1] Certainly there was no discussion by the Ninth Circuit of

[1] The only factual findings on GCSD's conduct in the record before the Ninth Circuit were the findings of the arbitral award, which concluded that the Tribe's allegations were baseless.

whether the tribal court power at issue – to effect the nationalization of a contract and the evisceration of its bargained-for remedies – was a "tribal power . . . necessary to avert catastrophic consequences." *Id*. (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232, n. 220 (2005 ed.)).

Respondents mistakenly assert that by focusing, as the Ninth Circuit did, on the nature of the contractual relationship between GCSD, SNW, and the Tribe, GCSD has waived – or "tacitly conceded" – an alternative holding that jurisdiction was proper under the second exception. Resp. Br. at 19. On the contrary, the Ninth Circuit never addressed whether GCSD's conduct fell under the second *Montana* exception by "imperil[ing] the subsistence of the tribal community." To the extent that the economic importance of the contract and the performance of the parties thereunder is relevant to determining whether the *Montana* exceptions apply, this can be addressed along with the other characteristics of the parties' "consensual relationship" when the Court considers the relationship between the jurisdiction selected under the *Montana* doctrine and jurisdiction and dispute resolution procedures adopted by the contracting parties. The Petition addresses these concerns by noting that "[t]he Ninth Circuit's alternative holding that the *Montana* test is satisfied, thereby requiring tribal court exhaustion even when arbitration is the sole contractual remedy, is also problematic," Pet. at 14; discussing the actual conduct of the parties, and explaining that arbitration provided a "perfectly standard technique" – effective and heavily favored by federal policy – for parties to resolve the differences arising from or related to a contract. Pet. at 16.

This Court can provide full relief to the parties without separately addressing and resolving the non-issue of the "catastrophic consequences" that could result if the Tribe was forced to defend against GCSD's breach of contract claims before an arbitrator instead of expropriating the contract and declaring its dispute resolution provisions non-sensical and non-existent.

II. Respondents concede that the opinion below, and its predecessor *Water Wheel*, create a circuit split.

In their Brief in Opposition, Respondents concede that "The Eighth and Tenth Circuits do read *Hicks* to require starting with the *Montana* presumption regardless of land status, and the Ninth Circuit has read *Hicks*, with ample support, as more narrowly confined to its facts." Resp. Br. at 17. This is a clear split between the three circuits that hear the significant majority of reported Indian law cases.

In an attempt to downplay this split, Respondents imply that the only difference between the two tests is the relative weight applied to different factors, an "involved, nuanced, and fact-driven" "analysis." *Id*. at 16. This exactly reverses the holding of the opinion below, which flatly refused to consider any factor besides land status: "[T]he district court correctly relied upon *Water Wheel*, which provides for tribal jurisdiction without even reaching the application of *Montana*." Pet. App. 14a.

Lower courts within the Ninth Circuit are not confused by this distinction and understand the Ninth Circuit's case law to be a significant departure: "The Supreme Court explicitly stated in *Hicks* that the reasoning in *Montana* 'clearly impl[ies] that the general rule of *Montana* applies to both Indian and

non-Indian land,' *Nevada v. Hicks*, 533 U.S. 353, 359–60 (2001)," [but] [i]n spite of this apparently clear language . . . *Water Wheel* . . . cannot be disregarded by the Court." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, CV-08-08028-PCT-JAT, 2013 WL 321884 at *10 (D. Ariz. Jan. 28, 2013).

III. There is no extra-territorial eminent domain power.

Respondents assert that the question of the extraterritorial reach of the Tribe's eminent powers was never raised before the District Court. This is incorrect. This issue was considered extensively at the hearing of February 24, 2012. Judge Campbell asked counsel for Respondents, "[C]an the State of Arizona exercise eminent domain over the personal property of a resident of Colorado?" Counsel responded with an unequivocal "yes," citing precisely the same cases that were briefed before the Ninth Circuit and this Court.

To defend the extraterritorial use of the eminent domain power, Respondents rely on cases examining the extraterritorial reach of the taxing power. This foray into tax law is inapposite because eminent domain "is, by its very nature, exclusive of another sovereign's power to condemn the same property." *Nichols on Eminent Domain* (3d ed. 1980), § 2.12.

Respondents do not address or even acknowledge the basic purpose of the eminent domain power, which is to take a piece of property needed for a public use. They insist that "GCSD's argument would suggest that it could arbitrarily and unilaterally change the forum to any jurisdiction of its choosing, or seek to ensure that no such forum would exist, merely by changing domiciles . . . even while it continued to

manage and operate the Skywalk on the Reservation." Resp. Br. at 25, n. 7.

But this ability to "arbitrarily and unilaterally change the forum" of an eminent domain action only presents a problem if the eminent domain power is viewed as an all-purpose tool to resolve contract disputes in the government's favor. There is nothing strange or pernicious about the idea that an owner can move his or her personal property between jurisdictions, even if that affects the property's availability for governmental purposes. And if the Tribe wishes to terminate its contracts or shut down a business operating on the Reservation, there are standard legal mechanisms for achieving both of those ends without co-opting the eminent domain power as a tool for forum-shopping.

IV. The issue of just how "extraordinarily narrow" the bad faith exception to tribal court exhaustion is, and whether the actions of the Tribe's executive and legislative branches may be taken into account, is a question of law.

This case presents an ideal vehicle for clarifying precisely what this Court meant in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), when the Court said "[w]e do not suggest that exhaustion would be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." 471 U.S. at 857 n. 21 (quotation omitted).

Respondents state that the bad faith exception is "extraordinarily narrow," but they are unable to cite any case law or other legal authority in support of that premise. The Ninth Circuit, similarly, required

"conclusive" evidence of bad faith. Pet. App. 11a. But nothing in the text of *National Farmers* suggests that any extraordinary showing is required for the exceptions to apply.[2]

This case squarely raises the issue of whether ordinary bad faith is sufficient to overcome the exhaustion doctrine or if the exception requires a finding of egregious conduct, and what standard of proof applies. It also provides an opportunity for the Court to address which types of evidence are relevant to these questions. Respondents claim that the District Court found that "the Tribe's judiciary *was* independent, *was* neutral, and *was* functioning, without any interference from the Tribal Council." Resp. Br. at 13. The District Court made no such factual finding at all. Instead, Judge Campbell ruled that there was insufficient evidence, which necessarily begs the question as to which legal standard is required under *National Farmers* for determining bad faith on the part of the Tribe's government. Clarifying this legal question is particularly important where a non-Indian's private contract rights have been seized by the Tribe, notwithstanding the contract's mandatory arbitration provision and where these acts have been done under color of a Tribal ordinance that expressly denies any ability whatsoever for Petitioner to challenge the Tribal government's takings decision on the merits.

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[2] Respondents are correct that Petitioner is not requesting a writ of certiorari on the question of whether there was sufficient evidence in March 2012, to find that litigation in tribal court would prove futile, although subsequent events have confirmed that the concerns GCSD expressed at that time were not without foundation.

Respondents argue, citing *Berman v. Parker*, 348 U.S. 26, 32 (1954), that the motivations of the Tribal Council, and the validity of their stated public purposes (which the arbitrator found to be knowing misstatements of fact), cannot be considered because condemnation is a legislative act. This argument was never made in the courts below, and is therefore waived. In any event, doctrines that are premised on separation of powers doctrines have to be applied with caution to tribal governments, such as the Tribe's, where the executive and legislative branches are combined, judicial independence is dubious, and where the issue is the application of these powers to non-members with no right to participate in the tribal political process.

V. This Court should grant certiorari because Petitioner could not have reasonably anticipated being subjected to the Tribe's jurisdiction, when the contract between the parties mandates arbitration enforceable in federal court.

The Ninth Circuit found that "GCSD should have reasonably anticipated being subjected to the Tribe's jurisdiction," Pet. App. 19a, on the basis of GCSD's decision to enter into a contract with a tribal enterprise, without regard for the fact that this contract specified that "[a]ny controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration" and that "any litigation" and all "civil matters" must be brought in federal district court in Arizona, Pet. App. 81a. At the time the contract was consummated, of course, the Tribe had not enacted an eminent domain law purporting to empower the Tribe to "take" all causes of action and associated remedies associated

with that contract. To suggest that this sequence of events was reasonably foreseeable is not credible.

The practical effect of the Ninth Circuit's decision, which undermines if not overrules *Montana*, is that any person wishing to do business with a tribe, tribal enterprise, or tribal member impliedly and automatically consents to the jurisdiction of the tribal courts. This is true even when the tribe or its agent signs a contract agreeing to arbitration enforceable in the forum the parties have selected.

Respondents argue that certiorari is inappropriate because "this is an undeniably unique case": "GCSD entered into a consensual relationship with a Tribally-chartered corporation under which it agreed to build, operate and manage Tribal property on Tribal land." Resp. Br. at 12. There is nothing "unique," however, about a business operating on tribal land, or even a business investing substantial capital to build improvements on tribal land.[3] And tribes routinely conduct business through subsidiary corporations, like any investor, to secure limited liability.

The use of an arbitration clause in tribal contracts to provide a neutral forum for disputes is widespread and important. It is objectively unreasonable for a business person to expect that, simply because an Indian tribe or nation is involved, his or her carefully negotiated contractual remedies can be stripped away by governmental fiat and private assets degraded or destroyed. The Hualapai Tribal Council majority's

[3] The Skywalk may have "infinitely unique" visual appeal, Resp. Br. at 12, but the legal principles applied to it, of course, are no different than those applied to a factory, grocery store, gas station, or hospital operating on tribal land under a contract with a tribal subsidiary.

abuse of eminent domain extends beyond any exercise of tribal jurisdiction this Court has considered, which have never involved tribes' ability to "condemn" contractual rights and remedies. There is nothing reasonable about what the Tribe has done here. To the extent that the Ninth Circuit's opinion suggests that Petitioner should have known better because it was dealing with an Indian nation, such an unjustified and perhaps cynical conclusion about Native American tribal governments and enterprises simply cannot be reconciled with this Court's own precedent or the decisions of other circuits.

"*Montana*'s consensual relationship exception requires that [exercise of authority] by the Indian tribe have a nexus to the consensual relationship itself," *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001), and the first and clearest source of information on the nature of a consensual relationship is an unambiguous written contract. "Having made the bargain to arbitrate, the party should be held to it." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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