No. 08-985

IN THE

Supreme Court of the United States

COUSHATTA TRIBE OF LOUISIANA,
Petitioner,

v.

MEYER & ASSOCIATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

BRIEF IN OPPOSITION

LYNN H. SLADE
JOAN D. MARSAN
DEANA M. BENNETT
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Bank of America Centre
500 Fourth Street NW
Suite 1000
Albuquerque, NM 87102
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1800

RICHARD P. IEYOUB
JAMES E. MOORE, JR.
Counsel of Record
CARLETON, DUNLAP, OLINDE, MOORE & BOHMAN, LLC
One American Place
Ninth Floor
Baton Rouge, LA 70825
(225) 282-0600

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

1. Whether a state court designated by a forum selection clause as the sole forum for adjudication of all contractual disputes invariably must defer to a tribal court, when the state court is fully competent to interpret an unambiguous tribal code provision alleged to have vitiated the tribe's express waivers of immunity?

2. Whether a contract expressly waiving sovereign immunity, stipulating to exclusive state court jurisdiction, and choosing state law provides the express or implied consent to tribal court jurisdiction sufficient to establish the 'consensual relationship' exception to the general rule of *Montana v. United States*?

CORPORATE DISCLOSURE STATEMENT

Meyer & Associates, Inc., pursuant to Supreme Court Rule 29.6, files this 'Corporate Disclosure Statement' and states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

This case presents a correct and unexceptional application of this Court's jurisprudence governing exhaustion of tribal court remedies and the limited jurisdiction of tribal courts. Given the specific facts below, the questions Petitioner purports to advance are not squarely presented, the case does not constitute a useful vehicle to provide guidance to the lower courts, and the decision of the Louisiana Supreme Court is supportable on alternative grounds not challenged here. The Louisiana Supreme Court reached the correct result. It did not hold that the tribal exhaustion doctrine is inapplicable to the States. It did not ignore the doctrine. After considering the tribal exhaustion doctrine, a tribal

procedural code provision that Petitioner admits is clear and unambiguous, express contractual waivers of sovereign immunity, forum selection and choice-of-law clauses, its own jurisdiction, and ramifications to major interests of the State, it declined to defer to the tribal court. To have ruled otherwise would, at best, have served no purpose other than delay and would have deprived Meyer & Associates, Inc. ("Meyer") of the contractually stipulated forum to determine critical jurisdictional issues. Such a decision could well have deprived Meyer and similarly situated Louisiana municipalities and electric cooperatives of any forum in which to advance contractual claims.

The Tribe's proffer of state court cases claimed to show a division among the States does not address issues related to whether a contractually designated state court may interpret unambiguous tribal law. Accordingly, whether or not the exhaustion doctrine applies to the States, and whether or not there may be conflicting state court decisions on that issue, this is not the case to support a ruling on the issue by this Court.

STATEMENT OF THE CASE

Petitioner's Statement of the Case omits or misstates significant portions of the extensive and case-specific factual record upon which the Louisiana state courts based their decisions.[1] Far from the Coushatta Tribe of Louisiana's (the "Tribe's") repeated representation that the Tribe's Chairman unilaterally acted to waive sovereign immunity, *see*

[1] The Petition begins by misstating the parties. Richard Meyer, whom the Tribe sued personally in Tribal Court, is not a party to the agreements and was not a party in the state court proceedings below.

Pet. 3, 4, 7, the record confirms a series of contracts, executed by a majority of the Coushatta Tribal Council and supported by Tribal Council Resolutions, confirming the Tribe's[2] informed, express, and repeated waivers of immunity and selection of non-tribal forums for dispute resolution.

In 2001, Meyer and the Tribe entered into a General Services Agreement ("GSA") for engineering services that waived sovereign immunity by agreeing to dispute resolution by arbitration under the Commercial Arbitration Rules of the American Arbitration Association.[3] Less than two years later, the Tribal Council enacted Resolution 2003-04, dated January 14, 2003 ("2003 Resolution"). The 2003 Resolution ratified the GSA, including its unambiguous arbitration clause waiving sovereign immunity. The Tribal Council through the 2003 Resolution authorized the Tribal Chairman to negotiate with Meyer and execute contracts related to the devel-

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[2] The Tribal Council is the sole governing body of the Tribe. There is no constitution or legislative branch. The judiciary's members are "at will" employees hired by the Council. Hence, for all legal and practical purposes, the Council is the government of the Tribe.

[3] In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418-20 (2001), this Court affirmed the Oklahoma appellate courts, holding such AAA arbitration agreements constitute waivers of sovereign immunity: "In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures." Although the GSA provided for enforcement of an arbitration award by the Coushatta Tribal Court, that provision was amended and superseded in every agreement specific to the Power Project, all of which specified that state court would be the exclusive forum for dispute resolution. This lawsuit was filed pursuant to those subsequent agreements.

opment of an electric power generation project, "pursuant to the General Services Agreement or any other agreement" (the "Power Project"). *See* Pet. App. F 68a, 72a. Also in January 2003, the Tribe, through its Chairman and Council, entered into a Supplemental Agreement to the GSA specifically to address the development of the Power Project. That contract provided unequivocally for dispute resolution exclusively in the Louisiana state court system. Pursuant to the Supplemental Agreement, the Tribal Council majority executed Work Authorization No. 2 ("WA2"), dated May 1, 2004. This contract between Meyer and the Tribe stipulated to dispute resolution in the trial court below, the Fourteenth Judicial District Court, State of Louisiana.

The Power Project contemplated construction of a major electric generating station. At the time litigation arose below, it was undisputed that the plant was to be located on nonmember-owned, privately held fee lands far outside the boundaries of any tribal reservation. As the Tribe knew, the Power Project entailed financial commitments of Louisiana businesses, electric cooperatives and municipalities far exceeding $100 million.[4] Meyer could only agree to participate, and enlist the participation of public entities, if it and they were contractually assured the contracts with the Tribe would be enforceable. No individual, business, or municipality would put such sums at risk in a business venture if it could be deprived of contractually specified dispute resolution by a later invocation of sovereign immunity or a contention that a different forum had exclusive jurisdiction over any issue or claim.

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[4] Total estimated Power Project cost was $591,000,000.

As the Tribe aptly noted, in 2005 there was a change in the makeup of the Tribal Council. The new Tribal Council's position, that it may require tribal court resolution of disputes in the face of clear and express contractual terms, defies common sense. The prior governing Council recognized, as testified by former Tribal Chairman Poncho[5] and Tribal Council Members Worfel and Battise, that "to obtain substantial . . . financial commitments from outside parties a valid and effective waiver of immunity from suit and forum selection provisions were absolutely required." Chairman Poncho testified that the 2003 Resolution, and the subsequent contracts authorized by the Council, complied fully with the Tribe's custom and practice and were fully authorized under Tribal law.[6] The agreements were reviewed by the Tribe's legal counsel, who assured Meyer they were enforceable.

The agreements between Meyer and the Tribe—and the 2003 Resolution authorizing those agreements—provided that the Power Project would produce power to supply a number of "off-taker" Louisiana electric cooperatives and municipalities, who in turn required assurances from the Tribe that their contracts would be enforceable. In reliance upon the Tribal Council's authority and the 2003 Resolution, they entered into additional written agreements with the Tribe, containing similar or identical dispute resolution provisions requiring any litigation arising

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[5] Mr. Poncho was Chairman for nineteen years, until the 2005 election.

[6] The Tribe advanced no facts or law below suggesting that the 2001-2004 Council majority and Chairman Poncho were not duly elected, properly authorized tribal officials. Consequently, the case does not present issues of internal tribal political authority.

from the contracts to take place exclusively in state court. The record confirms that those agreements also were reviewed by the Tribe's legal counsel who specifically referenced the agreement to litigate in state court and raised no concerns regarding their effectiveness.

The newly elected Council filed suit in Tribal Court, disavowing the contracts. Meyer responded by filing its breach of contract action in state court, the forum the parties' contracts stipulated would have exclusive jurisdiction over any litigation.[7] The Tribe filed Exceptions of Lis Pendens and Lack of Subject Matter Jurisdiction, contending that its express waivers of sovereign immunity were invalid and it was immune from suit.

PRIOR PROCEEDINGS

In the proceedings below, the Tribe contended a provision of the Tribal Judicial Code, which stated "[n]othing in this Code" waived tribal immunity from suit, applied to invalidate the express waivers made pursuant to a legislative Resolution and in contracts duly executed by majorities of the Tribal Council, even though the waivers were not made pursuant to "[the] Code."[8] Ruling upon the Tribe's exceptions, the Fourteenth Judicial District Court of Louisiana made a number of significant findings. *See* Pet. App. C 56a-62a. It acknowledged the GSA and the supplemental Power Project agreements unequivocally

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[7] Meyer also moved to dismiss the Tribal Court action. That motion remains pending in Tribal Court.

[8] The Tribe has not argued that the Tribal Judicial Code invalidates the choice-of-law provisions in the contracts and, by its terms, it does not address either forum selection or choice-of-law provisions.

waived sovereign immunity and held under the "agreements at issue, [the Tribe] consented to binding arbitration, waived sovereign immunity, and contractually agreed that the laws of the State of Louisiana would apply to any dispute." Pet. App. C 57a. It found the 2003 Resolution authorizing further contracts under the GSA or additional supplemental contracts was clear and effective. Pet. App. C 61a. It recognized that the tribal Judicial Code provision allegedly vitiating the Tribe's express waivers of sovereign immunity was inapplicable. It found, in any event, that the Tribe lacked jurisdiction under both *Montana* exceptions, *see Montana v. United States*, 450 U.S. 544, 565-66 (1981), specifically holding the agreements "expressly refute, and therefore cannot establish 'consensual relationships' supporting tribal court jurisdiction under the first exception." Pet. App. C 59a.

The Louisiana Third Circuit Court of Appeal reversed the District Court, finding that the federal doctrine of exhaustion of tribal remedies required it to defer to Coushatta Tribal Court for a determination on the Tribe's jurisdictional claims. *See* Pet. App. B 37a-55a.

The Louisiana Supreme Court reinstated the trial court's judgment, holding that exhaustion was not warranted where the 2001 GSA, ratified by Resolution 2003-04, and subsequent agreements entered in accordance with that Resolution contained clear waivers of sovereign immunity and valid forum selection clauses. *See* Pet. App. A 1a-36a. It found that, even if the Tribal Code provision relied upon by the Tribe applied, which it did not, the necessary Resolution had been passed by the Tribal Council: the 2003 Resolution. Pet. App. A 10a. It did not hold

that the exhaustion doctrine was inapplicable to the States. It did not "refuse to follow the Tribal Exhaustion Doctrine." *See* Pet. 9. It did not fail to have "followed federal law and jurisprudence." *Id.* It did not ignore Coushatta law; instead, as Petitioner concedes, the Louisiana Supreme Court "applied Coushatta law." Pet. 21.[9] The Tribe's disagreement with the Louisiana courts' application of a concededly unambiguous tribal Judicial Code provision presents no issue worthy of this Court's *certiorari* jurisdiction.

REASONS FOR DENYING THE WRIT

I. No Important Federal Question Is Presented by a Contractually Designated State Court's Decision Not to Defer to a Tribal Court to Interpret an Unambiguous Tribal Judicial Code Provision.

This case involves a unique set of facts that do not present an important federal question. The facts do not support a decision that will provide broad guidance to the lower courts. Throughout the proceedings below, the Tribe agreed the contracts at issue con-

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[9] Regardless of whether the case is heard in tribal, state, or federal court, the express provisions of the contracts at issue mandate the application and control of Louisiana law as to disputes arising from the contracts. For this same reason, Petitioner's claim that, "[t]he issues in this case are solely determined by federal and tribal law," Pet. 3, is simply incorrect. *See Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rptr. 2d 455, 463 (Cal. Ct. App. 2002). In *Smith*, the court explained that "in deciding whether the contractual waiver of tribal sovereign immunity is effective, we would not apply the [tribal] sovereign immunity ordinance, because the contract itself specifies that it is to be governed by *California law*." *Id.* (emphasis in original). The court then concluded that California law supported the conclusion that the tribe waived its sovereign immunity. *Id.*

tained unambiguous forum selection and choice-of-law provisions. Louisiana (like most states and this Court) has a strong policy of enforcing forum selection clauses. *See Power Mktg. Direct, Inc. v. Foster*, 05-2023, p. 20 (La. 09/06/2006) 938 So. 2d 662, 675; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (explaining that forum selection "clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances"). A member of this Court has recently recognized the decisive nature of forum selection clauses in tribally related suits. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. ___, ___, 128 S. Ct. 2709, 2729 (2008) (Ginsburg, J., concurring in part, dissenting in part) ("Had the bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted.").

In light of such policies, the Tribe could advance only one reason it should be immune from suit: It contended that despite its unambiguous waivers of sovereign immunity, choice-of-law provisions, and forum selection clauses, it was shielded from suit by a Tribal Judicial Code provision that it conceded also was unambiguous. The District Court and Louisiana Supreme Court agreed the provision was unambiguous and held that it did not apply. Because the Judicial Code provision plainly did not apply to the issues at hand, and the Tribe advanced no other reason to avoid its express waiver of immunity from suit, the state courts correctly held they had jurisdiction and the inherent discretion to decide whether to

defer that jurisdiction to the tribal court or maintain the suit in state court.

This Court's abstention and exhaustion jurisprudence makes plain that a court is not required to defer to a court of another jurisdiction for the interpretation and application of an unambiguous provision of law. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("[A]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim."). The decision below is consistent with this precedent, as are the decisions of other lower courts. *See United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 595-96 (2d Cir. 1989) (deference to the state court is not warranted where a statute is susceptible to interpretation by a federal court applying "well-known standards"); *BT Inv. Managers, Inc. v. Lewis,* 559 F.2d 950, 954 (5th Cir. 1977) (declining to apply the abstention doctrine, which "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain") (internal quotation marks and quoted authority omitted); *Wxyz, Inc. v. Hand*, 658 F.2d 420, 425 (6th Cir. 1981) (abstention not required where statute is "unambiguous"); *see also Amin v. Bakhaty*, 01-1967, pp. 13-15 (La. 10/16/01), 798 So. 2d 75, 85-86 (trial court did not abuse its discretion by interpreting Egyptian law and declining to extend comity to the Egyptian legal system).

The pertinent portion of the tribal code article at issue, Judicial Code § 1.1.05, merely provides:

> *Nothing in this Code* shall be deemed to constitute a waiver of the sovereign immunity of the

> Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such.

(Emphasis added.)

This sentence plainly provides a rule of interpretation of the Judicial Code, to be applied only when it is alleged a Judicial Code provision waives immunity. The critical language of Section 1.1.05 is its introductory clause, defining the scope of the provision: "[n]othing in this Code," i.e., nothing in the Tribal Judicial Code, shall be interpreted as waiving immunity—unless the Tribal Council has adopted a resolution to that effect.[10] That language and the rules of interpretation provided by the Judicial Code make clear that Section 1.1.05 merely clarifies two things: (1) that nothing "in this [Judicial] Code" itself should be construed as a waiver of the Tribe's sovereign immunity absent a resolution so stating; and, (2) that the Tribe's sovereign immunity naturally extends to its judicial officers. This provision serves the very specific purpose of prohibiting a court from interpreting the numerous provisions of the Judicial Code allowing various causes of action and the application of federal and state law for interpretive purposes to subject the Tribe or its judicial officers to suit. The provision, which speaks to the interpretation of the Tribe's Judicial Code, including the laws there compiled, simply does not apply out-

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[10] The Tribe's reference to the first sentence of Section 1.1.05, which merely restates general federal law regarding immunity, does not suggest a different interpretation. The proper interpretation must "give effect to every provision of the statute," *see Carcieri v. Salazar*, No. 07-526, slip. op. at 15 (U.S. Feb. 24, 2009), including the limiting phrase "[n]othing in this Code."

side that context. Mere reference to an inapplicable code provision such as Section 1.1.05 cannot deprive a party of its bargained-for, contractual assurances of access to a state forum.

The Tribe does not explain why the Coushatta Tribal Court is uniquely capable of interpreting and applying Section 1.1.05, particularly where the Tribal Judicial Code lays plain and familiar markers for courts' interpretations.[11] Given the language of Section 1.1.05 and the Code's guides to familiar canons of interpretation, interpretation of the unambiguous Code provision required no special knowledge of tribal custom or practice; it merely presented a straightforward exercise in statutory interpretation. The issue is one entirely appropriate to be resolved by the court designated in the forum selection clause.

Given these facts, nothing would have been gained by deferring to the tribal court. There was no valid reason to do so. In any event, the phrase "[n]othing in this Code" cannot reasonably be interpreted as limiting the plenary powers of the Tribal Council, the sole governing body of the Tribe, and its authority to enter binding contracts containing immunity waivers through majority vote. Requiring a contractually selected state court to defer to a tribal court under

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[11] *See* Judicial Code §1.1.07(b) ("Words shall be given their plain meaning and technical words shall be given their usually understood meaning when no other meaning is specified."); Judicial Code §1.1.07(d) ("This Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner."); Judicial Code § 1.1.07(e) ("Whenever the meaning of a term used in this Code is not clear, . . . such term shall have the meaning given to it by the laws of the State of Louisiana . . ."); Judicial Code §1.1.07(h) ("Any other issues of construction shall be handled in accordance with generally accepted principles of construction . . . .").

the tribal exhaustion doctrine would potentially divest the state court of jurisdiction, thus denying a remedy its businesses and municipalities had bargained for. Consequently, requiring tribal exhaustion on these facts would, at best, "serve no purpose other than delay." *See Strate v. A-1 Contractors,* 520 U.S. 438, 459 n.14 (1997).

Certiorari would also be improvident because, even if Section 1.1.05 applied, it is satisfied by the Tribal Council's actions. The 2003 Resolution expressly reaffirmed the GSA, which contained an arbitration clause constituting an express waiver of immunity, and authorized further contracts for the Power Project under the GSA or subsequent contracts. Given its confirmation of the earlier GSA, the 2003 Resolution clearly contemplated and authorized that subsequent contracts could contain waivers of sovereign immunity and forum selection and choice-of-law provisions. Authorization is confirmed further because such contracts were duly executed by a controlling majority of the Tribal Council.

This Court should not entertain an action seeking to divest state courts of their sovereign rights and obligations under our federal system to determine their own jurisdiction when acting under contractual forum selection clauses, whenever a tribe alleges its express waiver is invalid under tribal law. State courts can and do determine whether tribes have validly waived immunity in similar situations. *See, e.g., Bradley v. Crow Tribe of Indians*, 67 P.3d 306, 309-12 (Mont. 2003) (concluding that former tribal chairwoman validly waived sovereign immunity by contractual forum selection and choice-of-law provisions); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. Ct. App. 2004)

(tribal chief financial officer could waive sovereign immunity: "When, as here, a person has authority to sign an agreement on behalf of a sovereign, it is assumed that the authority extends to a waiver of immunity contained in the agreement."); *Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rptr. 2d 455, 458, 462 (Cal. Ct. App. 2002) (tribal chairwoman authorized "to negotiate and execute contracts" effectively waived immunity where the tribe's governing body was aware of the contracts the tribal official signed on its behalf). The documents containing the express waivers relied upon here were executed by a majority of the Tribal Council. Thus, the Tribal Council had full knowledge of the terms of the contracts, including the waivers of sovereign immunity. Those facts present no issue of general importance to tribes and those doing business with them.

Just as there is no basis for a federal court to stay under the federal-state abstention doctrine when interpretation of state law is "clear and certain," *see County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 196 (1959), here there is no reason to require exhaustion or abstention when the only reasonable interpretation of Judicial Code § 1.1.05 is that it applies only to interpreting whether provisions of the Tribal Judicial Code waive immunity, and no waiver under such provisions is argued to apply here.

II. The Decisions Below Comport, Rather than Conflict, with the Court's Prior Opinions Under *Montana* and *Strate*; Because the Tribal Court Plainly Lacked Jurisdiction, the Courts Below Properly Held that Exhaustion Was Not Required.

Whether state courts must follow the federal court exhaustion doctrine is not squarely presented here.

Applying the federal exhaustion doctrine to the salient facts below does not result in a different outcome. Because the Coushatta Tribal Court plainly lacked jurisdiction under *Montana*, requiring exhaustion of tribal court remedies would serve no purpose other than delay.

The tribal exhaustion doctrine is not a "jurisdictional prerequisite." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). Rather, it grants courts the flexibility to retain jurisdiction where appropriate. *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 79-80 (2d Cir. 2001). Indeed, this Court has made clear that the doctrine provides nothing more than a "prudential" rule by which tribal courts are given an opportunity to explain their basis for accepting or rejecting jurisdiction. *See Strate*, 520 U.S. at 449-50. Under the federal exhaustion doctrine, a federal court need not defer to a tribal court where *deferring to tribal court serves no purpose other than delay*. *Id.* at 459 n.14. The tribal court action here satisfies this exception.

A. Exhaustion Was Not Required Because Deferring to the Tribal Court to Interpret the Code Provision Would Have Served No Purpose Other Than Delay.

The tribal exhaustion doctrine is based in the principle of comity, *see Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8, which necessarily balances the concurrent jurisdiction of two sovereigns. Accordingly, the decision to extend comity under the exhaustion doctrine, although guided by established principles, is discretionary. The Fourteenth Judicial District Court and the Louisiana Supreme Court clearly did not abuse their discretion in interpreting the unambi-

guous Judicial Code provision in this case and determining that it did not support the Tribe's jurisdictional challenge.[12]

The interests of the respective sovereigns and their citizens, and the particular policies and circumstances before the court, determine the propriety of its decision to extend comity. Here, the parties expressly and repeatedly agreed that Meyer would not be haled into tribal court under any circumstances. The ramifications of allowing the Tribe to renege on its contractual commitment to litigate in Louisiana courts include Meyer's, and Louisiana cooperatives' and municipalities', loss of the stipulated right to have the critical immunity issue decided by the contractually selected court. If the Tribal Court were now allowed to conclude the waiver is invalid, Meyer and Louisiana entities risk losing any and all rights to assert any claims for breach of multi-million dollar contracts in *any* court.[13] It would serve no purpose

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[12] The Louisiana courts were not required to defer to a tribal trial court opinion that did not address the interpretive issue presented below, whether a Tribal Judicial Code provision limiting waivers under provisions "in this Code" limits waivers accomplished by the Tribal Council and Chairman, not acting under the Judicial Code. *Celestine v. Coushatta Tribe of Louisiana*, Tribal Ct. No. C 06-117 (Sept. 5, 2006), *see* Pet. App. E, simply is not material. In addition, here, a Tribal Council Resolution reaffirmed a predecessor agreement containing an arbitral waiver and authorized the further agreements at issue, signed by Tribal Council majorities, that contain additional waivers.

[13] The issue is not merely whether Meyer may present its claims in Tribal Court or state court. The Tribe has confirmed that it intends to use the defense of sovereign immunity to preclude any suit against it in Tribal Court, as well as any counter-claim or offset.

other than delay to defer to a tribal court to interpret a straightforward, concededly unambiguous code provision. No internal tribal knowledge or political interests are implicated in the dispute. This is not a case that presents an issue requiring clarification of the doctrines of immunity from suit or tribal court exhaustion.

B. The Exception Recognized in Footnote 14 of *Strate* Applies Here.

This Court has held exhaustion is not required when a tribal court clearly lacks jurisdiction in the circumstances present here:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmember's conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct.

Strate, 520 U.S. at 459 n.14. In such circumstances, "*state or federal courts will be the only forums competent to adjudicate those disputes.*" *Id.* (emphasis added). Therefore, when tribal court jurisdiction in such circumstances is challenged in state or federal court, "*the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.*" *Id.* (emphasis added) (citations omitted); *see also Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1066 (9th Cir. 2000) ("Because tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court."). The dispute here is "covered by *Montana's* main rule," the general rule that tribes lack jurisdiction over non-

members, *Montana*, 450 U.S. at 565, because neither *Montana* exception applies. It is "plain" that there is simply no basis for tribal jurisdiction over this matter. Consequently, exhaustion of tribal court procedures was not required because it "would serve no purpose other than delay."

The Tribe fails to demonstrate jurisdiction under *Montana*. The Tribe advances excerpted quotations from *Montana*, but provides no argument supporting jurisdiction under *Montana*'s exceptions and avoids discussion of its "main rule." *Montana* establishes the general rule that tribes lack jurisdiction over nonmembers unless one of two exceptions applies: Either the nonmember has a qualifying consensual relationship with the tribe, or the challenged activities of the nonmember so threaten tribal integrity that they may be deemed "catastrophic." *See Plains Commerce Bank,* 554 U.S. at ___, 128 S. Ct. at 2720, 2726; *Montana*, 450 U.S. at 565-66. The second exception is unquestionably inapplicable to this action; the Tribe conceded below it does not apply.

Montana's first exception also does not apply because the only relationship Meyer has with the tribe arises from the very contracts that eschew tribal court jurisdiction. A consensual relationship "of the qualifying kind," *see Strate*, 520 U.S. at 457, cannot arise from a contract that specifies exclusive state court jurisdiction and forecloses tribal court dispute resolution. As in *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 657 (2001), Meyer "cannot be said to have consented" to tribal court jurisdiction by entering into contracts excluding tribal court jurisdiction. As the Court more recently cautioned, tribal regulation through judicial jurisdiction over contracts regarding fee lands activities, like the

contracts here, not only falls "beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *See Plains Commerce Bank,* 554 U.S. at ___, 128 S. Ct. at 2724. The trial court below correctly held that the Coushatta Tribal Court lacked jurisdiction over this dispute under either exception.

Because tribal sovereignty falls "outside the basic structure of the Constitution," tribal courts "differ from traditional American courts in a number of significant respects." *Id.* at ___, 128 S. Ct. at 2724 (internal quotation marks and quoted authority omitted). Consequently, tribal jurisdiction "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Id.* As the Fourteenth Judicial District Court held below, "[t]hese agreements expressly refute and, therefore, cannot establish 'consensual relationships' supporting tribal court jurisdiction under the first exception." Pet. App. C 59a. Justice Ginsburg's separate opinion in *Plains Commerce Bank* puts this concept succinctly: "Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements . . . ." 554 U.S. at ___, 128 S. Ct. at 2729 (Ginsburg, J., concurring in part, dissenting in part).

Correct application of the federal court exhaustion doctrine, therefore, compels the conclusion that exhaustion was not required under the facts of this case. The Coushatta Tribal Court plainly lacked jurisdiction under *Montana* over litigation pertaining to contracts that expressly stipulated exclusive state

court jurisdiction and foreclosed tribal court dispute resolution. *See Strate,* 520 U.S. at 459 n.14.

III. The Decisions Below Present Neither a Material Conflict Between State Court Rulings Nor an Important Federal Question Regarding Whether State Courts Need Apply the Federal Court Tribal Exhaustion Doctrine.

Petitioner's contention that state appellate courts are divided over whether the tribal court exhaustion doctrine applies to state courts presents a false conflict, which is not necessary to the proper resolution of this case. First, the Louisiana Supreme Court did not hold that the exhaustion doctrine did not apply to state courts. Second, none of the authorities the Petition cites addresses forum selection clauses or cases satisfying a recognized exception to the tribal exhaustion doctrine prescribed for the federal courts. Prior rulings by this Court control the outcome of this case and fully support the Louisiana Supreme Court's holding below.

There simply is no split in authority pertaining to whether a contractually selected state court must defer to a tribal court to interpret unambiguous, written law. Closest in point to this case is *C & L Enterprises, Inc.*, 532 U.S. at 418-19, in which this Court affirmed the Oklahoma appellate courts' conclusion that the tribe's agreement to an American Arbitration Association arbitration clause effected a clear and effective waiver of immunity from suit, and recognized such AAA arbitration agreements constitute waivers of sovereign immunity. The Court did not suggest exhaustion of tribal court remedies was necessary to determine the effectiveness of such a waiver.

A. Under the Applicable Facts, the Petition's State Court Authority Presents No Real Conflict with the Decisions Below.

While some state court opinions the Tribe advances have arguably taken different positions regarding the application of the tribal court exhaustion doctrine to state courts, those differences do not present a material conflict given the vastly different factual circumstances between those cases and this one. Those state court cases cited by the Tribe that have applied the federal courts' tribal exhaustion doctrine, have done so in inapposite circumstances that are not instructive here: There were no express waivers of sovereign immunity, no express and specific forum selection clauses, no resolutions authorizing the actions of the tribe's governing body, nor even any contract between the parties alluding to these issues. *See Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379, 380-83 (Minn. Ct. App. 1995) (tort action, no written agreement between the parties waiving immunity or specifying jurisdiction in state court); *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998) (same); *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 907 (Wis. 2003) (applying state statute, not exhaustion doctrine, and extending full faith and credit to a tribal court default judgment against a nonmember who abandoned participation during tribal court proceedings). Those cases are personal injury and property damage cases where the underlying events took place on tribal land, whereas here the relevant dispute concerned a proposal dealing only with off-reservation, non-tribal lands. Perhaps even more importantly, those cases do not provide any precedent

for a state court to disregard the contractual dispute resolution procedure chosen by the parties who negotiated their rights and obligations at arms-length and relied upon by the state's businesses and municipalities. This is not a matter of giving "first crack" at a complex jurisdictional issue to the Coushatta Tribal Court. This is a matter of interpretation of an unambiguous Code provision and a forum selection clause—potentially taking away Meyer's right to bring suit to enforce its contractual rights in *any* forum.

B. Cases from Other States and the Decisions Below Do Not Present an Important Issue Regarding This Court's Tribal Exhaustion Jurisprudence.

The Petition fails to demonstrate decisions of the state courts reflecting a need for guidance from this Court. The Tribe's citation of the decision in *Astorga v. Wing,* 118 P.3d 1103, 1106 (Ariz. Ct. App. 2005), does not reflect misapplication of this Court's doctrines. In *Astorga,* where both the tribal court and the state court were entertaining the same action, the Arizona Court of Appeals held that a state court is not bound to strictly apply the federal court exhaustion doctrine. It ruled the Arizona trial court correctly declined to issue a stay on exhaustion grounds when the Navajo member had filed a parallel action in Navajo tribal court. *Id.* at 1109. The Arizona court found that, although both sovereigns' courts had jurisdiction over the matter, it should not waive the jurisdiction it properly had. *Id.* at 1108 ("[T]he exercise of concurrent jurisdiction alone by a tribal court is insufficient to divest the superior court of all discretion in determining whether to grant a stay in the parallel proceedings before it.").

The *Astorga* court recognized that two fundamental principles underlying the federal court exhaustion doctrine are inapplicable in the state court context:

> Despite Petitioner's argument, however, the principle of exhaustion recognized by federal courts in this context does not similarly operate in Arizona state courts. Unlike Arizona state courts, federal courts retain the power to review an Indian court's exercise of jurisdiction over non-members. Thus, *the relationship between the Navajo courts and the federal courts is (at least in part) a vertical one, governed by the rule of exhaustion.*

Id. at 1106 (emphasis added) (citations omitted). *Astorga* is correct on both grounds.

First, when a federal court stays its hand to allow for tribal exhaustion, it does just that—it stays, but ultimately has a clear opportunity to review the correctness of the tribal determination under its federal question jurisdiction. *Id.*[14] Because a state court lacks comparable procedural mechanisms enabling it to review tribal court decisions, exhaustion more severely compromises a state court's jurisdiction. *Id.*

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[14] A federal court has federal question jurisdiction to review a tribal court's rulings on tribal court jurisdiction over a non-member. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). However, the federal court's review may be limited to the tribal court's jurisdictional determination. State court review of a tribal court judgment, by contrast, may be available, if at all, only on the enforceability of any resulting tribal court judgment that the tribe may seek to enforce in the state court. Consequently, if, upon exhaustion, the Tribal Court here holds the Tribe did not effectively waive its immunity from suit, Meyer may never secure any portion of the state court adjudication to which the parties stipulated.

Second, federal principles of exhaustion arise, at least in part, out of the federal courts' obligations to accord comity to other courts in the federal system. *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8. The State, on the other hand, may have a different set of commitments, which may include those federal policies. State courts have a different primary policy and an obligation to heed those commitments and policies. *Astorga*, 118 P.3d at 1109. Here, the State of Louisiana has a clear policy of fostering and upholding contractual forum selection clauses. Given that clear state policy, the parties' expressed intent to have their disputes resolved in a state forum, under state law, and the unambiguous Judicial Code provision at issue, the federal exhaustion doctrine affords ample room for the state court to retain jurisdiction. *See C & L Enterprises, Inc.*, 532 U.S. at 418-19 (finding waiver of sovereign immunity based on the fact that the tribe entered into a contract containing an arbitration agreement without any reference to exhaustion). Thus, the state court cases upon which the Tribe relies provide little support because no forum selection provision was involved and no exception to the federal court exhaustion rule applied.

The Court need not address the proper application by a state court of the tribal court exhaustion doctrine, because its cases reflect, if the doctrine applies, it applies with a measure of flexibility that accommodates the decisions below. Although this Court has never held that the federal exhaustion of tribal remedies doctrine applies to state courts,[15] its deci-

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[15] Dicta in *Iowa Mutual Insurance Co.*, 480 U.S. at 16, stating that "[a]djudication of such matters by any non-tribal court . . . infringes upon tribal law making authority," does not counsel

sions do not conflict with the decision below. The Court introduced the doctrine to guide federal courts in determining *when* they should exercise the federal question jurisdiction recognized in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985), to determine whether tribal courts have jurisdiction over nonmembers. That the Court was applying its abstention and exhaustion cases guiding the timing of the federal courts' exercise of their jurisdiction is evidenced by the foundational tribal abstention or exhaustion cases. *See, e.g.*, *National Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21 (citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977)); *id.* at 856 n.24 (citing *Weinberger v. Salfi*, 422 U.S. 749, 765 (1976)); *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8 ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976)."). The logic of those decisions dictates that the exhaustion doctrine should not apply to state court actions in a manner that forecloses state courts from honoring forum selection provisions specifying state court adjudication, particularly given that state courts may lack the mechanisms for review of tribal court decisions that federal courts have.

Federalism concerns counsel a rule that allows state courts to retain flexibility to apply state policies

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an inflexible rule. *Iowa Mutual Insurance Co.* was decided long before this Court's decisions clarifying the limited scope of tribal judicial jurisdiction over nonmembers and recognizing the role of state courts in *Strate,* 520 U.S. at 459; *Nevada v. Hicks,* 533 U.S. 353, 367-69 (2001); and *Plains Commerce Bank*, 554 U.S. at ___, 128 S. Ct. at 2724-26.

when faced with a claim they must require a litigant to exhaust tribal remedies. The trial court and Louisiana Supreme Court decisions in this case amply reflect such a balance in light of the forum selection provisions and clear absence of jurisdiction in the Coushatta Tribal Court. Those decisions do not conflict with decisions of other state courts.

IV. This Case Is of Little Consequence to Any Other Case.

This case involves the straightforward application by a court of competent jurisdiction of a code provision unique to a single tribe that has attempted to sidestep its commercial agreements with nonmember businesses and public entities. Both parties contracted to have the state courts, applying state law, resolve any disputes arising under the agreements, necessarily including waiver of sovereign immunity issues. Both parties benefitted from these agreements. The Tribe induced Meyer to enter into the agreements by agreeing to proceed in state court, and Meyer was able to induce others to participate in the project by providing the certainty of state court proceedings. The agreements between the Tribe and the nonmembers assured Louisiana's businesses, cooperatives, and municipalities that they would not be forced into the tribal court system and would retain access to a state court forum. The contracts entered by the Tribe through its sole governing authority and its Tribal Chairman provided express waivers of immunity to effectuate express forum selection clauses. Most tribal governments honor their contracts. The instant action presents an outlier situation in which the Tribe is attempting to disavow its word by proffering a single, tenuous, and

ultimately unsupportable argument about an unambiguously inapplicable code provision.

CONCLUSION

This case does not present facts upon which the questions the Tribe presents may be answered, and it has established no compelling reason why this Court should grant its Petition. Accordingly, the Writ should be denied.

Respectfully submitted,

LYNN H. SLADE
JOAN D. MARSAN
DEANA M. BENNETT
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Bank of America Centre
500 Fourth Street NW
Suite 1000
Albuquerque, NM 87102
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1800

RICHARD P. IEYOUB
JAMES E. MOORE, JR.
Counsel of Record
CARLETON, DUNLAP, OLINDE, MOORE & BOHMAN, LLC
One American Place
Ninth Floor
Baton Rouge, LA 70825
(225) 282-0600

Counsel for Respondent

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