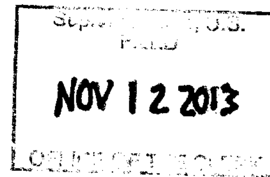

No. 13-313

In the Supreme Court of the United States

GRAND CANYON SKYWALK DEVELOPMENT, LLC,
Petitioner,

v.

GRAND CANYON RESORT CORPORATION, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

Mark A. Fuller
Counsel of Record
Gallagher & Kennedy
2575 E. Camelback Road
Suite 1100
Phoenix, Arizona 85016-9225
(602) 530-8000
maf@gknet.com

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

BLANK PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE 2

Relevant Facts 3

Proceedings Below 6

REASONS WHY THE PETITION SHOULD BE DENIED 9

THE NINTH CIRCUIT'S DECISION WAS CORRECT AND UNREMARKABLE 13

A. On The Facts Of This Case, Tribal Jurisdiction Is Not "Plainly Lacking." 14

1. Whether *Montana* Presumptively "Applies On Tribal Land" Is Irrelevant, And The Contrived Circuit Split Is Academic. 15

2. Both *Montana* Exceptions Presumptively Provide A Basis For Tribal Jurisdiction In Any Event. 19

B. The Ninth Circuit Correctly Rejected GCSD's "Bad Faith" Argument Based On The District Court's Factual Findings 20

C. The Ninth Circuit Correctly Refused to Consider GCSD's "Contract Location" Argument 23

CONCLUSION 25

APPENDIX

Appendix Hualapai Law & Order Code
§ 2.16 . . . . App. 1

TABLE OF AUTHORITIES

CASES

Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.,
148 U.S. 372 (1893) 12

Arizona v. California,
283 U.S. 423 (1931) 21

Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,
609 F.3d 927 (8th Cir. 2010) 17, 18

Berman v. Parker,
348 U.S. 26 (1954) 22

Calumet Gaming Grp. - Kansas, Inc. v. Kickapoo Tribe of Kansas,
987 F. Supp. 1321 (D. Kan. 1997) 21

City of Oakland v. Oakland Raiders,
646 P.2d 835 (Cal. 1982) 23, 24

Curry v. McCanless,
307 U.S. 357 (1939) 23

Duro v. Reina,
495 U.S. 676 (1990) 17

Eason v. Dickson,
390 F.2d 585 (9th Cir. 1968) 9

Espil v. Sells,
847 F. Supp. 752 (D. Ariz. 1994) 21

GNS, Inc. v. Winnebago Tribe of Neb.,
866 F. Supp. 1185 (N.D. Iowa 1994) 21

Graver Tank & Mfg. Co. v. Linde Air Prods. Co.,
336 U.S. 271 (1949) 13

Hill v. Potter,
352 F.3d 1142 (7th Cir. 2003) 10

Juidice v. Vail,
430 U.S. 327 (1977) 9, 21

Mayor & City Council of Baltimore v. Baltimore Football Club,
624 F. Supp. 278 (D. Md. 1986) 24

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 18

Montana v. United States,
450 U.S. 544 (1981) . . . . *passim*

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985) . . . . *passim*

Nevada v. Hicks,
533 U.S. 353 (2001) 12, 17, 18

Plains Commerce Bank v. Long Family Land and Cattle Co.,
554 U.S. 316 (2008) 11, 17, 18

Rice v. Sioux City Mem'l Park Cemetery,
349 U.S. 70 (1955) 12

Shaw v. Merritt-Chapman & Scott Corp.,
554 F.2d 786 (6th Cir. 1997) 10

South Dakota v. Bourland,
508 U.S. 679 (1993) 18

Strate v. A-1 Contractors,
520 U.S. 438 (1997) 12

Texas v. New Jersey,
379 U.S. 674 (1965) 24

Tindall v. Wayne County Friend of Court, By: Schewe,
269 F.3d 533 (6th Cir. 2001), *cert. denied*,
535 U.S. 988 (2002) 22

Virginia Military Inst. v. United States,
508 U.S. 946 (1993) 12

Water Wheel Camp Recreational Area, Inc. v. LaRance,
642 F.3d 802 (9th Cir. 2011) 8, 17, 18

ORDINANCE

Hualapai Law & Order Code § 2.16 6

RULES

Sup. Ct. R. 10(c) 13

Sup. Ct. R. 15.2 3

OTHER AUTHORITY

18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 4436 (2d ed. & Supp. 2012) 10

SUMMARY OF ARGUMENT

This case is about one thing: Petitioner Grand Canyon Skywalk Development's ("GCSD") failure to exhaust tribal remedies, in disregard of long-standing principles of tribal sovereignty and self-governance. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). The *only* issue decided below was whether GCSD was obligated to seek relief in the Tribal court in the first instance, before filing suit in federal court. Thus, there is no occasion for the Court to consider the ultimate issues of whether the Tribal court has jurisdiction, or the reach of the Tribe's power of eminent domain. Pet. at i–ii (issues one through three). The merits of those arguments are not before the Court at this stage.

Moreover – and equally dispositive – GCSD does not even challenge one of the three alternative bases on which the Ninth Circuit rested its decision with respect to the exhaustion requirement. Tribal jurisdiction lies in any case where the conduct of a non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). The Ninth Circuit found this principle would likely be a basis for tribal jurisdiction here, and this was an independent ground for rejecting GCSD's plea to be excused from exhausting tribal remedies. Petitioner's Appendix ("Pet. App.") 19a. The Petition does not argue the point, so the remaining arguments about tribal jurisdiction are moot.

Once one sets aside the phantom "issues" of tribal jurisdiction, all that remains of the Petition is GCSD's *factual* argument that "the Tribe's judiciary lacked

judicial independence." Pet. at ii. GCSD argues that this should have triggered an exception to the exhaustion requirement for "bad faith assertion of jurisdiction." *Id.* But the District Court made a factual finding, based on the evidence presented at the TRO stage, that the Tribe's judiciary is neutral, functional, and independent. The Ninth Circuit upheld that finding, and the Petition does not even argue that it was clearly erroneous.

All of these flaws (and others) aside, the facts of this case can fairly be described as *sui generis* insofar as they strike at the heart of tribal sovereignty and the need for adherence to the *National Farmers* principle of tribal exhaustion. At issue is an eminent domain action under which the Hualapai Tribe seeks to acquire – for just compensation – GCSD's interests in a long-term contract to build, operate and manage the Grand Canyon Skywalk. The Skywalk project, situated on Tribal land and owned by the Tribe, is a world famous tourist destination overlooking what the Ninth Circuit aptly termed "one of the world's great wonders." Pet. App. 4a. This is a unique set of facts without parallel elsewhere, and it is hardly surprising that the courts below found no cause for immediate federal court intervention in the Tribal court's process of determining its own jurisdiction.

For these reasons and others discussed below, nothing about this case merits certiorari.

STATEMENT OF THE CASE

The Petition distorts and misstates the record, and even neglects to mention one of the alternative bases on which the Ninth Circuit rested its decision. A more

complete and accurate account of the facts and proceedings below is therefore in order. *See* Supreme Court Rule 15.2.

Relevant Facts

In 2003, Petitioner GCSD entered into a Development and Management Agreement with 'Sa' Nyu Wa, Inc. ("SNW"), a Tribally-chartered corporation located on the Hualapai Reservation and wholly owned by the Hualapai Tribe. Under the Agreement, GCSD acquired a limited license to build, operate and manage the Grand Canyon Skywalk development. The Skywalk itself is a glass-bottomed viewing platform suspended over the rim of the Grand Canyon, which draws visitors from around the world. It is the centerpiece of a larger development, all of which is located on Tribal land, and as the Ninth Circuit noted, "[i]t is the impressive beauty of the tribal land's location that is the valuable centerpiece of this controversy." Pet. App. 16a. And the Tribe owns both the Skywalk and all other improvements. This is, in other words, a case which involves a unique, irreplaceable Tribal asset unlike any other on earth, located on Tribal land and wholly owned by the Tribe itself.

The Skywalk was to be an economic engine for the Tribe, and the Agreement required that it be substantially completed by mid-2005. But GCSD did not complete any construction by that deadline. The viewing platform itself was only opened to the public in March 2007, at which time no other specified project improvements, including the visitors' center, was anywhere near complete. *See* Pet. App. D (describing status of project in early 2012). Instead of entering the

visitors' center, tourists walked around an empty building. There was no gift shop or amphitheater. There were no indoor restrooms.

On September 10, 2007, GCSD and SNW signed an amendment to the 2003 Agreement, which reaffirmed GCSD's obligation to build the facilities and required completion of the project by March 2008. That deadline, too, came and went. Year after year, the project remained incomplete. Meanwhile, GCSD also failed to account for visitor funds it was receiving. *Id.*

GCSD's conduct drastically impacted the viability of the project, and, by extension, the economic welfare of the Tribe. In February 2011, as the dispute continued to brew, GCSD took the offensive and filed a Complaint in Tribal court against SNW, seeking to compel arbitration. The next month, GCSD also filed suit in federal court anticipatorily seeking to enjoin the Tribe from exercising its power of eminent domain. *Grand Canyon Skywalk Dev. LLC v. Vaughn* (*GCSD I*), No. CV11-8048-PCT-DGC, 2011 WL 2981837 (D. Ariz. July 22, 2011). The District Court denied a TRO and dismissed the case, holding that "[p]laintiff's claim in this case challenges tribal authority to enact and enforce a tribal condemnation ordinance, a claim central to tribal self-government, and *the tribal court must be given an opportunity to both decide whether it has jurisdiction and to interpret the ordinance.*" *Id.*, 2011 WL 2491425, at *3 (emphasis added). After further briefing, the court also denied GCSD's motion to reconsider. GCSD did not appeal.

Meanwhile, on August 9, 2011, GCSD initiated an arbitration under the auspices of the American

Arbitration Association.[1] The arbitration involved many different disputes over construction and operation of the Skywalk, including questions about GCSD's failure to account for substantial amounts of revenue and whose responsibility it was to bring utilities to the project. The 2003 Agreement provided that GCSD, at its own expense, would construct "all related on and off-site Improvements and Infrastructure," and this was re-confirmed in a 2007 Amendment, but GCSD maintained that this was not the parties' true intent. *Cf.* Pet. at 5 (arguing that "contemporaneous documents . . . make it clear that the utilities were the Tribe's responsibility").

In 2012, as the arbitration became ever more protracted and expensive, and with no realistic prospect of compelling GCSD to complete the project, the Tribe (a) obtained an independent appraisal of the fair market value of GCSD's interests in the Agreement, (b) enacted a Resolution to acquire those interests under the power of eminent domain, and (c) filed a condemnation action in Tribal court.[2] Although the Petition states that the eminent domain ordinance "denies GCSD the right to be heard" on "substantive issue[s], including valuation," (Pet. at i)

---

[1] The Tribal court had dismissed GCSD's Complaint, finding that the 2003 Agreement only permitted arbitration by application to federal court.

[2] Once the condemnation action was filed, the Tribe requested that the arbitration be dismissed and SNW withdrew from further participation. The Arbitrator nonetheless proceeded to hold a hearing where only GCSD presented evidence, and, not surprisingly, found in GCSD's favor, awarding it more than $28 million. SNW is now in bankruptcy.

the ordinance is modeled on federal and Arizona statutes, providing for payment of just compensation after an adversarial process very similar to what is available in state or federal court. *See* Hualapai Tribal Law & Order Code § 2.16 (eminent domain ordinance), Respondent's Appendix 1. And the Tribal court provides "an adequate and impartial opportunity to challenge jurisdiction." Pet. App. 13a.

GCSD has since "actively litigat[ed] its case in Hualapai Tribal Court." Pet. App. 14a. The Petition complains that "[a]s a practical matter, the seizing of GCSD's interest in the Skywalk nearly two years ago has resulted in no relief." Pet. at 13. But as the District Court just recently noted in dismissing yet *another* lawsuit filed by GCSD, it is GCSD's own litigation strategy which has disrupted the orderly disposition of the Tribal court proceedings. *See Grand Canyon Skywalk Dev. LLC v. The Hualapai Indian Tribe of Ariz., et al.* (*GCSD III*), No. CV-13-08054-PCT-DGC, 2013 WL 4478778, at *16—17 (D. Ariz. Aug. 20, 2013) ("GCSD asserts that justice delayed is justice denied. . . . This assertion appears to be based on the Tribe's opposition to the actions GCSD filed in this Court . . . GCSD appears to have done more to delay resolution of the condemnation action than Defendants.").

Proceedings Below

As we noted above, the District Court held in *GCSD I* that any challenge to the Tribe's jurisdiction or authority to condemn GCSD's interests in the Agreement would have to be pursued in Tribal court in the first instance. GCSD did not appeal that ruling. But once the Tribe initiated the condemnation action,

GCSD returned to District Court and filed this action, again seeking a TRO, and again challenging the Tribe's jurisdiction. *Grand Canyon Skywalk Dev. LLC v. 'Sa' Nyu Wa*, (*GCSD II*) No. CV-12-8030-PCT-DGC, 2012 WL 1207149 (D. Ariz., Mar. 26, 2012). Just as before, the issue was whether GCSD needed to pursue its remedies in the Tribal court. And just as before, the District Court ruled in the affirmative.

Generally speaking, the details of the District Court's ruling need not be addressed here. There is, however, one important exception. In seeking a TRO, GCSD argued that jurisdiction in or by the Tribal Court is in bad faith. *GCSD II*, 2012 WL 1207149, at *1—2. As its support for this argument, but without advance notice to the other parties or the Court, GCSD brought to the hearing a report entitled "Hualapai Tribal Court Evaluation," arguing that the report established the absence of an independent tribal judiciary. The District Court considered the report in its entirety, and found that, contrary to the way it was portrayed by GCSD, the report actually confirmed that (a) "[t]he judiciary is separate and apart from the tribal council," (b) it has a "functional, established system with court procedures," and (c) there was no evidence to suggest the Tribal Council had ever interfered with Tribal court matters. Pet. App. 13—14a. Report aside, the District Court also found that what had *actually happened* in the condemnation action reflected a functional, independent judiciary.[3]

---

[3] For example, the Tribal court declared one provision in the condemnation ordinance unconstitutional, and appointed a non-Tribal member judge *pro tem* to preside over the case, thereby

The Ninth Circuit affirmed, holding that regardless of the collateral estoppel consequences of *GCSD I*, GCSD needed to exhaust its tribal remedies. Pet. App. 7a.

The court first held that GCSD had not established that tribal jurisdiction was "plainly lacking" under *Montana*, such that exhaustion would be unnecessary. *Montana* was "unlikely to apply to the facts of this case," the court reasoned, because GCSD's conduct interfered directly with the Tribe's inherent powers to exclude and manage its own lands, and there were no competing state interests at play. Pet. App. 14a-16a (citing *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011)). That said, "even if *Montana* applied," the particular facts of this case supported tribal jurisdiction because: (a) GCSD had entered into a "'consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,'" Pet. App. 18a (quoting *Montana*, 450 U.S. at 565); and (b) GCSD's conduct "'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 566). *Either* of these would place the case "squarely" within the *Montana* exceptions. *Id.* at 15a.

The court likewise rejected GCSD's contention that exhaustion of tribal remedies was unnecessary under *National Farmers* by virtue of the exception for cases where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith.'"

---

removing any conceivable argument of partiality. *GCSD II*, 2012 WL 1207149, at *7.

Nat'l Farmers, 471 U.S. at 856 n.21. (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). Applying the correct, deferential standard of review, the court upheld the District Court's factual finding that the Tribal courts are independent, neutral, and offer "an adequate and impartial opportunity to challenge jurisdiction." Pet. App. 14a.

Finally, the court addressed a tangential argument that GCSD raised for the first time on appeal; namely, that its contract rights to build, operate and manage the Skywalk were somehow "extra-territorial" because GCSD's home office was in Nevada. Based on this premise, GCSD argued, the Tribe was exceeding its sovereign power of eminent domain. The argument had been waived by GCSD's failure to make it below, *Eason v. Dickson*, 390 F.2d 585, 589 (9th Cir. 1968), but in any event, as the Ninth Circuit explained, GCSD was confusing tribal jurisdiction with the merits of the condemnation case. Pet. App. 15a n.4 (noting that GCSD's argument "conflates the interlocutory jurisdictional question with the merits of the condemnation action" and the court "need not determine the situs of the contract to render [its] decision").

GCSD asked the Ninth Circuit to rehear the case *en banc*; the motion was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

The lone issue decided below was whether, on the particular facts of this case, GCSD was obligated to exhaust its challenges to Tribal court jurisdiction in the Tribal courts before filing a lawsuit in federal court.

For a number of different reasons, nothing about the Ninth Circuit's decision on that narrow issue merits certiorari.

First, the *National Farmers* rule requiring exhaustion of tribal court remedies – a matter of comity and respect for tribal governments and tribal self-governance – has long been settled. Over the years, the lower courts have developed a robust body of case law applying this rule in a wide variety of factual settings, nearly always finding that exhaustion is required. Nothing about this case suggests a need to revisit either the rule or its very narrow exceptions.

Second, the District Court reached the same conclusion in *GCSD I* applying the *National Farmers* rule – a decision GCSD did not appeal. Although the Ninth Circuit found it unnecessary to address the issue, GCSD is collaterally estopped from arguing that it is exempt from tribal exhaustion, as its arguments on this topic were raised, briefed, argued and decided in *GCSD I*. The District Court's rejection of those arguments was essential to its dismissal of the action. Although the District Court dismissed *GCSD I* without prejudice, that does not diminish the collateral estoppel effect of those findings which bore on the jurisdictional issues leading to the dismissal. *See, e.g.,* 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 4436 (2d ed. & Supp. 2012); *Hill v. Potter*, 352 F.3d 1142, 1146-47 (7th Cir. 2003); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir. 1977).

Third, the Petition does not even challenge one of the three alternative bases on which the Ninth Circuit found probable tribal jurisdiction under *Montana*. As

explained above, the Ninth Circuit held that "even if *Montana* applied," the facts of the case would likely fall within both *Montana* exceptions, including the exception for cases where a non-member's conduct "'threatens or has some direct effect on . . . the economic security . . . of the tribe.'" Pet. App. 18—19a (quoting *Montana*, 450 U.S. at 566). This analysis is commonsense – after all, this case centers on an extraordinarily important economic engine for the Tribe – but more importantly for present purposes, the Petition does not argue that it was incorrect. This being an independent basis for the Ninth Circuit's decision, GCSD's arguments about other aspects of tribal jurisdiction are moot.

Fourth, the Petition ignores the procedural posture of the case. GCSD pretends that the Ninth Circuit's opinion tees up various issues of tribal jurisdiction or authority: (a) whether the "main rule" of *Montana* applies to cases arising on tribal lands; (b) whether GCSD's agreement to build, operate and manage the Skywalk development falls within the "consensual relationship" basis for tribal jurisdiction; and (c) whether the agreement between GCSD and SNW is beyond the eminent domain powers of the Tribe. Pet. at i-ii (questions one through three). But these issues were never decided below, and are not presented here. To repeat, the *sole* question was whether there was a colorable basis for tribal jurisdiction such that under *National Farmers*, GCSD was obligated to litigate its arguments in the Tribal courts in the first instance. Such interlocutory decisions fall far short of definitively framing important issues on a fully developed record. *Cf. Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316 (2008) (accepting certiorari to

consider jurisdictional issues only *after* plaintiffs exhausted their tribal court remedies); *Nevada v. Hicks*, 533 U.S. 353 (2001) (same); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (same); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Justice Scalia) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (internal citations omitted); *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) (finding that, as a general rule, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order").

Fifth, even if one or more of these tribal jurisdictional issues were actually presented here (they aren't), and even if these issues were not mooted by the Ninth Circuit's alternative bases for its decision (they are), it would still be difficult to imagine a case less deserving of further review under *National Farmers*. This is undeniably a 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. And not just any property on any piece of land, but the infinitely unique Skywalk project. This is not a set of facts that can be expected to recur in other cases. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that, regardless of importance, an issue must be "beyond the academic or the episodic," and must be important to the public as opposed to the particular parties involved). Moreover, if an eminent domain action under these unique circumstances does not

demand respect for the authority of Tribal courts to determine their own jurisdiction in the first instance, it would be difficult to imagine a case that would.

Sixth, with respect to the actual issue presented and decided below – GCSD's need to exhaust its tribal remedies – the Petition's sole argument relies on a factual assumption contrary to the findings below. Specifically, GCSD argues that the Court should consider whether the "bad faith assertion of jurisdiction" exception in *National Farmers* should apply to a case in which a Tribal council allegedly acts in bad faith and "the Tribe's judiciary lack[s] judicial independence." Pet. at ii (question 4). But the District Court found that the Tribe's judiciary *was* independent, *was* neutral, and *was* functioning, without any interference from the Tribal Council. So this, too, is a non-issue. GCSD does not argue that the District Court clearly erred in its factual findings based on the record at the TRO hearing, and such an argument would not justify certiorari in any event. Supreme Court Rule 10(c) (certiorari rarely appropriate where the "asserted error consists of erroneous factual findings"); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (finding certiorari is not appropriate "for correction of errors in fact finding").

Finally, even putting aside all of the above, the Ninth Circuit unquestionably reached the correct result on the singular facts of this case.

THE NINTH CIRCUIT'S DECISION WAS CORRECT AND UNREMARKABLE

The Ninth Circuit's analysis correctly started with the general rule that "a federal court should stay its

hand 'until after the Tribal Court has had a full opportunity to determine its own jurisdiction.'" *Nat'l Farmers,* 471 U.S. at 857 (internal citations omitted). Drawing from *National Farmers'* analysis, the court articulated the policies underlying federal law's longstanding recognition of "comity and deference to the tribal court" for purposes of tribal jurisdiction, including: "(1) Congress's commitment to 'a policy of supporting tribal self-government and self-determination;' (2) a policy that allows 'the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge;' and (3) judicial economy, which will best be served 'by allowing a full record to be developed in the Tribal Court.'" Pet. App. 7a (quoting *Nat'l Farmers*, 471 U.S. at 856).

The court then examined GCSD's arguments about why it should be exempted from the general rule in *National Farmers*, and found those arguments unavailing for reasons that are logical, straightforward and supported by well-developed bodies of law.

A. On The Facts Of This Case, Tribal Jurisdiction Is Not "Plainly Lacking."

This Court recognizes an exception to the general rule of *National Farmers* if jurisdiction in the tribal courts is "plainly lacking." *Nat'l Farmers*, 471 U.S. at 856 n.21. In other words, if it is painfully obvious on the facts of a particular case that the tribal courts could not have jurisdiction, then the interests of comity are not implicated, and the federal courts need not abstain and defer to the tribal courts to determine their own jurisdiction. This argument rarely carries the day; here, the facts could not possibly meet that standard,

and a close reading of the Petition shows that GCSD does not argue otherwise. To repeat, this is a case about a Tribe's exercise of its sovereign power of eminent domain in a dispute that centers on rights to build, operate and manage a unique Tribal development on a piece of Tribal land unlike any other. As the Ninth Circuit noted, "the impressive beauty of the tribal land's location [is] the valuable centerpiece of this controversy." Pet. App. 16a. On these facts, there is no credible argument that the Tribe's court so plainly lacks jurisdiction as to justify departing from the general rule of abstention in *National Farmers*.

Shrugging aside the narrow holding of the decision below, the Petition seeks to elevate the opinion to the status of a definitive pronouncement from the Ninth Circuit on the reach of tribal jurisdiction over non-Indians. In particular, GCSD pretends that the opinion reflects the Ninth Circuit's decision that *Montana* does not apply to cases involving Indian land, and then characterizes this as representing a split between circuits. This is a false premise, as explained above. All the Ninth Circuit decided was that for a variety of reasons – including one the Petition does not even challenge – GCSD had not established that jurisdiction in the tribal courts was "plainly lacking." That decision was correct. We will address each of the court's grounds in turn.

1. Whether *Montana* Presumptively "Applies On Tribal Land" Is Irrelevant, And The Contrived Circuit Split Is Academic.

To repeat, the Ninth Circuit did not decide whether *Montana* does or does not "apply to" tribal lands, to use the simplistic phrase in the Petition. Rather, the court

concluded that the main rule in *Montana* was not "likely" to apply to the particular facts of this case, and then went on to hold that the case would likely fall squarely within both of the recognized *Montana* exceptions in any event. Pet. App. 18-19a. So arguing about a circuit split over the application of *Montana*'s "main" or "presumptive" rule to cases arising on tribal land is an academic exercise which has no relevance to the result below. In this case, it simply doesn't matter.

That said, what the Petition portrays as a split between circuits is contrived. The word "*Montana*" is not talismanic; it is simply shorthand for the principle that tribal courts do not presumptively have jurisdiction over non-Indians. Of course, there may be a case in which the relationship between the dispute and the happenstance of where it arises is so remote and tangential that application of this "main rule" would be dispositive. But there are other cases, like this one, where the centerpiece of the dispute is Tribal property on Tribal land, where the parties have a commercial, contractual relationship, where the dispute implicates the sovereign power to exclude non-Indians from Tribal land, and where there are no competing state interests. In such a case, arguing about whether the initial "presumption" of *Montana* "applies" to tribal land misses the point. The analysis is considerably more involved, nuanced, and fact-driven than that.

In any event, regardless of how one phrases the inquiry, the courts have had no difficulty weighing these factors and reaching thoughtful, well-reasoned decisions on the particular facts of the cases presented to them. This is true of the Eighth and Tenth Circuit

cases cited in the Petition, and it is equally true in this case. 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. *See Water Wheel,* 642 F.3d at 810. But this difference, or "split," to use the term in the Petition, is of no ultimate consequence, and there is no inconsistency in the results reached by these courts on the facts of those cases. The Petition does not suggest otherwise.

Meanwhile, no one, including GCSD, denies the significance of land status in the calculus. *See* Pet. at 9—10. As recently as 2008, this Court emphasized again "the critical importance of land status" to questions of tribal jurisdiction. *Plains Commerce,* 554 U.S. at 338; *see also Hicks*, 533 U.S. at 730 ("[T]ribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be dispositive."). This is in large part because the tribes retain "'traditional and undisputed power to exclude persons' from tribal land.'" *Plains Commerce*, 554 U.S. at 335 (quoting *Duro v. Reina*, 495 U.S. 676, 696 (1990)). Thus, for example, to cite the Eighth Circuit opinion, tribes plainly have jurisdiction to adjudicate trespass and related claims where a non-Indian enters a tribal facility on tribal land. *Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010). "Tribal civil authority is at its *zenith* when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner," and thus exercising jurisdiction over a lawsuit under such circumstances is "well within the Tribe's retained power under

Montana." *Id.* at 940 (emphasis added) (citing *Hicks*); *cf. Water Wheel*, 642 F.3d at 816—19 (holding that land status is dispositive when assertion of jurisdiction relates to ongoing trespass within tribal fee land).

Moreover, it is not merely land "status" which matters, but the degree to which the assertion of jurisdiction relates to a nonmember's presence on tribal land. Nothing in this Court's jurisprudence calls into question the long-standing principles about a tribe's "right to occupy and exclude." *Hicks*, 533 U.S. at 359; *accord Plains Commerce Bank*, 554 U.S. at 335; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (finding power to exclude "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct"); *see also Water Wheel*, 642 F.3d at 810—11 ("The authority to exclude non-Indians from tribal land necessarily includes the lesser authority to set conditions on their entry through regulations."). Nor is there any doubt that jurisdiction follows hand in hand with this power to exclude. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) ("Regulatory authority goes hand in hand with the power to exclude.").

If this were a case squarely presenting the question of tribal jurisdiction, the analysis could proceed even further. For example, we could discuss the absence of countervailing state interests – again, a recognized factor in the jurisdictional analysis, and an important distinction between this case and *Hicks*. *See* Pet. App. 18a. But we already have wandered far afield of what is actually at issue here: exhaustion of tribal remedies, based on "respect for comity and deference to the tribal court as the appropriate court of first impression to

determine its own jurisdiction. *Id.* at 7a (citing *Nat'l Farmers*, 471 U.S. at 856—57). So rather than extend an unnecessary analysis even further, we will turn to the *Montana* exceptions – one of which so clearly applies here that the Petition does not even argue otherwise.

2. Both *Montana* Exceptions Presumptively Provide A Basis For Tribal Jurisdiction In Any Event.

The Petition acknowledges, as it must, that *Montana* recognizes two exceptions. One exception applies to cases where a non-member's conduct threatens or has a direct effect on the economic security of a tribe. The Petition tacitly concedes that the Ninth Circuit was correct in concluding on the facts of this case that tribal jurisdiction would likely be available under this test. After all, the whole point of the Skywalk project was (and is) to attract visitors from around the world to the Hualapai Reservation.

Without addressing this dispositive point, the Petition spends several pages arguing about the other exception articulated in *Montana*, which applies to cases in which non-Indians enter into "consensual relationship[s] with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Montana*, 450 U.S. at 565. Again, this argument is beside the point, but it is not difficult to see why the Ninth Circuit found that the Tribal courts would likely have jurisdiction under this test as well. GCSD entered into a commercial contract with a Tribal corporation wholly owned by the Tribe, negotiated at arm's length.

The Petition acknowledges, as it must, the existence of a negotiated consensual relationship between GCSD and SNW, a corporate member of the Tribe. And it was this very consensual relationship which allowed GCSD to be physically present on Tribal land in the first instance, and to operate and manage Tribal property. GCSD nonetheless argues that the Ninth Circuit erred in considering the relationship as a potential basis for Tribal jurisdiction, claiming that this would "abrogate" the arbitration clause in the 2003 Agreement. Pet. at 14. This argument confuses a dispute resolution mechanism in a commercial contract with a Tribal affiliate and the question of tribal jurisdiction in an eminent domain action. There is no arbitration agreement which would encompass the Tribe's exercise of its sovereign power to condemn property. In fact, the Agreement explicitly confirmed that the Tribe was *not* a party, and thus was not, for example, waiving its sovereign immunity. *See also GCSD III*, 2013 WL 4478778, *9—12 (concluding that Tribe's status as third-party beneficiary to the 2003 Agreement did not waive sovereign immunity from arbitration).

B. The Ninth Circuit Correctly Rejected GCSD's "Bad Faith" Argument Based On The District Court's Factual Findings.

The so-called "bad faith" exception to tribal court exhaustion is extraordinarily narrow, as it should be. In the words of this Court, it applies only where "*an assertion of tribal jurisdiction* 'is motivated by a desire to harass or is conducted in bad faith.'" *Nat'l Farmers*, 471 U.S. at 856, n.21 (emphasis added). As the italicized language reflects, it is the assertion of jurisdiction – *i.e.*, the conduct of the tribal judiciary –

which matters, not the motives of the parties to a case. *Cf. Juidice,* 430 U.S. at 338 (cited by *Nat'l Farmers* 471 U.S. at 856 n.21) ("bad faith" exception to *Younger* abstention not applicable where prosecutors allegedly obtained a contempt order and arrest warrant to harass plaintiff; the bad faith exception "may not be utilized unless it is alleged and proven that *they* [the judges] are enforcing the contempt procedures in bad faith or motivated by a desire to harass") (emphasis added).[4]

GCSD did not argue below that a Tribal judge asserted jurisdiction over GCSD in bad faith. Instead, it argued that the defendant *Tribal Council members* acted in bad faith when they voted to authorize the condemnation action, and that their allegedly improper motives should be imputed to the Tribal judiciary because it "lack[ed] judicial independence." Pet. at 18. The Ninth Circuit was correct in rejecting this argument.

As a threshold matter, there is no "imputed bad faith." In fact, the law forbids inquiry into legislative motives, *Arizona v. California*, 283 U.S. 423, 455 (1931), and "[t]his principle admits of no exception

---

[4] *Accord Calumet Gaming Grp. - Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F. Supp. 1321, 1327 (D. Kan. 1997) ("The exception requires bad faith or a desire to harass in the *assertion of tribal court jurisdiction*."); *Espil v. Sells*, 847 F. Supp. 752, 757 (D. Ariz. 1994) (reasoning that bad faith exception to exhaustion rule "relates to actions of courts and not the parties"); *GNS, Inc. v. Winnebago Tribe of Neb.*, 866 F. Supp. 1185, 1190 (N.D. Iowa 1994) (concluding alleged bad faith conduct by tribe insufficient to demonstrate that "*the assertion of tribal court jurisdiction* is in bad faith").

merely because the power of eminent domain is involved." *Berman v. Parker*, 348 U.S. 26, 32 (1954). To permit an exception to *National Farmers* based on alleged improper motives of Council members would run head-on into this long-standing principle, with predictable and far-reaching negative consequences. Far from being consistent with principles of comity, such a rule would put the federal courts squarely in the middle of legislative decision-making, interfering with the basic business of tribal government, its political integrity and the right of self-governance.[5]

In any event, GCSD's argument about a captive judiciary was flatly contrary to the District Court's findings. As we explained above, the District Court considered the report GCSD offered at the TRO hearing, as well as what had actually occurred in the Tribal court condemnation action, and concluded that the courts were independent, neutral, and offered an adequate and impartial opportunity to challenge jurisdiction. The Ninth Circuit upheld those findings under the proper standard of review, and that ends the matter.[6]

---

[5] And all for no reason. Sister courts are perfectly well equipped to deal with alleged bad faith conduct by litigants. *See, e.g.*, *Tindall v. Wayne County Friend of Court, By: Schewe*, 269 F.3d 533, 539—40 (6th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002); Pet. App. 10a ("[W]e trust that our tribal court counterparts can identify and punish bad faith by litigants.").

[6] In this regard, we should also note that GCSD has now abandoned its argument that exhaustion of Tribal remedies was futile. *See* Pet. App. 12—14a (analyzing and rejecting GCSD's futility argument).

C. The Ninth Circuit Correctly Refused to Consider GCSD's "Contract Location" Argument.

The Petition repeats GCSD's argument, raised for the first time on appeal, that the Tribe is exceeding its power of eminent domain because GCSD's contract rights are supposedly "extra-territorial." Even putting aside the fact that GCSD waived the argument by not making it in the District Court, the Ninth Circuit correctly noted that the argument conflates the merits of the condemnation action with the question of tribal jurisdiction. Pet. App. 15 n.4. The Petition acknowledges as much, presenting the "issue" as one of general authority to condemn, not jurisdiction. Pet. at 18.

That said, and in any event, this Court has rejected a blanket application of *mobilia sequuntur personam* in cases involving intangible property, refusing to "substitute a rule for a reason." *Curry v. McCanless*, 307 U.S. 357, 367 (1939). *Curry* rejected the blind use of the *mobilia* doctrine that would have prevented a state from taxing activities related to intangible property, even where the owner was domiciled elsewhere. Jurisdiction was proper, the Court reasoned, because the non-resident "extend[ed] his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state . . . ." *Id.*

So too here. In fact, GCSD's own authorities reject any reliance on an inflexible *mobilia* doctrine in cases involving condemnation of intangibles. In *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982), for example, the California Supreme Court upheld

Oakland's condemnation of the Raiders franchise, even though the team's owner was domiciled elsewhere, reasoning that "[t]he location assigned to [intangible property] depends on what action is to be taken with reference to it." *Id.* at 844 (citation omitted). The court considered several non-exclusive factors pertaining to the use of the property, such as the franchise's principal place of business, the site of the team's home games, and the primary location of the franchise's tangible property, and found Oakland to have jurisdiction. *Id.*

To the same effect is *Mayor & City Council of Baltimore v. Baltimore Football Club*, 624 F. Supp. 278 (D. Md. 1986). There, the court held that *Texas v. New Jersey*, 379 U.S. 674 (1965) – another case cited by GCSD – did not control in condemnation cases, and refused to apply the "mechanical [*mobilia*] rule" to determine the situs of the Baltimore Colts franchise. *Id.* at 287. Applying an analysis similar to that in the *Oakland Raiders* case, the court held that Maryland could not condemn the Colts franchise because it had ceased operating in the state and had moved all of its operations and tangible property to Indiana before the condemnation action was filed. *Id.*

In short, even if the reach of the Tribe's power of condemnation were presented here (it isn't), the law does not support GCSD's myopic argument. The locus of a condemnation action must be evaluated in relation to the type and location of the property to be condemned. This is not a case about bookkeeping tasks in Las Vegas. Rather, what is at issue is GCSD's license to build and operate a Tribal asset on Tribal land under an agreement with a wholly-owned affiliate

of the Tribe – an agreement governed by Hualapai law. The obligations GCSD undertook – operating the Skywalk, maintaining the facilities, supervising employees, selling food and merchandise, collecting receipts, transporting visitors – could not have taken place anywhere but within the boundaries of the Hualapai Reservation. Under any meaningful analysis, the Tribe's power of eminent domain extends to such an agreement.[7]

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

Mark A. Fuller
Counsel of Record
Gallagher & Kennedy
2575 E. Camelback Road, Suite 1100
Phoenix, Arizona 85016-9225
(602) 530-8000
maf@gknet.com

Counsel for Respondents

---

[7] If GCSD were correct, only the State of Nevada could condemn an interest in the 2003 Agreement, even though it is a contract with a Tribal entity to build a Tribal asset, governed by Tribal laws, the performance of which must occur on land located entirely outside of Nevada and within the territory of a sovereign Indian Nation. Moreover, 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 to a different state or another country, even while it continued to manage and operate the Skywalk on the Reservation. At the risk of stating the obvious, none of this makes any sense.

BLANK PAGE