No. 07-411

In The Supreme Court of the United States

PLAINS COMMERCE BANK,

Petitioner,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER PLAINS COMMERCE BANK'S BRIEF

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QUESTION PRESENTED

Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or publicly held company owning 10% or more of its stock.

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The June 26, 2007 Opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 491 F.3d 878 (8th Cir. 2007), and is reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-1 through A-23. The prior opinion of the United States District Court for the District of South Dakota, entered July 17, 2006, is reported at *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 440 F. Supp. 2d 1070 (D.S.D. 2006), and is reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-24 through A-44.

The prior decision of the Cheyenne River Sioux Tribal Court of Appeals, case number 03-002-A, entered November 22, 2004, is unreported, and is reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-45 through A-68. The prior decisions of the Cheyenne River Sioux Tribal Court, case number R-120-99, entered February 18, 2003, and January 3, 2003, respectively, are unreported, and are reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-69 through A-71, and pp. A-72 through A-83.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The

Petition for Writ of Certiorari was filed on September 21, 2007, and granted on January 4, 2008.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal courts have jurisdiction to review tribal-court jurisdiction pursuant to 28 U.S.C. § 1331, which provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

See Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53 (1985).

STATEMENT OF THE CASE

This case arises out of a dispute concerning non-Indian-owned land located within the boundaries of an Indian reservation in South Dakota. The practical problem presented by the Eighth Circuit's opinion is that nonmembers doing business with tribal members can be swept into tribal courts as defendants, triggering all of the unknowns this entails. Neither a nonmember's ownership of land on an Indian reservation, nor contracting with a member-owned South Dakota corporation, is sufficient to subject a nonmember to tribal-court adjudication of tribal, common-law tort

claims. Indian tribes' assertion of adjudicative authority over nonmembers is inconsistent with their diminished status as dependent domestic sovereigns. Their retained, inherent sovereignty generally does not extend to nonmembers.

A. The Cheyenne River Sioux Reservation

Although at one time the Sioux Tribe claimed a large part of the Great Plains as its own, wars, treaties, Congressional divestiture, land allotments, and sales have significantly diminished the Sioux Tribe's land. *South Dakota v. Bourland*, 508 U.S. 679, 682 (1993); and *Solem v. Bartlett*, 465 U.S. 463, 468-69 (1984). The Fort Laramie Treaty of 1868 established the now defunct Great Sioux Reservation, consisting of more than 60 million acres, principally in western South Dakota and south-western North Dakota. Treaty With The Sioux Indians, Art. II, April 29, 1868, 15 Stat. 638 (1868), Joint Appendix ("JA") 205-22. The Indian General Allotment Act of 1887, however, provided for diminishment of this reservation by enabling non-Indians to acquire fee title to unallotted and "surplus" land on the reservation. Indian General Allotment Act of 1887, 24 Stat. 388 (1887). In 1889, Congress replaced the Great Sioux Reservation with a number of smaller reservations, which included the Cheyenne River Sioux Reservation ("Reservation"). *Bourland*, 508 U.S. at 682.

The boundaries of the Reservation encompass almost all of Dewey and Ziebach counties in north-central South Dakota. Further sales and transfers of individually and tribally owned lands within the Reservation occurred when Congress later opened up 1.6 million acres of land within Reservation boundaries for homesteading by non-Indians. Act of May 29, 1908, 35 Stat. 460 (1908). Today, non-Indians own substantial land within Reservation boundaries, including the land at issue in this case.

B. The Parties

Plains Commerce Bank ("the Bank"), formerly known as Bank of Hoven, is a South Dakota banking corporation. Aff. Charles Simon ("Simon Aff.") at ¶ 2 (D.S.D. Dec. 1, 2005) (Dkt. No. 32). During the events at issue in this lawsuit, its main place of business was located in Hoven, South Dakota. *Id.* The Bank is not on the Reservation, and is not owned by tribal members. *Id.*

The Long Family Land and Cattle Company ("the Long Company") is a South Dakota ranching and farming corporation, located on the Reservation. The Long Company was incorporated by filing Articles of Incorporation with the State of South Dakota on March 24, 1987. *Id.*; *see also* JA 13-20. Shortly thereafter, the Indian-owned Long Company, which was eligible for Bureau of Indian Affairs ("BIA") guaranteed loans pursuant to 25 C.F.R. § 103.25 (2001), began lending relations with the Bank. Simon Aff. at

¶¶ 3-4. Cheyenne River Sioux tribal members Ronnie Long and his wife, Lila Long ("the Longs") have a majority shareholder interest in the Long Company. *Id.* at ¶ 3.

C. The Land

The primary collateral underlying the loan arrangements between the Bank and the Long Company consisted of approximately 2,230 acres of pasture and farm land on the Reservation in Dewey County, South Dakota, and a home in Timber Lake, South Dakota. *Id.* at ¶ 4. Kenneth Long, Ronnie Long's father, and a non-tribal member, owned this property in fee status before his death. *Id.* In 1992, Kenneth Long mortgaged this property to the Bank as security for the Long Company's debt. Aff. Ronnie and Lila Long, Ex. 7 (D.S.D. Dec. 9, 2005) (Dkt. No. 38); *see also* JA 31-33, 42-46. At no time did the Long Company, or Ronnie or Lila Long own the relevant property. Second Aff. of Charles Simon ("Second Simon Aff.") at ¶ 3 (D.S.D. Dec. 22, 2005) (Dkt. No. 45).

Kenneth Long died on July 17, 1995. Simon Aff. at 5; *see also* JA 86-88. On September 26, 1995, the Bank filed in Dewey County, South Dakota, a Statement of Claim against the estate for Long Company debts totaling approximately $687,000. Simon Aff. at ¶ 5, Ex. 2. In lieu of foreclosure, Kenneth Long's second wife, Pauline Long, provided a

personal representative's deed for the real estate and home in Timber Lake to the Bank. JA 113-15.

D. The Contracts

Two contracts underlie this suit: a loan agreement and a lease with option to purchase. JA 96-106. Neither contract is between the Bank and Ronnie Long or Lila Long in their individual capacities. Ronnie Long signed both the loan agreement and the lease with option to purchase in his capacity as president of the Long Company. JA 101, 106. Lila Long signed the loan agreement in her capacity as secretary treasurer of the Long Company. JA 106.

The Bank and the Long Company entered into a loan agreement on December 5, 1996. JA 104-06. Under the terms of the loan agreement, the Bank credited the Long Company debt for the farm real estate, and the home in Timber Lake deeded to the Bank. JA 104. The loan agreement required the Bank to request that the BIA increase the guarantee on one outstanding Long Company loan from 84% to 90%, and to reschedule payment of the delinquent note over 20 years. JA 105. The Bank also was to request that the BIA provide a 90% guaranty for a new operating loan. *Id.* "If the BIA guarantee requests are approved," the Bank was to make an additional loan of $53,500 to the Long Company. *Id.*

The Bank and the Long Company also entered into a two-year lease with the option to purchase the

pasture farm real estate on December 5, 1996. JA 96-103. The option price was $468,000. JA 98.

E. The Relationship

By letter dated December 12, 1996, the Bank fulfilled its obligation to request the agreed BIA guarantees. JA 107-08.

During the winter, while the BIA request was pending, the Bank issued loans to the Long Company totaling approximately $24,000. Simon Aff. at ¶ 10. The BIA provided no response until February 14, 1997, when it rejected the Bank's application as incomplete. JA 118-19. By that time, most of the cattle the Long Company had proposed to use as collateral for the loans had perished in harsh winter conditions. JA 120-22. Because the BIA rejected the application, and the contemplated loan could no longer be sufficiently collateralized, the Bank did not make the loan, though it did provide subsequent additional financing. Simon Aff. at ¶¶ 8-9.

The Long Company failed to exercise its option to purchase the farm real estate in December 1998. On March 17, 1999, with the Long Company still in possession of approximately 960 acres, the Bank sold 320 acres of pasture land to Ralph and Norma Pesicka, who are not members of the Tribe. JA 141-43. The Pesickas paid $49,600 in cash for the land, or $155 per acre. *Id.* Edward and Mary Maciejewski, who are not members of the Tribe, purchased the remaining 1,905 acres from the Bank for $401,100

under a contract for deed on June 29, 1999. JA 148-57. The Maciejewskis paid approximately $210 per acre for the remaining pasture and farm land. The Long Company remained in possession of 960 acres. Simon Aff. at ¶ 14.

Together, the Maciejewskis and the Pesickas paid approximately $450,700 for the part of the property they acquired. According to the terms of the option to purchase, the Long Company's option to purchase for $468,000 – had it been exercised – would have been reduced with a net cost of $443,600 for the Long Company.

F. The Tribal Courts

Because the Long Company continued in possession of 960 acres of the property following the expiration of the lease, the Bank sought to serve a Notice to Quit on the Long Company as a prerequisite to the action for forcible entry and detainer it filed in South Dakota state court. Off-reservation process servers cannot effectuate valid service on the Reservation, so the Bank sent the Notice to the Cheyenne River Sioux Tribal Court ("Tribal Court") on June 14, 1999, asking that the Tribal Court authorize service. JA 144-47. The Notice was then served by a tribal process server. JA 147.

In response to the Bank's Notice to Quit, Ronnie and Lila Long commenced the underlying Tribal Court action, seeking a temporary restraining order against the Bank. Simon Aff., Ex. 18. The Bank

responded, denying Tribal Court jurisdiction and opposing entry of injunctive relief. JA 181-82. The Tribal Court upheld jurisdiction and issued a preliminary injunction. Simon Aff., Ex. 19.

Ronnie and Lila Long then amended their Complaint, adding the Long Company as a Plaintiff. JA 158-79. They asserted several causes of action, including breach of contract and discrimination. *Id.* The Bank answered, again denying Tribal Court jurisdiction. JA 180-86. It then stated a Counterclaim alternatively, "in the event the Court finds that it does have jurisdiction," seeking eviction of the Long Company from the 960 acres of the farm real estate it continued to hold, and damages for holding over under the lease. *Id.*

A trial was held before a Tribal Court jury in Eagle Butte, South Dakota, on December 6 and December 11, 2002. In addition to the contract claim, the Longs asserted that the Bank discriminated against them by preventing the Long Company from exercising the option to purchase the leased property, and for charging a higher per-acre value than the subsequent nonmember purchasers. JA 171-72. The discrimination claim was submitted to the jury as a claim by Ronnie and Lila Long, not the Long Company. Simon Aff., Ex. 25 at 430.

The jury returned a general verdict, encompassing all claims of the Longs and the Long Company against the Bank, for $750,000, and indicated that interest should also be awarded. JA 192; *see also* JA

194-96. The jury found the Bank had discriminated against Ronnie Long and Lila Long. JA 191.

On post-trial motions, the Tribal Court upheld jurisdiction over the Bank, ruled that federal law supported the discrimination claim, added pre-judgment interest to the judgment, and gave the Long Company an option to purchase the 960 acres it possessed by offset against the judgment. A-69-71, 82-83.

The Bank appealed the judgment to the Cheyenne River Sioux Tribal Court of Appeals ("Tribal Court of Appeals"). The Tribe participated as amicus curiae on appeal. In an opinion dated November 22, 2004, the Tribal Court of Appeals affirmed the Tribal Court ruling, agreeing with the Tribe that the discrimination claim was based on tribal common law, arising out of tribal tradition and custom. A-45, 54. Neither party had previously argued that the discrimination claim was based upon tribal tort law. Simon Aff., Ex. 28. The Tribe does not have a codified discrimination statute. A-54.

G. The Federal Courts

The Bank then commenced a declaratory-judgment action in the U.S. District Court, District of South Dakota, Central Division. Complaint (D.S.D. Jan. 7, 2005) (Dkt. No. 1). The Bank moved for summary judgment based upon the Tribal Court's lack of jurisdiction, as well as the violation of its due-process rights. Pl's Mot. for Summ. J. (D.S.D. Dec. 1, 2005)

(Dkt. No. 30). The Longs made a cross-motion for summary judgment. Defs' Mot. for Summ. J. (D.S.D. Dec. 1, 2005) (Dkt. No. 36). The District Court ruled on the parties' cross-motions for summary judgment in an order and memorandum dated July 17, 2006. A-24. It granted the Longs' motion and denied the Bank's motion, finding the Tribal Court had jurisdiction over the discrimination claim pursuant to the "consensual relationship" element of the first exception articulated in *Montana v. United States*, 450 U.S. 544 (1980), and ruling that due process was not violated. A-31-41.

The Bank appealed to United States Court of Appeals for the Eighth Circuit. There, the Bank asserted that the District Court erred in ruling that the Tribal Court had jurisdiction and that the Bank was afforded due process. Appellant Br. (8th Cir. Oct. 23, 2006) (Dkt. No. 16).

Specifically, the Bank challenged the District Court's determination of jurisdiction based on consent and a voluntary consensual relationship with tribal members. It argued that the Tribal Court did not have jurisdiction over the federal claim, and that the after-the-fact assertion of tribal discrimination-law resulted in a violation of the Bank's due-process rights. *Id.*

In an opinion dated, June 26, 2007, the Circuit Court affirmed the ruling of the District Court. It found that the Bank's due-process rights had not been violated, and that the Tribal Court's exercise of

jurisdiction over the Bank fell within the inherent authority of the Tribe under the first *Montana* exception. A-9-18. According to the Circuit Court, the Bank formed a consensual relationship with tribal members. Thus, the tribal tort law the Longs invoked was an "other means" by which a tribe may regulate nonmember conduct. *Id.*

The Bank petitioned this Court for a writ of certiorari, which this Court granted on January 4, 2008. In its petition, the Bank explicitly declined to seek review of two arguments made below – that tribal courts lack jurisdiction to adjudicate claims based on federal law, and that the Tribal Court's judgment should be denied comity because the Bank was denied due process – to present its main argument without extraneous distractions. Petition for Writ of Certiorari at 1, No. 07-411 (Sept. 21, 2007).

SUMMARY OF THE ARGUMENT

The Tribal Court lacked jurisdiction to adjudicate the Longs' common-law tort claim as an "other means" of regulating the Bank's nonmember conduct arising out of land it owned within the Reservation's boundaries and leased to a member-owned, South Dakota corporation. The underlying contracts concern land the Bank owned on the Reservation, which it leased to a South Dakota corporation, the Long Company. The Longs, who are members of the Tribe,

had a majority shareholder interest in the Long Company.

This lending relationship cannot support tribal adjudicatory jurisdiction over members' tort claims. The Tribe was generally divested of authority over nonmembers because of its dependent sovereign status. The general rule established in *Montana*, 450 U.S. 544, controls. The exceptions do not overcome the presumption against retention of inherent tribal regulatory authority over nonmembers.

Once the power to exclude nonmembers from particular reservation lands has been surrendered by the tribe or terminated by Congress, inherent tribal regulatory power over nonmembers ordinarily is lost. *Bourland*, 508 U.S. at 679. Where there is no regulatory power, there can be no tribal adjudicatory power over nonmembers. This is a consequence of tribes' dependent status in our federal system. The Bank's ownership of the land at issue precludes assertion of regulatory, and consequently adjudicatory, authority by the Tribe.

Even if the Bank's ownership of the land is not dispositive, the Tribe lacked retained, inherent tribal authority to regulate the Bank or adjudicate the Longs' or their company's dispute with the Bank. The exceptions this Court recognized in *Montana* provided for exercise of retained, inherent adjudicatory authority only where a nonmember's conduct threatens the very survival of a tribe. This case does not implicate that exception. *Strate v. A-1 Contractors*, 520 U.S.

438 (1997). Nor does it implicate the *Montana* exception that contemplated tribal ability to regulate – through licensing, taxation, or other presumably similar means – nonmember conduct arising out of a consensual relationship with a tribe or its members.

The Bank's contracts were made with the Longs' South Dakota corporation. That activity was not susceptible to regulation by the Tribe. Thus, without the power to regulate, there could be no power to adjudicate. *Nevada v. Hicks*, 533 U.S. 353 (2001). But more importantly, the Tribe lacked retained, inherent authority to regulate the Bank's activity by applying tribal common law to adjudicate the Longs' claims. It does not follow from the Bank's contracts with the Long Company that it consented to the Tribe's civil adjudication of the tort claim, or any other claim. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). A broad range of policy concerns militate against recognition of tribal-court jurisdiction over nonmembers. The Tribe's assertion of adjudicatory authority over the Bank is inconsistent with its diminished status as a dependent sovereign.

ARGUMENT

I. THE DEPENDENT SOVEREIGN STATUS OF INDIAN TRIBES CARRIES WITH IT A GENERAL DIVESTITURE OF AUTHORITY OVER NONMEMBERS.

The Tribe may maintain internal sovereignty with respect to its members, but lacks broad authority over

nonmembers such as the Bank. This is particularly so when the Tribe would be extending its authority over non-Indian land – even when that land is within the boundaries of the Reservation. This is a consequence of history.

Indian tribes, while possessing certain incidents of preexisting sovereignty, are not comparable to state or local governments. They instead possess unique legal characteristics identified early in this Nation's jurisprudence. They are – at most – "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Their relationship with the United States is "marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* at 16. The inherent political and territorial sovereignty tribes originally possessed has been diminished, and in some respects eliminated, by the United States throughout its history. *See Worcester v. Georgia*, 31 U.S. 515 (1832), *superseded and abrogated on other grounds*.

One of the unique legal characteristics of Indian tribes is the extent to which the United States has divested tribes of authority with respect to nonmembers who live on, conduct business within, or pass through reservations. This Court's opinions have helped define the scope of that divestiture, based in part on this Court's consistent view of the nature of tribal sovereignty. Two basic threads of this Court's Indian-law jurisprudence explain why.

The first thread is that Indian tribes possess powers of internal self-government that are neither based in, nor constrained by, the Constitution. *See, e.g.*, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 57 (1978); *Talton v. Mayes,* 163 U.S. 376 (1896). Indian tribes' inherent powers of self-government are of a kind "unknown to any other sovereignty in the Nation," *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation,* 492 U.S. 408, 433 (1989) (Stevens, J., concurring in part and dissenting in part), a fact that reflects they are not party to the federal Union. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1990). Thus, where extant, Indian tribes' inherent powers of self-government allow them to govern in ways that would "be intolerable in a non-Indian community." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 170 (1982) (Stevens, J., dissenting); *Santa Clara Pueblo,* 436 U.S. at 55-56.

The second thread recognizes that Indian tribes are no longer independent nations. They have been incorporated into our Nation's social and political fabric. Of necessity, however, this incorporation involved the divestiture of Indian tribes' preexisting sovereign powers to determine independently their relations with persons who are not part of their self-governing political community. If, as Chief Justice Marshall observed in *Worcester,* 31 U.S. at 560-61, under the "settled doctrine of the law of nations . . . a weaker power does not surrender its independence – its right to self government, by associating with a stronger, and taking its protection," the correlative

principle is also true: that such retained self-government rights empower the weaker power to do no more than to "maintain [its] own laws and usages and customs over [its] own race, [and to] regulate [its] own private rights and affairs according to [its] own municipal jurisprudence." Joseph Story, *Commentaries on the Conflict of Laws* § 2a (1865). This correlative principle is reflected in Justice Johnson's oft-quoted statement from his concurrence in *Fletcher v. Peck,* 10 U.S. 87, 147 (1810), "[a]ll the restrictions upon the right of soil in the Indians [ ] amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."

This Court's modern decisions have carried forward this view of limited inherent, retained tribal sovereignty. As explained in *Bourland*:

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, . . . the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation."

Bourland, 508 U.S. at 694-95 (citing *Montana*, 450 U.S. at 564). Indian tribes' retained inherent sovereign powers are thus grounded, either in notions of

self-government (*see, e.g.*, *Duro v. Reina,* 495 U.S. 676, 684-86 (1990), *superseded by statute on other grounds*), or federal delegation (*see, e.g.*, *United States v. Mazurie,* 419 U.S. 544, 556-58 (1975)).

Indian tribes do retain some indicia of sovereignty. *United States v. Wheeler*, 435 U.S. 313 (1978). But through their original incorporation into the United States, as well as through specific treaties and statutes, they have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers of the tribe. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-46 (1980), *superseded by statute as to inherent power of tribes to exercise criminal jurisdictional over all Indians*. As this Court observed in *Montana*:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.

Montana, 450 U.S. at 564 (internal citations omitted).

In the present case, the Longs brought suit against the Bank in Tribal Court on the Cheyenne River Sioux Reservation in South Dakota.[1] The

[1] This Court has addressed the history of the Sioux Tribe and the Cheyenne River Sioux Reservation in at least three previous cases: *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (involving review of an Indian Claims Commission decision

(Continued on following page)

Reservation was originally a part of the Great Sioux Reservation established by the Fort Laramie Treaty of 1868, which comprised virtually all of what is now South Dakota west of the Missouri River, as well as part of what is now south-western North Dakota. 15 Stat. 635; *see also Bourland*, 508 U.S. at 682.

Then, in the Indian General Allotment Act of 1887, Congress provided non-Indians with fee title to some of the unallotted and surplus lands on the Reservation. 24 Stat. 388. And in the Act of Mar. 2, 1889, Congress greatly reduced the Great Sioux Reservation, replacing it with smaller reservations. 25 Stat. 888. The Cheyenne River Sioux Reservation – located in north-central South Dakota – was the largest of these smaller reservations, with boundaries established by the Act that encompassed 2.8 million acres. *Id.* With the Act of May 29, 1908, Congress further authorized the Secretary of the Interior to open 1.6 million acres of the Reservation to homesteading and settlement by non-Indians. 35 Stat. 460. As a result of these (and subsequent) actions by Congress, some of the land within the Reservation boundaries is owned by the Tribe and its members; some is owned by nonmembers.

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regarding an 1877 act that effected a taking of the Black Hills without compensation); *Bourland*, 508 U.S. 679 (involving the Tribe's inability to regulate nonmember hunting on Reservation land taken by the United States for construction of a dam and reservoir project); and *Solem*, 465 U.S. 463 (involving interpretation of the Act of May 29, 1908, and its impact on state court criminal jurisdiction over members).

The result is extensive and pervasive interaction between land owned by the Tribe or its members – over which the Tribe may exercise certain retained inherent sovereignty – and land owned by nonmembers. Nonmembers' ownership of land on an Indian reservation operates to divest the tribe of any sovereignty over that land. Such sovereignty is held by States or the federal government.

The Longs' tribal common-law discrimination claim decided in Tribal Court against the Bank necessarily falls outside the scope of the limited sovereignty retained by the Tribe. Specifically, alleged discriminatory acts by a nonmember owning non-Indian fee land against member-majority owners of a South Dakota corporation that entered into a lease agreement with the nonmember, do not infringe upon the Tribe's ability to govern itself or to control its internal relations. By definition, nonmembers are excluded from participation in such self-government, and Congress has not delegated to tribes civil-adjudicatory jurisdiction over nonmember, non-Indians.

II. TRIBAL-COURT CIVIL JURISDICTION DOES NOT EXTEND TO THE ACTIVITIES OF NONMEMBERS OWNING FEE LAND ON A RESERVATION.

This case should be resolved by application of the general presumption against tribal authority over a nonmember land owner such as the Bank. The Tribe

retains no inherent authority to govern the activities of a nonmember where, for whatever reason, the land at issue has passed into non-Indian ownership. The fact that the Bank owned the land on the Reservation that it leased to the Long Company should completely preclude tribal authority over the Bank in this case.

In *Montana*, this Court established narrow exceptions to the general rule that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. However, this Court need not determine whether either exception applies, because the land at issue is non-Indian-owned fee land. Although as recognized in *Hicks*, 533 U.S. at 360, land ownership is not a dispositive factor, tribal power is at its nadir when nonmember land ownership is involved. With one limited exception (*Brendale*, 492 U.S. 408), this Court has never recognized tribal civil-regulatory jurisdiction over the conduct of a nonmember owning non-Indian fee land on a reservation, and it has never before recognized tribal-court civil-adjudicatory jurisdiction over a nonmember defendant in over 200 years of jurisprudence.

To be sure, "tribal jurisdiction over nonmembers on non-Indian fee land has been the subject of extensive litigation." F. Cohen, *Handbook of Federal Indian Law*, 600 (2005). But this Court has made clear that treaty provisions securing tribal authority over reservation lands "must be read in light of the subsequent alienation of those lands." Cohen, *supra*, at 600-01 (internal citations omitted).

In *Nat'l Farmers Union*, 471 U.S. 845, this Court first considered the potential for tribal civil-adjudicatory jurisdiction over a non-consenting nonmember. Although it was ultimately resolved through application of the exhaustion-of-tribal-remedies doctrine, this Court characterized the civil-adjudicatory question as concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. That, in turn, must be determined by an examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. *Id.* at 855-56.

This Court has defined the scope of rights enjoyed by Indian tribes. In fact, in *Bourland*, this Court determined that the Cheyenne River Sioux Tribe had given up – by operation of the General Allotment Act of 1887, the Act of 1889, and the Act of 1908 – its right to regulate nonmembers on non-Indian-owned land inside the Reservation. *Bourland*, 508 U.S. at 689. This is because when a tribe (or Congress) conveys ownership of tribal lands to non-Indians, the tribe loses the right of absolute and exclusive use and occupation of these lands. *Id.* "The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* Stated differently, "the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in

hand with the power to exclude." *Id.* at 691, n.11 (citations omitted).

Bourland controls here. There is no material distinction between the abrogation of Cheyenne River Sioux inherent tribal sovereignty in *Bourland*, and that given up by the Tribe in this case. When Congress opened up the tribal trust lands and other reservation land for the Oahe Dam and Reservoir Project in *Bourland* through the Flood Control and Cheyenne River Acts, it eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory-jurisdiction formerly enjoyed by the Tribe. *Bourland*, 508 U.S. at 689. The fact that nonmember Kenneth Long owned, and his estate subsequently deeded, the land at issue to the nonmember Bank, shows that a similar divestiture of tribal sovereignty had occurred here. "[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Bourland*, 508 U.S. at 692.

This reasoning is straightforward, and flows from the theory of "implied divestiture" articulated by this Court. Due to their diminished status as sovereigns, tribes have necessarily lost any "right of governing every person within their limits except themselves." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205 (1978) (holding Indian tribes lack criminal jurisdiction over nonmembers). In particular, "the areas in

which such implicit divesture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . ." *Montana*, 450 U.S. at 564 (emphasis in original), quoting *Wheeler*, 435 U.S. at 326. And this Court has consistently "rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'" *Hicks*, 533 U.S. at 359 (citations omitted); *see also Montana*, 450 U.S. at 559 (noting that it defies common sense to suppose Congress would intend non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the purpose of allotment was elimination of tribal government; relevant consideration is effect of land alienation on treaty rights tied to use and occupation of reservation).

Significantly, since *Montana* was decided, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360 (comparing *Merrion*, 455 U.S. at 137, 142 (tribe has taxing authority over tribal lands leased by nonmembers), with *Atkinson*, 532 U.S. at 659 (tribe has no taxing authority over nonmembers' activities on land held by nonmembers in fee)); *but see Brendale*, 492 U.S. at 443-44, 458-59 (opinions of Stevens, J. and Blackmun, J.) (tribe can impose zoning regulation on that 3.1% of land within reservation that was not

owned by the tribe). "[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Hicks*, 533 U.S. at 360. Excepting, however, the zoning issue in *Brendale*, the absence of tribal ownership has precluded tribal jurisdiction over nonmembers on non-Indian-owned land on a reservation.

By noting in *Hicks* that land ownership was "only one factor to consider" in determining whether tribal jurisdiction was proper over nonmembers, this Court did not weaken the general concept that nonmember ownership is usually preclusive. *Id.* Rather, the Court in *Hicks* extended its jurisdictional analysis to Indian-owned land on the tribal reservation. For the purpose of the present analysis, however, the Court did recognize that nonmember land ownership can "be a dispositive factor." *Id.* And as to that frequently "dispositive factor," Justice Souter's concurrence adds that it is the membership status of the party, not merely the status of the land, that is the primary jurisdictional fact. *Hicks*, 533 U.S. at 382.

There is no dispute that the Bank held fee-simple title to the land at issue. Under *Montana* and its progeny, this fact alone precludes tribal-court adjudication of the Longs' discrimination claim against the Bank. For all practical purposes, whatever interest or right to regulate the land the Tribe initially had was lost when the Tribe lost ownership of the land. *See Bourland*, 508 U.S. at 688-89. The fact the Bank entered into a lease with a member-owned South Dakota corporation is inconsequential.

Neither *Montana* exception is applicable, as the Tribe could not exercise rights incidental to ownership over the non-Indian fee land at issue, and, therefore, could not regulate its use.

III. TRIBAL COURTS MAY NOT ADJUDICATE TORT CLAIMS AGAINST NONMEMBER DEFENDANTS; THEIR INHERENT POWERS DO NOT EXTEND TO THE ACTIVITIES OF NONMEMBERS.

Even assuming, for the sake of argument, that the non-Indian-owned status of the land does not, by itself, preclude tribal adjudicative jurisdiction over the nonmember Bank, the Circuit Court's holding – that a tribal civil court may hear civil tort claims involving a nonmember as an "other means" of regulating its conduct – must be reversed. The Circuit Court's decision tears down the wall separating tribal civil-regulatory and adjudicatory jurisdiction erected by this Court in *Montana*.[2] As a result, the Eighth Circuit would elevate tribal courts to the status of courts of general jurisdiction, contrary to the teaching of *Hicks*. That is, they would have general

[2] The federal district court judge who presided over this case, Judge Kornmann, recently observed: "As I read the [United States Court of Appeals for the Eighth Circuit's] appellate opinion, I was struck by the fact that such opinion would clearly and substantially broaden the jurisdiction of tribal courts in the Eighth Circuit. . . . this would be a significant expansion of tribal court jurisdiction in civil cases." *Farmers Union Oil Co. v. Guggolz*, No. CIV 07-1004, 2008 WL 216321, *6 (D.S.D. 2008).

civil-adjudicative jurisdiction to hear tort and contract claims brought against nonmember defendants on reservations – an issue this Court has never before decided, and which it should now decide in the negative.

As this Court is well aware, *Montana* recognized two exceptions from the general principle that tribes lack civil jurisdiction over nonmembers. First, "[a] tribe may *regulate*, through *taxation*, *licensing*, or *other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (emphasis added). Second, "[a] tribe may also retain inherent power to exercise *civil authority* over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (emphasis added).

Montana immediately involved regulatory authority under the first exception (the ability to require nonmember hunters to purchase licenses to hunt on non-Indian land within the boundaries of the reservation). *Id.* at 564-67. But it used the concept of inherent sovereignty, through the main rule and, in particular, its second exception, to define the extent of tribes' retained power to exercise forms of civil regulatory and adjudicatory jurisdiction over non-Indians. The first exception is, in contrast to the second, wholly transactional in nature; *i.e.*, tribal

regulatory-authority over the nonmember is truly not "inherent," but agreed to by a nonmember as the price of doing business with a tribal member.

Following *Montana*, this Court clarified the intended narrowness of both in *Strate*, 520 U.S. at 446. As to the first exception, the Court reiterated the type of consensual activities that it had in mind – concluding that the alleged tort did not present a qualifying consensual relationship. *Id.* at 456-57. As to the second exception, the Court reiterated the type of tribal interests it envisioned – concluding that the optional opening of tribal court for the claim at issue was not necessary to protect tribal self-government or control internal regulations against impermissible state intrusion. *Id.* at 457-59. The Court also rejected the argument that *Montana*'s general rule against tribal authority over nonmembers applied only to regulatory, as opposed to adjudicatory, authority – holding that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. *Id.* at 453. *See also* Cohen, *supra*, at 232.

The split of tribal civil-jurisdiction into regulatory authority and adjudicatory authority set forth in *Montana* should be maintained. "*Legislative jurisdiction* concerns a government's general power to regulate or tax persons or property, while *adjudicative jurisdiction* concerns the power of a court to decide a case or to impose an order." Cohen, *supra*, at 597 (emphasis in original). "[L]egislative jurisdiction" and "adjudicative jurisdiction" must be analyzed separately because they involve different concerns. *See*

Cohen, *supra*, at 598. ("The Supreme Court has often suggested that adjudicative and legislative jurisdiction are separate inquiries for tribal courts, as they are for state and federal courts.")

A. *Montana*'s Second, "Adjudicatory" Exception Is Not Applicable Because Self-Government and Internal Relations Are Not Implicated.

Simply stated, this is not a second *Montana* exception case, because the alleged discriminatory conduct did not "threaten[ ] or ha[ve] some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Strate*, 520 U.S. at 441, 446, 457-58 (holding nonmember defendant's contractual agreement with tribe for on-reservation work insufficient to support jurisdiction because the civil action sounded in tort, and though careless driving threatens the health and safety of tribal members, availability of state civil litigation is sufficient to deter and compensate for dangerous driving); *see also Atkinson*, 532 U.S. at 657 (rejecting application of tribe's hotel occupancy tax to nonmembers under *Montana*'s second exception, because hotel operation within reservation did not threaten or directly affect the political integrity, the economic security, or the health or welfare of the tribe).

As this Court noted in *Strate*, when "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. Its purpose is

to protect against infringement of the tribes' retained, inherent authority – such as to punish tribal offenders, to determine tribal membership, to regulate members' domestic relations, and to proscribe rules of inheritance for members. *Id.* The second *Montana* exception's applicability is limited to situations where it is needed to preserve the right of reservation Indians to make their own laws and be ruled by them.

This case principally involved two private actors – a nonmember Bank and a South Dakota corporation. "[I]f *Montana*'s second exception require[d] no more, the exception would severely shrink the rule [that tribes lack civil jurisdiction over nonmembers on non-Indian-owned land]." *Strate*, 550 U.S. at 458. To its credit, the Circuit Court properly concluded this was not a second *Montana* exception case.

The problem is that the Circuit Court shoehorned into the first *Montana* "regulatory" exception, tribal "adjudicative jurisdiction" over nonmembers, notwithstanding the fact that "a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations . . . [and] [a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453, 459. Tribes' inherent, retained authority generally does not extend to nonmembers.

The Circuit Court ignored controlling precedent of this Court. The circumstances that would allow tribal civil-adjudication under the second *Montana*

exception are not present here: "[s]elf-government and internal relations are not directly at issue. . . . since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders." *Hicks*, 533 U.S. at 371.

B. *Montana*'s First "Regulatory" Exception Is Also Not Applicable Because There Is No Consent to Regulation.

As a threshold issue, the first *Montana* "regulatory" exception requires the existence of a consensual relationship between the Tribe, or its members, and the nonmember Bank. The exception provides that "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Because no such relationship existed, the Circuit Court should not have applied it.

Here, the Circuit Court supposed the member-owned Long Company to be a tribal member for *Montana* analysis purposes, "[b]ecause the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation." A-12. Yet the December 1996 loan agreement, and the lease with option to purchase, were between the Bank and the Long Company, executed by the Longs only in their capacities as officers of the Long Company.

By ascribing tribal membership status to the Long Company, a member-owned South Dakota Corporation, for purposes of its analysis, the Circuit Court made an insupportable leap of logic. The Long Company's legal status is distinct from the Longs in their individual capacities as a matter of black-letter law. *See, e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (corporate owner is distinct from the corporation, which is a legally different entity with different rights and responsibilities due to its different legal status). Because the Long Company is neither an "Indian" nor a member of the Tribe, no consensual contractual relationship existed between a tribal member and nonmember. Rather, the contractual aspects of this case involve a relationship between two nonmembers – a situation falling outside the first *Montana* exception.

This Court's decision in *Atkinson*, 532 U.S. at 657, makes clear that a nonmember within a reservation on non-Indian fee land does not generally subject itself to tribal regulation. In *Atkinson*, this Court concluded that the Navajo Nation could not tax non-tribal-member guests of a hotel located on non-Indian fee land within the reservation. "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil-authority beyond these limits." *Id.* at 659 (citation omitted).

The Court rejected the Navajo Nation's contention that a consensual relationship existed between

the guests and the Tribe based on the guests' acceptance of benefits from services potentially rendered by the Tribe. *Id.* at 654. The Court found that receipt of such services did not satisfy the requisite relationship. "If it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the 'advantages of a civilized society' offered by the Indian tribe . . . we think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.* at 655.

"A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson*, 532 U.S. at 656 (citations omitted). In practical effect, the first *Montana* exception is limited to regulation of commercial relationships on Indian-owned, tribal reservation lands where nonmembers voluntarily accept existing tribal regulation, or its possibility. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that tribes retained power to impose cigarette taxes on nonmember purchasers with respect to on-reservation sales).

As in *Atkinson*, there is no merit to the idea that by leasing non-Indian land on a reservation to a member-owned South Dakota Corporation, the Bank availed itself of the advantages of doing business with a member, thereby subjecting itself to the regulatory jurisdiction of the Tribe. And this in no way bound the nonmember Bank to adjudication of

claims in Tribal Court. The asserted basis for tribal regulatory-authority here is even more tenuous than in *Atkinson*.

The Bank owned the land, and the only agreements at issue are between the Bank and a member-owned South Dakota corporation, a business entity not organized under Indian law, but rather the law of the State of South Dakota. If anything, it was the Long Company that took advantage of state law to shield its members from personal liability. Accordingly, any claims arising from the Bank's contracts with the Long Company should be governed by South Dakota law.

Even assuming, for the sake of argument, the Long Company is an "Indian," thereby allowing the first *Montana* exception analysis to proceed, the parties simply did not enter into a consensual relationship that contemplated tribal adjudication of the discrimination tort at issue. A tort is a wrongful act by one party, not including a breach of contract or trust, resulting in an injury to another which entitles the other party to compensation. Black's Law Dictionary 1036 (6th ed. 1991). As discussed more fully below, the consensual-relationship test of the first *Montana* exception simply cannot be read to provide adjudication of a tort claim as an "other means" of regulating nonmember conduct, where the tort presupposes existence of an injury resulting from something other than a breach of contract.

Furthermore, because the "Tribe [ ] lost the right of absolute use and occupation of lands so conveyed, the Tribe no longer had the incidental power to regulate the use of the lands by non-Indians." *Bourland*, 508 U.S. at 688. Because the Tribal Court could not regulate the activities of the nonmember Bank under the first *Montana* exception, it necessarily follows that the Tribal Court could not adjudicate the claims against the Bank as an "other means" of regulation.

C. Tribal-Court Adjudication of a Tort Claim Against a Nonmember Is Not an "Other Means" of Regulating Its Conduct Under the First *Montana* Exception.

Montana's first exception has nothing to do with "adjudication." It provides that "[a] tribe may *regulate*, through *taxation*, *licensing*, or *other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Hicks*, 533 U.S. at 371 (emphasis added), quoting *Montana*, 450 U.S. at 565. This case begs the question whether "adjudication" by a tribal court can be an "other means" for the tribe to regulate nonmembers that enter into consensual relationships with the Tribe or its members.

The Circuit Court's interpretation of "tribal court adjudication" as an "other means" of "regulating" nonmember conduct turns the first *Montana* exception on its head. This Court has not, and should not,

extend the first *Montana* exception in this way. Indeed, if this Court applies the statutory interpretation principles *noscitur a sociis* (it is known from its associates), and its corollary *ejusdem generis* (of the same kind), to the words "licensing," "taxing," and "other means" in the first *Montana* exception, the inexorable conclusion follows that "tribal adjudication" cannot be an "other means" of "regulating" nonmember conduct. *See Wash. State Dept. of Social & Health Servs. v. Keffeler*, 537 U.S. 371, 384 (2003) (defining and applying *ejusdem generis* and *noscitur a sociis*).

"Licensing" and "taxation" contemplate regulatory action by the tribe – a world apart from tribal-court adjudication of tort claims against nonmembers. Had this Court wanted to create adjudicative jurisdiction in instances not involving the welfare, political integrity, or economic security of a tribe, it could have easily done so by including such language in the first exception. But it did not. Rather, it created the second *Montana* exception, which contemplates adjudicatory jurisdiction over nonmembers in limited instances.

The "first exception" cases decided by this Court after *Montana confirm this proposition*: a tribe's ability to "regulate" the activities of nonmembers contemplates legislative enactments – such as licensing, taxing, and zoning – nothing else. *See Merrion*, 455 U.S. 130 (1982) (tribal tax over nonmembers permissible where oil and gas companies found to have entered into commercial relationship with tribe

for use of *member-owned* lands over which tribe retained right to exclude producers from affected lands); *Brendale*, 492 U.S. 408 (1989) (tribal zoning regulation over non-Indian land upheld under very limited circumstance); *Bourland*, 508 U.S. 679 (1993) (abrogation of tribes' absolute and undisturbed use and occupation of the involved tribal land under the statutes deprived tribe of power to license non-Indian use of the lands); *Strate*, 520 U.S. 438 (1997) (first *Montana* exception inapplicable for tribal court to hear claims arising from accident between two nonmembers on state highway in reservation, notwithstanding nonmember defendants' contractual relationship with the tribes, the tribal court plaintiff was not a party to that contract and the tribe was a "stranger to the accident"); and *Atkinson*, 532 U.S. 645 (2001) (tribe lacked authority to tax guests of hotel operated by nonmember on non-Indian land within reservation).

There is no comparable history of second *Montana* exception cases. Since its articulation in 1981, this Court has never applied the second *Montana* exception to find that a tribe had civil-adjudicatory jurisdiction over a nonmember defendant. It remains an unrealized possibility. The continuing absence of a second *Montana* exception case from this Court extending civil-adjudicatory jurisdiction, and the absence of a first *Montana* exception case from this Court construing civil-adjudicatory jurisdiction as an "other means" of regulation, together reinforce the point this Court made in *Hicks*: "[W]e have never held

that a tribal court had jurisdiction over a nonmember defendant." *Hicks*, 533 U.S. at 358, n.2.

The fact this Court chose to use the word "regulate" as opposed to "adjudicate" in the first *Montana* exception, is also noteworthy in and of itself. The Court's intended use of the word "regulate" no doubt parallels its prior usage in the Indian Commerce Clause of the United States Constitution, which provides: "Congress shall have the power . . . [t]o *regulate* Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*." U.S. Const. Art. I, § 8, cl. 1 (emphasis added). Historically, the "commerce clause is the most often cited basis for modern legislation regarding Indian tribes, from legislation protecting tribal cultural resources, to legislation regulating gaming in Indian country." Cohen, *supra*, at 397. Naturally, regulation is effectuated through legislative enactment, not adjudication of tribal tort claims in tribal court.

In *Strate*, this Court concluded that tribal adjudicatory jurisdiction over non-consenting, nonmember defendants could not exceed the reach of inherent tribal regulatory authority. *Strate*, 520 U.S. at 453. In other words, tribal-court jurisdiction would be absent if the tribe could not regulate the involved activity pursuant to its inherent authority. This Court, therefore, found that the tribal court lacked the ability to adjudicate a tort claim against a nonmember arising out of an accident that occurred on a state highway, on a federal right-of-way through reservation land, even though the nonmember had a contract with the

tribe to perform work on the reservation. Moreover, the tortious nature of the claim precluded consent. *See Strate*, 520 U.S. at 456-57.

This Court followed a similar approach in *Hicks* – analyzing the availability of civil-adjudicatory jurisdiction by first considering whether civil-regulatory jurisdiction existed. Because adjudicatory jurisdiction can be no larger than regulatory jurisdiction, and because regulatory jurisdiction was absent, the Court did not resolve whether adjudicatory jurisdiction exists with respect to nonmember defendants. *Hicks*, 533 U.S. at 358, n.2. *Hicks*, however, casts doubt on whether there is a coterminous relationship between tribal adjudicatory and tribal regulatory authority. *Id.* at 358.

In sum, it is the second *Montana* exception that defines (and confines) the scope of tribal civil-adjudicatory authority over nonmembers – not the first. The Circuit Court's reading of the first *Montana* exception so as to permit tribal-court adjudication of a tort claim against the nonmember Bank as an "other means" of regulating its conduct, necessarily renders the second *Montana* exception useless – a result antithetical to its creation.

IV. PUBLIC POLICY MANDATES AGAINST FORCING NON-INDIANS TO DEFEND THEMSELVES IN TRIBAL COURT.

Tribal civil-adjudicatory jurisdiction over non-members is an ill-defined proposition. Unfortunately,

the Circuit Court's decision, without significant considered analysis, creates a form of tribal authority this Court has never before recognized: tribal-court civil-adjudicatory jurisdiction over nonmember defendants. This Court has suggested that nonmember defendants may be subject to a tribe's adjudicatory authority in the proper circumstances. But it has never so held.

Whenever the question has arisen regarding a specific nonmember defendant, tribal jurisdiction has either been found absent, or the question was not decided. By holding that tribal courts can adjudicate tort claims against nonmembers as an "other means" of regulating their conduct, the Circuit Court has summarily answered this question, determining for itself that tribal regulatory and adjudicatory authority are coextensive. "Surely [this issue] deserves more considered analysis." *Hicks*, 533 U.S. at 374.

Indian tribes and their members have taken steps over the past several decades to shape their future and develop internal systems of government and economies. But the fact remains that, at present, tribal courts remain very different from state and federal courts in the United States, and the concerns articulated by Justice Souter in his concurrence in *Hicks* as to the appropriateness of tribal-court civil jurisdiction over nonmembers still remain.

Until approximately 25 years ago, "tribal courts were the least developed branch of tribal government." Cohen, *supra*, at 265. Tribes have their own

traditional, though mostly informal and unwritten, governmental and legal systems. *Id.* at 265-67. Tribal justice systems, however, have been underfunded for decades. U.S. Comm'n of Civil Rights, A Quiet Crisis: Federal Funding and Unmet Need in Indian Country, 79 (2003). And the lack of adequate funding has impaired their operation. 1993 Tribal Justice Support Act, 25 U.S.C. § 3601 (1993).

Justice Souter pointed out additional concerns. The Bill of Rights and the Fourteenth Amendment do not apply to Indian Tribes. *Hicks*, 533 U.S. at 383 (Souter, J., concurring). The handful of analogous safeguards enforceable in tribal court under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, "are not identical," *Oliphant*, 435 U.S. at 194. The presumption against tribal-court civil jurisdiction therefore squares with one of the principal policy considerations underlying *Oliphant*: an overriding concern that non-member citizens be "protected . . . from unwarranted intrusions on their personal liberty." *Hicks*, 533 U.S. at 384, quoting *Oliphant*, 435 U.S. at 210.

There are also significant differences between tribal courts and other American courts in their structure, in the substantive law they apply, and in the independence of their judges. *Hicks*, 533 U.S. at 384. Most significantly:

> Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and

> norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." [citation] The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," [citation], which would be unusually difficult for an outsider to sort out.

Hicks, 533 U.S. at 384-85 (internal citations omitted).

These concerns show why "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given the special nature of Indian Tribunals." *Hicks*, 533 U.S. at 383 (internal citations and quotations omitted). Furthermore, nonmembers have no voice in tribal governance:

> [n]onmember[s] . . . living on the reservation are not in fact involved in tribal self-government . . . the Cheyenne River Sioux Tribe's constitution and bylaws do not allow nonmember[s] . . . to vote in tribal elections or hold office on the reservation.

U.S. on behalf of Cheyenne River Sioux Tribe v. State of S.D., 105 F.3d 1552, 1559-60 (8th Cir. 1997).

Twin concerns also exist that a non-Indian defendant will not know the type of claim at issue, or, even more generally, the laws of the tribe. The Tribe, in its amicus brief to the Tribal Court of Appeals, acknowledged that "tribal law is 'still frequently unwritten, being based instead on values, mores, and

norms of a tribe and expressed in its customs, traditions, and practices.'" Simon Aff., Ex. 28 at 14. The Tribe also acknowledged that, in the absence of any written tribal law, "the tribal court is governed . . . by the traditional customs of the different Sioux bands residing on the reservation . . . Such traditional customs can be adduced by expert testimony." *Id.* at 15 (internal citation omitted).

In this case, there was a considerable question whether the Tribe's courts had authority to adjudicate a federal-law discrimination claim. Displeased with the result, the Tribe filed an amicus brief before the Tribal Court of Appeals, which then reversed the Tribal Court judge's decision, determining that the discrimination claim was a common-law tribal claim, not a federal claim, and that the Bank was properly a defendant before the Tribal Court. A-52-55.

The legal uncertainty of what exactly tribal law is was readily apparent in this case. Even counsel for the parties in the underlying case believed the discrimination claim at issue to be a federal-law claim. It was the Tribe, in its amicus brief, that first suggested the discrimination claim arose from tribal law and that such a claim was based, not on the tribal codes, but on "Lakota tradition and custom," and "Lakota principles of equity and fairness." Simon Aff., Ex. 28 at 16. The Tribal Court of Appeals then determined the discrimination claim sounded in tribal tort law. A-52-55. Citing no prior tribal law precedent, the Tribal Court of Appeals recognized a tribal discrimination claim in its opinion, which the

absence of prior precedent suggests it had never before recognized.

Practically speaking, there are no compelling reasons requiring a nonmember defendant to defend itself in tribal court against a tort claim brought by a tribal member. Lawsuits like this one, that only involve private actors, one of whom is a nonmember defendant owning non-fee land on the reservation, do not belong in tribal court.

It is true that the indicia of sovereignty retained by the tribes allows them to "punish tribal offenders . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564. But this Court has determined that tribes lack civil jurisdiction with respect to claims brought against nonmembers because "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* This is because:

> The areas in which such implicit divestiture of [tribal] sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . . [ ] [which] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*.

Montana, 450 U.S. at 564 (emphasis in original) (internal citations omitted).

As noted by this Court in *Strate*, "[o]pening the Tribal Court for [ ] [Respondent's] optional use is not necessary to protect tribal self-government." *Strate*, 520 U.S. at 459. The Long Company and its shareholders' concerns are no different in this case. Neither regulatory nor adjudicatory authority was needed here to preserve the right of Reservation Indians to make their own laws and be ruled by them. And requiring the Bank to defend itself in Tribal Court is not crucial to the political integrity, economic security, or health or welfare of the Tribe.

Here, the Tribe gave up its sovereignty and concomitant power to control nonmembers on non-Indian land within the Reservation long ago. Yet, even setting aside the facts of this case, the panoply of public policy concerns set forth above militates against recognition of tribal-court adjudicatory jurisdiction over a nonmember defendant, at least where the second *Montana* exception is not implicated.

CONCLUSION

Plains Commerce Bank asks this Court to hold that the Tribal Court lacked jurisdiction to adjudicate the Longs' tribal common-law tort claim as an "other means" of regulating the Bank's nonmember conduct arising out of land it owned within the Reservation's boundaries and leased to a member-owned, South

Dakota corporation. Accordingly, this Court should reverse the District Court's grant of the Longs' cross-motion for summary judgment, reverse the District Court's denial of the Bank's motion for summary judgment as to the Tribal Court lacking jurisdiction, and remand this case to the United States Court of Appeals for the Eighth Circuit for further proceedings.

Respectfully submitted,

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