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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

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALASKA, FLORIDA, OKLAHOMA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WASHINGTON, AND WISCONSIN IN SUPPORT OF PETITIONER

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The *amici curiae* States, through their respective Attorneys General, respectfully submit an *amicus* brief pursuant to S. Ct. R. 37.4 in support of petitioner.

INTEREST OF *AMICI CURIAE* STATES

For three decades, this Court has endeavored to define the scope of an Indian tribe's inherent authority over the on-reservation activities of individuals or entities that are not members of the tribe. The decisions have ranged from the criminal context,[1] to the civil regulatory,[2] and to the civil adjudicatory.[3] States were parties in some of these cases and appeared as *amici curiae* in others. Notwithstanding the factual and legal distinctions among the controversies, the

[1] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990); *United States v. Lara*, 541 U.S. 193 (2004); *see also United States v. Wheeler*, 435 U.S. 313 (1978) (inherent authority of tribe to impose criminal sanctions on its members).

[2] *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1983); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

[3] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

fundamental state interest remained consistent: The need to define with clarity the extent to which nonmembers of a tribe are nevertheless subject to the sovereign powers of that tribe. Clarity is especially critical in the adjudicatory arena for, as Justice Souter observed in *Hicks*, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' . . . which differ from traditional American courts in a number of significant respects." 533 U.S. at 383. Tribal justice systems, in short, often partake of the unique cultural practices and governmental structure of the particular tribe.

The present matter presents yet another opportunity for this Court to define "where tribal jurisdiction begins and ends." The question presented requires it to consider the scope of the first, or consent, exception identified in the "pathmarking" *Montana v. United States* opinion (*Strate v. A-1 Contractors*, 520 U.S. at 445), not only generally but also with reference to whether the requisite "consensual relationship[ ]" can be inferred from dealings between two corporations – neither of which is or could be a tribal member – merely because one of those corporations is majority owned by two tribal members – the individual respondents here. Resolution of the latter issue has independent significance to the *amici* States insofar as it bears directly upon their ability to regulate member-owned corporations and to adjudicate reservation-based disputes when

those corporations are haled into state court without their consent.

The *amici* States believe that the Court's prior decisions leave little doubt about the correct disposition of both issues. First, whatever the precise reach of the *Montana* consent exception in the civil regulatory environment, it requires *actual* and *clear* consent to the exercise of tribal court authority. Second, the touchstone of "Indian" status lies in the unique political relationship which exists between the United States, individual Indians, and the tribes to which they belong. Artificial legal entities like corporations cannot partake of this unique relationship. Indeed, they exist for the very purpose of separating the corporate from the personal. This commonsense conclusion simply means that tribal members, like other individuals, must decide what mode of engaging in commerce best accommodates their particular circumstances. The court of appeals' decision cannot be reconciled with these principles and should be reversed.

SUMMARY OF THE ARGUMENT

I. *Montana* established a bright-line rule that inherent tribal authority presumptively extends only to internal governance matters, *i.e.*, that tribal sovereignty over nonmembers has been divested by the dependent status of Indian tribes. The exceptions to its "main rule" therefore must be construed narrowly.

The second *Montana* exception, for example, authorizes the exercise of tribal civil authority over nonmembers where such exercise is essential "to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459. Formulated originally as a federal preemption test, that standard has never been applied by this Court to extend any form of tribal civil authority over the conduct of nonmembers. The Court's *Strate* decision instead established that tribal courts do not have adjudicatory authority over garden-variety tort actions brought against nonmembers under the second exception. There is no principled basis to distinguish respondents' discrimination claim from the personal injury action found outside the exception's reach in *Strate* for second exception purposes.

The existence of nonmember consent for purposes of the first *Montana* exception should be measured by no less stringent standards. An analysis of this Court's immediately relevant precedent – *Strate*, *Atkinson Trading* and the decisions cited in *Montana* itself as the genesis of the consent exception – reflects the need for the predicate "consensual relationship" to be identified with precision and for the nonmember to be shown as having consented to the particular form of tribal civil authority as part of the *quid pro quo* for that relationship. Only actual and clear nonmember consent satisfies this consent standard. The actual and clear requirement has straightforward application in contract situations where the parties can agree to resolve disputes through tribal

court adjudication. However, in the absence of such provisions, the requisite nonmember consent to tribal court jurisdiction over contract-related controversies, including those asserted under tribal tort law, does not exist.

II. Application of the proper *Montana* consent-exception standards requires reversal. The relevant consensual relationship was between petitioner and the respondent Long Family Land and Cattle Company, Inc. ("Long Company") – a South Dakota corporation and therefore a nonmember. The court of appeals erred in relying on its perception of the "broader" interaction between petitioner and the individual respondents to transform the Long Company into a tribal member for consent-exception purposes. The lower court's approach ignores this Court's now-settled authority holding that "Indian" status carries with it an ancestral, or racial, component and limiting the reach of a tribe's "internal relations" to its own members. That approach also ignores the fact that the very goal in forming the Company was to create a legal entity separate from the individual respondents. Aside from greatly complicating application of the consent exception, the Eighth Circuit's elastic understanding of "member" status would have a potentially disruptive impact on the States' ability to enforce their laws on reservations against corporate entities wholly or partially owned by tribal members.

Because the Long Company is a nonmember, no plausible claim of consent to the exercise of tribal

court authority over a common-law cause of action for discrimination exists given this Court's analysis in *Strate*. The individual respondents, like the *Strate* tribal court plaintiffs, were "strangers" to the contractual relationship that was the sole predicate for application of the first exception. Even if the Company had been properly deemed a "member" for *Montana* purposes, nothing in the 1996 lease with option to purchase embodied consent to tribal court adjudication for disputes arising out of the negotiation or application of that contract, including tort claims of any kind. The court of appeals' contrary conclusion means in practical effect that tribes have civil regulatory authority over all but wholly nonmember commercial transactions on the basis of constructive, not actual, consent. Such an expansive application of the first exception undermines *Montana*'s "main rule" and closely approximates a comparable constructive consent rationale rejected in *Atkinson Trading*.

ARGUMENT

The proposition that tribal court adjudication of common law-based tort claims fall within the scope of the first *Montana* exception is anomalous on its face. The exception demands the presence of a "consensual relationship" – a requirement foreign to most torts and indisputably not an element of the "discrimination" claim adjudicated by the tribal courts below. *Montana*, 450 U.S. at 455 ("[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"). The "duty" sought to be enforced in a tort action thus is typically an invasion of an interest legally protected *de hors* a contract. As the *Restatement* explains, "[t]he duty in contract is normally to do or refrain from doing a particular or definite thing irrespective of the end which is to be served[,]" while "[t]he duty in tort is only occasionally to do or refrain from doing a particular thing" and, instead, "is merely a means whereby the interest protected by the duty can be made secure." *Restatement (Second) of Torts* § 4, cmt. c (1965) ("*Restatement*"). Another key distinguishing feature is that contractual duties are known and operate prospectively but "the actor's duty in tort is often to conduct himself in a manner the propriety of which is to be determined ex post facto." *Id.*

The *amici* States nevertheless understand the decision below to conclude that the exception applies because it *grows out* of a consensual relationship – *i.e.*, the 1996 lease with option to purchase between petitioner and the Long Company. Even if one accepts that premise and the Company's status as a nonmember for *Montana* purposes, the requisite consent to the application of tribal court authority to adjudicate the discrimination claim logically must similarly grow out of the same relationship and be defined by the parties' consensual undertakings. Where, as here,

the contract is silent as to *any* form of enforcement, implying consent to application of tribal tort law and tribal court power to apply that law vitiates any ordinary notion of "consent." *See Restatement* § 10A ("[t]he word "consent" is used throughout the Restatement . . . to denote *willingness in fact* that an act or an invasion of an interest shall take place") (emphasis supplied). That conclusion, otherwise consistent with accepted tort law principles, also follows inexorably from this Court's analysis of *Montana*'s exceptions generally and the first exception specifically. The States' argument first outlines the relevant standards and then applies them to the circumstances here.

I. *MONTANA*'S FIRST EXCEPTION IS PREDICATED ON A NONMEMBER'S VOLUNTARY SUBMISSION TO TRIBAL AUTHORITY AND, WHERE ADJUDICATORY JURISDICTION IS INVOLVED, REQUIRES ACTUAL AND CLEAR CONSENT TO THE EXERCISE OF SUCH JURISDICTION

A.

Analysis of the *Montana* exceptions must begin by recognizing the strength of the general rule to which they apply. This Court left no doubt in *Montana* that the "implicit divestiture of [tribal] sovereignty" (*Wheeler*, 435 U.S. at 326) by virtue of Indian tribes' dependent status precludes any "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations"

absent "express congressional delegation." *Montana*, 450 U.S. at 564.[4] While it eschewed extending the complete divestiture of tribal criminal authority over non-Indians found in *Oliphant* to civil proceedings, the *Montana* Court stressed that the principles relied upon in the earlier case "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. *Montana* therefore establishes a bright-line and forceful presumption – or "main rule" (*Strate*, 520 U.S. at 453) – against the exercise of tribal civil authority of any type to individuals who are not members of the involved tribe. The Court thus has warned against construing the *Montana* exceptions in a manner that "would severely shrink" (*Strate*, 520 U.S. at 458) or "swallow the rule" (*Atkinson Trading*, 532 U.S. at 655). The strength of *Montana*'s main rule is reflected further in this Court's subsequent decision-making. While specific to their facts, these cases have construed the exceptions narrowly and declined to find either applicable.

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[4] No claim of congressional delegation, express or otherwise, exists here. *See* Pet. A-10 n.5. The only positive federal law relevant to this controversy identified below was loan guaranty program established under Department of the Interior regulations. Pet. at A-11; *see* 25 C.F.R. pt. 103 (2007). Those regulations do not extend any authority to tribes over the underlying contractual undertakings. *See id.* § 103.3 (Secretary of the Interior has "ultimate[ ]" authority to administer program but, "[a]bsent a direct exercise of authority, . . . delegates Program authority to [Bureau of Indian Affairs] officials through the U.S. Department of Interior Departmental Manual").

So, for example, the second exception – the "exercise [of] 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" (*Montana*, 450 U.S. at 566) – has been construed as a mirror-image of the formulation of the standard for determining when state adjudicatory authority is preempted. This Court accordingly held in *Strate* that the exception's proper application must focus on what "is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" 520 U.S. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). "Opening the Tribal Courts for [an injured nonmember's tort claim]," the Court concluded unanimously, is not necessary to protect tribal self-government." Tribal self-government interests, in other words, do not compel submission by nonmember defendants to tribal court authority where adequate judicial remedies exist before state or federal courts.

This Court reaffirmed the self-government protection standard four years later in *Hicks* and *Atkinson Trading*. The *Hicks* Court held that the second exception could not provide a basis for the exercise of jurisdiction over on-reservation law enforcement activities of state game officials when enforcing a search warrant related to a possible off-reservation crime, despite the fact that enforcement occurred on the member suspect's reservation property. 533 U.S. at 364. It reasoned that earlier decisions had "suggest[ed]

state authority to issue search warrants in cases such as the one before us" and that "[t]he State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Id.* at 363-64. The Court left open the possibility that state officers might be subject to tribal regulation "depending on the outcome of *Montana* analysis" for actions unrelated to legitimate law enforcement functions but observed that, in such situations, "the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights." *Id.* at 373. The existence of those nontribal remedies, once again, mitigated the need for tribal jurisdiction to redress alleged abuses.

Unlike *Strate* and *Hicks*, *Atkinson Trading* dealt with a purely regulatory question – tribal authority to impose a hotel occupancy tax on customers of a corporate trading post doing business on its fee-owed land – but similarly rejected application of the second exception because "[t]he exception is only triggered by *nonmember conduct* that threatens the Indian tribe . . . [and] does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government." 532 U.S. at 657 n.12. Consequently, "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of

the Indian tribe, there can be no assertion of civil authority beyond tribal lands." The second exception, the *Atkinson Trading* Court later reiterated, subjects nonmembers to a tribe's "civil authority" at most in those situations where "the impact of the nonmember's conduct 'must be *demonstrably serious* and must *imperil* the political integrity, the economic security, or the health and welfare of the tribe.'" *Id.* at 659 (quoting *Brendale*, 492 U.S. at 431 (opinion of White, J.)) (emphasis supplied).[5]

More generally, this Court has found the requisite infringement on tribal self-government interests

[5] It warrants mention that Justice White's opinion in *Brendale* rejected *any* application of the second exception to attempted tribal regulation of nonmembers' use of their fee lands. 492 U.S. at 430 ("[t]he governing principle is that the tribe has not authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land"). His opinion used the "demonstrably serious" and "imperil" standard to describe those instances in which a tribe possesses a "protectible interest" capable of vindication in state and federal court. *Id.* at 431. The opinion nonetheless suggested that the second exception might provide a basis for the exercise of tribal authority in other regulatory areas. *Id.* at 429 (the use of "may" in the second exception's formulation "indicates . . . that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances"). *Atkinson Trading*, in contrast, employed the "demonstrably serious" and "imperil" standard as a showing essential to a tribe's taxing nonmembers with respect to transactions on nontribal land, at least in areas not comparable to the "closed" lands described in Justice Stevens' separate *Brendale* opinion. *Atkinson Trading*, 532 U.S. at 658-59.

only in three instances: *Williams*; *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (*per curiam*); and *Kennerly v. District Court*, 400 U.S. 423 (1971) (*per curiam*). Each decision involved the same basic jurisdictional issue of whether *tribal members* could be subjected without their consent to state court jurisdiction over reservation-based disputes. They did not speak to whether nonmembers could be sued in tribal court without their consent. Indeed, at the time *Williams* was decided, the Navajo Nation employed Courts of Indian Offenses that could not exercise jurisdiction over nonmembers without stipulation of all parties. 25 C.F.R. §§ 11.1, 11.22C (1958); *see generally* Stephen Conn, *Mid-Passage – The Navajo Tribe and Its First Legal Revolution*, 6 Am. Indian L. Rev. 329, 354-64 (1978) (discussing the interrelationship between *Williams* and the more general issue of debt collection actions against tribal members and the Navajo Nation's determination to replace the Court of Indian Offenses with an independent judicial system). *Strate* further suggests that tribal courts never have authority over nonmembers with respect to garden-variety tort claims of the sort here under the second exception, since no sound basis exists to distinguish respondents' claim of discrimination from injuries caused by "those who drive carelessly on a public highway running through a reservation . . . and surely jeopardize the safety of tribal members." *Strate*, 520 U.S. at 457-58.

B.

The question presented here does not ask this Court to determine whether the Cheyenne River Sioux Tribal Court possessed adjudicatory authority over petitioner under the second *Montana* exception. The federal courts below left that issue unaddressed. Pet. A-14 n.7, A-34. The exception nevertheless is central to assessing the scope of the first exception to remember that the second embodies the *only* circumstances under which a tribe may exercise its authority over a nonmember without the latter's consent. The necessary corollary is that consent to the otherwise extraordinary exercise of such authority – and particularly when that authority takes the form of adjudicatory proceedings before tribal tribunals applying often uncertain law and subject to no review as to non-jurisdictional issues (*Hicks*, 533 U.S. at 384-85 (Souter, J., concurring)) – should be measured by equally, if not even more, stringent standards.[6] This

[6] This case illustrates the uncertainty over substantive law that may attend tribal court litigation. The tribal trial court construed respondents' discrimination claim as arising under federal law – specifically 42 U.S.C. § 2000d – because "[t]he Tribe does not appear to have specific [tribal] code provisions prohibiting private discrimination and the court is therefore instructed to look to relevant federal law." Pet. A-81. That approach arguably ran afoul of *Hicks*' determination that tribal courts lack inherent authority to entertain claims under federal law. 533 U.S. at 366-67. The Cheyenne River Sioux Tribal Court of Appeals altered the lower court's reasoning, but not the ultimate result, by holding that a tribal common law-based claim for discrimination should be created and defined in "Lakota customs and norms." Pet. A-54 ("[s]uch a potential claim

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Court's decisions in *Strate* and *Atkinson Trading*, as well as the several cases cited by *Montana* in support of the consent exception, provide dispositive guidance on those standards.

The *Montana* Court cited four cases as relevant to the consent exception: *Williams*; *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); and *Colville*. *Williams* has been discussed above and simply stands for the proposition that a nonmember may invoke voluntarily tribal court jurisdiction despite the fact that, as there, nonmembers were not subject to unconsented suit. The merchant thus had the option of pursuing tribal court remedies to enforce the debts allegedly incurred by his Navajo customers.

Morris rejected an attempt by non-Indians to enjoin federal officials from enforcing a Chickasaw Nation law and accompanying federal regulations that required the payment of a fee for cattle and horse grazing on tribal land. This Court cited with approval an Attorney General Opinion issued in 1900 construing relevant treaties and federal legislation and reasoning, in part, that purchasers of lots within the Nation's Oklahoma territory did so "'with notice

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arises directly from the existence of Lakota customs and norms such as the 'traditional Lakota sense of justice, fair play and decency to others[ ]' . . . and 'the Lakota custom of fairness and respect for individual dignity'") (citations omitted). The *Hicks*-related difficulty thus was eliminated but was replaced by a culturally-grounded liability theory of indefinite scope.

of existing Indian treaties, and with full knowledge that they can only occupy them by permission from the Indians[,]" and that "'[s]uch lands are sold under the assumption that the purchasers will comply with the local laws.'" 194 U.S. at 392 (quoting 23 Att'y Gen. Op. 214 (1900)). No comparable assumption exists here; rather, the opposite is true. *Montana*, 450 U.S. at 559 ("[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government"); *Bourland*, 508 U.S. at 692 (holding generally and with specific respect to the Cheyenne River Sioux Reservation that "regardless 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"). It additionally bears noting that *Morris* did not involve the exercise of tribal adjudicatory authority. The non-Indians instead sought to enjoin the Department of the Interior officials from enforcing federal regulations.

Buster and *Colville* similarly arose from tax disputes and fit into the paradigm of nonmembers consciously subjecting themselves to the tax as the *quid pro quo* for carrying on commercial transactions with tribes or their agents. This Court clarified in *Atkinson Trading* that *Montana*'s reference to *Buster* was intended only to provide "guidance . . . as to the

type of consensual relationship contemplated by the first exception" and that "we have never endorsed *Buster*'s statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'" 532 U.S. at 653 n.4 (emphasis supplied). The "type" of arrangement there was a permit tax approved by the President and then imposed by the Creek Nation on nonmembers as a condition of doing business within its territory. *Buster*, 135 F. at 949.[7] *Colville* upheld tribal authority to impose cigarette taxes on nonmember reservation customers as part of the purchase price of the goods. 447 U.S. at 144, 153.

2. *Strate* and *Atkinson Trading* provide the most immediate assistance as to the scope of the *Montana* consent exception. In *Strate*, this Court dismissed with brief analysis the asserted applicability of the consent exception to a tort claim predicated on a reservation highway accident with a nonmember, where the defendant was party to building construction subcontract on a tribal project. The record was unclear as to whether the defendant was in the process of carrying out its contractual responsibilities

[7] *Atkinson Trading* disclaimed any intent to rely on *Buster* to the extent that it could be read to mean that a tribe may impose a tax as a condition for the use of nontribal land within a reservation. 532 U.S. at 653 n.4. The Court held instead that "[a]n Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land." *Id.* at 653. The result in *Buster* therefore appears suspect.

at the time of the accident (520 U.S. at 443), but resolution of that factual uncertainty was unnecessary. The reason was straightforward: The alleged tort victim "'was not a party to the subcontract, and the [T]ribes were strangers to the accident.'" *Id.* at 457. The accident thus "present[ed] no 'consensual relationship' of the qualifying kind" when "measured" against the decisions cited by *Montana* as emblematic of the first exception. *Id.*

This Court's consent-exception discussion in *Atkinson Trading* was more extensive. It initially rejected the tribe's contention that the requisite consensual relationship was inferable from the acceptance by the trading post and its guests of various tribal services. 532 U.S. at 654. "[T]he generalized availability of tribal services," the Court stated, is "patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.* at 655. The tribal officials' argument, in other words, proved far too much because "[a]ll non-Indian fee lands within a reservation benefit, to some extent, from the 'advantages of a civilized society' offered by the Indian tribe" and consent to tribal regulation therefore would be implied from mere presence on the reservation – a conclusion "which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power." *Id.* This Court next rejected the tribe's and the *amicus curiae* United States' reliance on the petitioner trading post's licensure as an Indian trader under federal law. It reasoned that "*Montana*'s consensual relationship

exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself" but that "[t]he hotel occupancy tax at issue here is grounded in petitioner's relationship with its nonmember hotel guests, who can reach the . . . Trading Post on . . . non-Indian public rights-of-way." *Id.* at 656-57. In a nutshell, "[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.'" *Id.* at 656.

3. This Court's disposition of the consent-exception issue in *Strate* and *Atkinson Trading* highlights the need to identify with care the foundational "consensual relationship" with the tribe or its members and then to assess the "nexus" – or *quid pro quo* – between that relationship and the tribal regulation or claim in dispute. The outcome in those cases differed from the several taxation decisions cited in *Montana* as support for the first exception because the *quid pro quo* element was missing; *i.e.,* there was no consent by the nonmember to the regulation as the price for being permitted to engage in the regulated activity. Implicit in the *quid pro quo* requirement is the need to examine closely the nature of the predicate consensual arrangement and to determine whether it manifests the necessary nonmember consent to the exercise of the *particular* form of tribal authority at issue. The *amici* States further draw from *Montana* and its progeny the rule that, at least in the civil adjudicatory environment, nonmember

consent must be *actual* and *clear*. Several considerations support the latter requirement.

First, this Court has recognized that "tribal courts embody only the powers of *internal* self-governance." *Duro*, 495 U.S. at 692. They thus are fundamentally instruments for resolving disputes between tribal members with reference to tribal law. Tribes have no obligation to open their judicial systems to nonmember-initiated claims and, as discussed above, have no jurisdiction over nonmembers absent applicability of a *Montana* exception. *See Hicks*, 533 U.S. at 367 (tribal courts are not "courts of general jurisdiction" comparable to state courts, which "'lay[ ] hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe[,]'" because "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction"). Also significant is the fact that the internal-governance role played by tribal courts derives from "the consent of the governed" – *i.e.*, individuals who have entered into a political relationship with the tribe. *Duro*, 495 U.S. at 693 ("[t]he retained sovereignty of the tribe is but a recognition of certain additional authority that tribes maintain over Indians who consent to be tribal members").[8] Any consent standard thus should be

[8] Amendments to the Indian Civil Rights Act responded to *Duro* and authorized tribal criminal jurisdiction over nonmember Indians created an exception to this general rule. Pub. L. No.

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stringent enough to ensure that a nonmember has knowingly acceded to tribal adjudicatory jurisdiction.

Second, requiring the nonmember consent to be actual and clear ensures that parties to the "*private* consensual relationship[s]" contemplated under the first exception (*Hicks*, 533 U.S. at 359 n.3) do not through inadvertence commit themselves to the jurisdiction of a sovereign that, in the absence of consent, lacks adjudicatory power. *Williams* is instructive in this regard, since it effectively eliminated the ability of one party to the commercial transaction to hale the other into a court system whose jurisdiction the latter had not consented to; *i.e.*, the Arizona courts could have entertained an action against the Indian trader by his customers, while the Navajo courts could have entertained an action against the customers by the trader.

Last, the actual and clear standard is used to determine whether a tribe has consented to adjudication of its rights in, *inter alia*, a state court. *E.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Symmetry in standards not only comports with basic notions of equity

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102-137, 105 Stat. 646 (1991) (making permanent Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (1990)); *see Lara*, 541 U.S. at 200 (Congress possessed power to "relax the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power"). This limited extension of inherent tribal authority merely reinforces the more general rule.

but also means that courts will have a ready source of federal common law to resolve, when necessary, disputes over whether the requisite clarity of consent exists. The proposed standard therefore encourages the parties to consider and address the dispute resolution issue with some precision.

Application of the actual and clear standard in the ordinary contract situation is straightforward. The parties may contain choice-of-law and forum provisions that provide for application of non-tribal law and dispute resolution in a non-tribal forum. *See Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) ("In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination"); *cf. C & L Enters.*, 532 U.S. at 422 ("clause [providing for enforcement of arbitration awards in any court having jurisdiction] no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime" and waived its immunity to suit). No reasonable question could be raised, in the face of such a provision, that the nonmember party has "consented" to tribal adjudicatory authority. Alternatively, the parties may agree to exclusive use of a tribal forum, and, again, no reasonable question could be raised that the nonmember has *not* "consented" to tribal adjudicatory authority. Failure to address the forum issue would mean that, absent consent on the

defendant's part, the contract could be enforced by the tribal party only in state court and by the nonmember at most in tribal court. The contractual arrangements relied upon by the courts below and respondents fall into this category.

II. NEITHER THE AGREEMENTS BETWEEN PETITIONER AND RESPONDENT LONG COMPANY NOR THE GUARANTY AGREEMENT WITH THE INDIVIDUAL RESPONDENTS PROVIDE A BASIS FOR THE IMPOSITION OF TRIBAL COMMON LAW TORT LIABILITY UPON PETITIONER UNDER THE FIRST *MONTANA* EXCEPTION

The court of appeals relied upon what it characterized as the "broader context of its interaction with the Long Company and the Longs themselves" to find the consensual relationship upon which to ground application of the first *Montana* exception. Pet. A-11. That "context" consisted of agreements between petitioner and respondent Long Company and personal guaranties for the Long Company's indebtedness entered into by respondents and Maxine Long, respondent Ronnie Long's mother who died in 1992. *Id.* The Long Company is a South Dakota-chartered corporation. Respondents, who are members of the Cheyenne River Sioux Tribe ("CRST"), own at least a majority of its outstanding stock. The predicate contracts with the Company are a loan agreement dated December 5, 1996 and, most important, a lease with an option to purchase executed on the same

date. The individual respondents signed the former in the capacities of the Company's president and secretary-treasurer; respondent Ronnie Long signed the latter in his authorized role as president. J.A. 101, 106. The lease agreement related to land then owned by petitioner and later sold to nonmembers. The individual respondents' personal guaranty was directed to the Company's indebtedness to petitioner under the 1996 loan agreement and "any extensions, renewals or replacements thereof." J.A. 130. None of the contracts provided a mechanism for dispute resolution or choice of law. The Company's indebtedness under the 1996 agreement was additionally subject to a Bureau of Indian Affairs ("BIA") loan guaranty under 25 C.F.R. part 103. Petitioner made no attempt to enforce the individual respondents' personal guaranty in any judicial or other forum. *See* J.A. 184-85 (petitioner's tribal court counterclaim for eviction and holdover damages). The district court's summary judgment record – which consists largely of tribal court exhibits, hearing transcripts and pleadings or orders – contained documents related to contracts and personal guaranties predating the 1996 loan agreement, but there was no contention below that they imposed any liability on the Company or the individual respondents subsequent to execution of the 1996 loan agreement.

This factual summary, although brief, is nevertheless more than adequate for purposes of answering the question whether the *Montana* consent exception

applies to respondents' tort claim premised on Indian-status discrimination. It shows that the 1996 loan and lease agreements were between two nonmembers: petitioner and the Long Company; that petitioner did not seek to enforce the individual respondents' personal guaranty; and that any alleged discrimination related to the lease agreement and the subsequent sale of the leased property to nonmembers. *See* Pet. A-55 (tribal appellate court opinion characterizing "[t]he core of the Longs' discrimination claim" as "the Bank's letter to the Longs dated April 26, 1996 . . . in which the Bank withdrew its offer to sell the land back to Longs on a 20 year contract for deed because it involved an 'Indian owned entity' and related (but unidentified) 'jurisdictional problems[ ]'"); J.A. 172-73 (tribal court amended complaint's discrimination allegations). Respondents thus ask this Court to deem the Long Company a "tribal member" for consent-exception purposes and to infer from the lease agreement petitioner's consent to being sued in tribal court for discrimination in connection with the refusal to enter into a particular form of contract with the Company. The consent exception, however, plainly does not apply under these circumstances.

A.

That the Long Company's legal status is distinct from the individual respondents is settled under applicable state law. As the South Dakota Supreme Court has stated on repeated occasions, "[a] firmly

entrenched doctrine of American law is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors and shareholders until there is a *sufficient reason* to the contrary." *Kan. Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 111 (S.D. 1994); *accord Osloond v. Osloond*, 609 N.W.2d 118, 122 (S.D. 2000); *Brevet Int'l, Inc. v. Great Plains Luggage Co.,* 604 N.W.2d 268, 273-74 (S.D. 2000). It explained further in *Kansas Gas & Electric* that the separate legal status of corporations "is considered the central purpose for choosing the corporate form because it permits corporate shareholders to limit their personal liability to the extent of their investments." 521 N.W.2d at 111. Like other American jurisdictions, South Dakota allows that the "corporate veil" may be pierced "to disregard the distinction between a corporation and its shareholders to prevent fraud or injustice" – *i.e.*, when the corporate form is used by shareholders, officers, or directors "to *defeat* public convenience, justify wrong, protect fraud, or defend crime." *Id.* (emphasis supplied). The veil is pierced, in other words, to impose individual liability for obligations nominally those of the corporation because of illegal or inequitable conduct by the shareholder, officer, or director. Petitioner thus entered into a "consensual relationship" under the 1996 agreements not with the individual respondents but with the Long Company itself. Tellingly, the Department of the Interior's loan guaranty regulations themselves distinguish between "[a]n Indian individual," who must be a member of a federally acknowledged Indian tribe (25 C.F.R.

§ 103.44), and "[a]n Indian-owned business entity organized under Federal, State, or tribal law, with an organizational structure reasonably acceptable to BIA" (*id.* § 103.25(a)), with the latter eligible for loan guaranties in excess of those available to individual Indians (*id.* § 103.5).

Neither respondents nor the various courts below suggested that the Long Company is either an "Indian" or a member of the CRST. Any such suggestion, of course, would have flouted settled authority from this Court that "Indian" status has a racial ancestry component. *See, e.g.*, *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (non-Indian adopted into tribe did not qualify for Indian-against-Indian exemption from prosecution under federal criminal statute, since "the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race" and "does not speak of members of a tribe, but of the race generally, – of the family of Indians"). The court of appeals nevertheless imbued the Company with membership status for *Montana* purposes "[b]ecause the bank not only transacted with a corporation of conspicuous Indian character, but also formed concrete commercial relationships with the Indian owners of that corporation." Pet. A-12. "At its heart," the court added, "the *Montana* inquiry is about tribal interests and tribal self government." *Id.*

The Eighth Circuit's analysis misses the mark widely. This Court determined over a quarter-century ago that the critical distinction between the categorical

rule precluding state taxation on Indian reservations absent congressional authorization is membership status in the resident tribe. *Colville,* 447 U.S. at 160-61; *see also Rice v. Rehner*, 463 U.S. 713, 720 (1983) (applying distinction to non-tax state civil regulation). It followed *Colville*'s lead in *Duro* where it distinguished between tribal members and Indian nonmembers where criminal prosecution was at stake. It reasoned that nonmember Indians did not differ from non-Indians "[i]n the area of criminal enforcement" because "tribal power does not extend beyond internal relations among members." The Long Company is even more removed from the ambit of "internal relations" given its formation under state law with the objective of establishing a legal entity separate and apart from its stockholders to take advantage of benefits that accrue under the federal loan guaranty program unavailable to individual tribal members. The Company thus came into existence not to further *internal* tribal relations but, *inter alia*, to leverage the ability of its stockholders, who included the individual respondents, to engage in relations with commercial lending institutions like petitioner. It makes no sense to conclude under these circumstances that petitioner should have realized that, by loaning money to and entering into a leasing arrangement with the Long Company, it was actually contracting with a tribal member. The court of appeals' reliance on the history of personal guaranties by the individual respondents for the Long Company's loans (Pet. A-11) actually supports the conclusion that petitioner realized that, as a matter of state

commercial law, it was contracting with a corporate entity. The guaranties would have served no purpose otherwise.

Indulging the position taken below also carries with it pernicious consequences, from the *amici* States' perspective, in other Indian law-related contexts. Examples abound. It is often critical to determine whether a tribe or tribal member bears the legal incidence of a state tax to the extent it applies to on-reservation transactions or property. *E.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-10 (2005); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" that precludes such taxation with respect to on-reservation transactions or property where the legal incidence falls on the resident tribe or its members except when Congress has authorized the tax in "'unmistakably clear'" terms). The court of appeals' reasoning could be advanced to establish at the least *pro tanto* "member" status for corporations that are partly owned by tribal members – *i.e.*, an immunity from taxation proportionate to the amount of tribal member ownership. Such a requirement would be cumbersome, if not impossible, to administer. On-reservation application of state laws, which otherwise can be enforced against a nonmember, could be compromised where the corporation's equity is owned in whole or part by a tribal member, since substantially more stringent preemption standards apply when a

State attempts to enforce its civil regulatory laws against members than against nonmembers. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("exceptional circumstances" required before state civil regulatory authority exists over tribal members with respect to on-reservation activity), *with County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (interest-balancing test applied to on-reservation civil regulation of nonmembers doing business with tribe).[9]

[9] This case does not involve the status of corporate entities as "Indian tribes" for sovereign immunity or other purposes. *E.g.*, *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1 (2003) (accepting without substantive analysis the assertion that a tribal corporation was an "arm of the tribe" and therefore entitled to assert tribal immunity from suit but not "person" status under 42 U.S.C. § 1983); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275 (Wash. 2006) (adopting "bright-line rule" that "tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws") (plurality op.), *cert. denied*, 127 S. Ct. 2161 (2007); *cf. Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) ("[w]hen the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe"), *cert. denied*, 127 S. Ct. 1307 (2007).

This case illustrates the *amici* States' concerns. The court of appeals relied on petitioner's expression of concern over "possible jurisdictional problems if [it] ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation" (J.A. 91) as supporting the proposition that "[t]he bank could not have been unaware that it might be subject to tribal jurisdiction." Pet. A-11. The letter, which conveyed the advice of the bank's counsel, reflected understandable caution over the often hazy contours of civil jurisdiction within Indian country and, in light of the South Dakota Supreme Court's subsequent treatment of a tribal member-owned corporation as a member for preemption analysis purposes in *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2005), arguably proved prescient. *Compare Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1134-35 (9th Cir.) (college incorporated under state and tribal law deemed "member" for *Montana* purposes), *cert. denied*, 126 S. Ct. 2893 (2006); *Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578 (Mont.) (tribal member-owned company incorporated under state and tribal law enjoyed same immunity from taxation as tribal member where corporation conducted all activity on reservation), *cert. denied*, 537 U.S. 1046 (2002), *with Baraga Prods., Inc. v. Comm'r,* 971 F. Supp. 294 (W.D. Mich. 1997) (corporation created under state law, whose only shareholder was tribal member, did not possess Indian status since "[w]hen the taxpayer chooses the

advantages of incorporation, it must also accept the disadvantages with regard to taxation"), *aff'd*, 156 F.3d 1228 (6th Cir. 1998) (unpublished op.). The present matter consequently presents an opportunity to remove apparent doctrinal confusion on this point. *See Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999) (noting that the respondent taxpayer was a corporation chartered under the Blackfeet Tribe's law and owned by a tribal member, but also noting concession that the corporation was equivalent to a non-Indian because the taxed proceeds were generated from work on reservations other than the Blackfeet Reservation).

B.

The "member" status of the Long Company constituted the linchpin of the analysis below with respect to applicability of the *Montana* consent exception since it, not the individual respondents, was denied the allegedly favorable purchase terms. Lacking this status, the consensual relationship was reduced, for present purposes, to the 1997 guaranty agreement that not only was unenforced but also had nothing to do with the alleged discrimination. The guaranty is as well silent as to enforcement. The nexus and consent requirements discussed in Part I.B.3 above are plainly absent. Indeed, this case bears striking resemblance to *Strate* where this Court found no consent to a tort suit brought by a nonmember, who had been injured in a reservation motor vehicle accident, and her five children, who were

tribal members and complained of loss of consortium with their mother. *Strate*, 520 U.S. at 443-44. The individual respondents here, no less than the *Strate* tribal court plaintiffs with respect to the subcontract between A-1 Contractors and the resident tribe, were not parties to the lease between petitioner and the Long Company. *Id.* at 457. They were, for legal purposes, "strangers" to the lease agreement and to the entity against whom the alleged discrimination was visited.

However, even if "member" status of the Long Company is assumed, the result does not change. Petitioner entered into a commercial relationship with the Company whose scope was defined by the involved contract itself. The agreement related to the right to occupy land owned by petitioner and spelled out in substantial detail the parties' rights and responsibilities. J.A. 96-103. Its duration was two years, and the Company was accorded the option to purchase the property for $468,000 during the lease term. J.A. 98. Nothing suggested, much less expressed, petitioner's consent to any form of tribal regulation, including the exercise of adjudicatory authority to resolve disputes related to the negotiation or subsequent application of the agreement.

On the basis of this straightforward and self-contained bilateral relationship, the court of appeals effectively implied consent as a matter of law to the CRST's authority through common-law tort law "to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with

tribal members." Pet. A-13. It later reiterated that "[b]y subjecting the bank to liability for violating tribal antidiscrimination law in the course of business dealings with the Longs, the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation." Pet. A-14. The rule to be drawn from these statements is that any time a nonmember enters into "business dealings" or "commercial transactions" anywhere within a reservation the nonmember has consented to any form of tribal regulation – whether legislative or common law in nature – for purposes of *Montana*'s first exception so long as the regulation has some connection to the dealings or transactions. This approach effectively arrogates to a tribe sovereign authority over all but purely nonmember consensual relationships within a reservation under a constructive, as opposed to an actual, consent rationale.

The first exception cannot shoulder the burden placed on it by the opinion below. The Eighth Circuit's approach extends to tribes a form of reservation-wide sovereign control over nonmembers that eviscerates *Montana*'s main rule. This Court found a comparably expansive reading of the consent exception in *Atkinson Trading* as "ignor[ing] the dependent status of Indian tribes and subvert[ing] the territorial restriction upon tribal power." 532 U.S. at 655. There, the tribe claimed that nonmember hotel guests consented as a matter of law to tribal taxation by virtue of utilizing or having access to tribal services without regard to the fact that the taxed transaction occurred

on nontribally-owned fee land; here, respondents claim that nonmembers have consented as a matter of law to general tribal civil authority to regulate their interactions with tribal members notwithstanding the fact that those interactions related to the disposition of land owned by respondent.

The consent contemplated by *Montana* and later decisions, in sum, is not a legal fiction. It instead must be manifested by the nonmember's knowing acceptance of a particular tribal regulation or form of authority – *e.g.*, suit in tribal court – that has been identified as a *quid pro quo* for entering into the commercial relationship. No such actual and clear consent exists instantly on petitioner's part with respect to enforcement of the contracts with the Long Company, let alone with respect to tribal common-law torts arising from alleged inequities attendant to the negotiations that preceded the contracts' formation or to their later implementation.[10] The *amici* States do not suggest that respondents should be denied a forum for their grievances against petitioner. Claims of racial discrimination could have been, and perhaps still can

[10] It makes no difference whether petitioner eventually "consented" to tribal court adjudication of respondents' contract claim once the tribal court litigation commenced. Such consent, if it existed, was not embodied in the contracts themselves but instead resulted from a strategic determination to waive an otherwise available jurisdictional defense as to a particular claim. *Cf. Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002) (voluntarily invoking federal court jurisdiction through removal waived Eleventh Amendment immunity).

be, maintained in federal or state court under statutes, such as 42 U.S.C. § 1981 or 2000d, on whose case law the tribal courts relied in adjudicating the discrimination claim. Pet. A-53 – A-54, A-78 – A-81. This Court accordingly counseled in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986), that it "and many state courts have long recognized that Indians share [an] interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country." *Id.* at 888. This admonition should have been heeded by the courts below.

CONCLUSION

The court of appeals' judgment should be reversed and this matter remanded for further proceedings.

Respectfully submitted,

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