

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 FOR AMICUS CURIAE
AMERICAN BANKERS ASSOCIATION AND
SOUTH DAKOTA BANKERS ASSOCIATION
IN SUPPORT OF PETITIONER**

—◆—
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INTEREST OF THE AMICUS CURIAE

The American Bankers Association (“ABA”) is the principal national trade organization of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States. The outcome of this case will have an impact upon ABA members that transact business on Indian reservations and with Indians who live on reservations.

The South Dakota Bankers Association¹ (“SDBA”) is a voluntary association of banks doing business in South Dakota. It has 86 member banks located throughout South Dakota, including numerous banks located on or near one of South Dakota’s numerous Indian reservations. SDBA wishes to offer its views on the effect that an expansion of the so-called “*Montana*² exceptions” to the general rule that Indian

¹ The parties have consented to the filing of this brief, and their consent forms have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae ABA and SDBA, their members or their counsel made a monetary contribution to its preparation or submission. It should be noted that Petitioner is a dues-paying member of both ABA and SDBA, but no special or supplemental dues were paid by Petitioner or any other member to fund the cost of this brief.

² *Montana v. United States*, 450 U.S. 544 (1981).

tribes do not have regulatory or civil-adjudicatory jurisdiction over non-members will have on SDBA's members and on the communities (both on-reservation and off) which they serve.



SUMMARY OF ARGUMENT

Uncertainty as to the rules of the “economic game” leads to reluctance on the part of off-reservation businesses to transact business on Indian reservations or with Indians who live on reservations. This reluctance is understandable given the “special nature of [Indian] tribunals.” *Duro v. Reina*, 495 U.S. 676, 693 (1990). An expansion of the *Montana* exceptions to allow tribal courts to exercise civil adjudicatory jurisdiction in circumstances such as those presented in this case will add to that uncertainty and reluctance, the net result of which will be continued economic hardship for those living on and near Indian reservations.



ARGUMENT

As the current state of our national and world economies demonstrates, a lack of reasonable predictability as to future events is detrimental to the economy in general and to the credit market in particular. Although admittedly on a smaller scale, uncertainty concerning the nature and extent to which tribal courts may exert jurisdiction over non-Indians can

result in similarly injurious consequences to reservation Indians and non-Indians alike. The expansion of the so-called “*Montana* exceptions” to include civil-adjudicatory jurisdiction over non-members will add to that uncertainty and ultimately harm local economic development, both on-reservation and off.

The fact that uncertainty regarding the jurisdictional reach of tribal courts poses potential problems for non-Indians seeking to transact business on a reservation is well-recognized. As Justice Souter noted in his concurrence in *Nevada v. 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. . . .’” 533 U.S. 353, 383 (2001) quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990). This is true because of the uncertainty associated with the varying structure of Indian tribunals, the uncertainty associated with the substantive law they may apply and the varying levels of independence enjoyed by the judges of those tribunals. *Hicks*, 533 U.S. at 384 (Souter, J., concurring). This is also true, at least in part, because non-members generally cannot vote in tribal elections, and thus have no voice in changing procedural rules, substantive law or other matters involving Indian tribunals with which they disagree. *See Duro*, 495 U.S. at 679.

The ultimate “practical consequence” of uncertainty as to the nature and extent of tribal jurisdiction is reluctance on the part of off-reservation businesses to trade on Indian reservations or with

tribal members who live on reservations. ABA and SDBA submit that the primary reason for that reluctance is the difficulty in determining and understanding “the rules of the game.” As Justice Souter stated in *Hicks*,

[t]ribal 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.’ . . . The resulting law applicable in tribal courts is a complex ‘mix of tribal codes and federal, state, and traditional law,’ . . . which would be unusually difficult for an outsider to sort out.

Hicks, 533 U.S. at 384-85 (Souter, J., concurring) (internal citation omitted).

The confusion resulting from that “complex mix” is evident in the case at bar. For example, Petitioner first attempted to start an eviction action against a state-chartered corporation in state court, but was required to ask the tribal court to order the appropriate tribal officials to serve the process necessary to begin the proceeding. *Plains Commerce Bank v. Long Family Land and Cattle Company*, 491 F.3d 878, 882 (8th Cir. 2007). In the tribal court proceedings that followed, the trial court based its decision on a provision of federal law that had not been pled by either party. *Id.* at 882. The tribal court of appeals then upheld the trial court’s decision based on tribal common law. *Id.* at 883. In doing so, the tribal court

of appeals noted that tribal common law includes “Lakota tradition . . . [and] Lakota custom and norms such as the ‘traditional Lakota sense of justice, fair play and decency to others.’” *The Bank of Hoven v. Long Family Land and Cattle Company, Inc.*, No. 03-002-A, slip op. at 8 (C.R.S.T. App. Nov. 22, 2004).³

Although it is not unusual for an appellate court to affirm the “right decision” made by a lower court, even if made for the “wrong reason,” *see, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 (1990), ABA and SDBA submit that the level of uncertainty regarding applicable decisional law (including the necessary elements of, and defenses to, the claimed wrongdoing) to be applied in this case is disconcerting. Lacking any meaningful decisional guideposts, it is virtually impossible for an outsider to become familiar with Lakota customs and traditions, let alone predict how a particular dispute is likely to be resolved under these customs.⁴

This inability to predict how a tribal court will rule and on what basis is especially apparent with the Cheyenne River Sioux Tribal courts. In *Thorsten-son v. Cudmore*, 18 Indian L. Rep. 6051 (C.R.S.T. App.

³ Bank of Hoven is now known as Plains Commerce Bank. A copy of the Tribal Court of Appeals Opinion is included in the Appendix to the Petition for Writ of Certiorari at pp. A-45 through A-68.

⁴ There is no indication in the record that any testimony was presented from tribal elders or others concerning Lakota customs and traditions as they might be applicable in this case.

1991), the Cheyenne River Sioux Tribal Court of Appeals invalidated a provision of the Tribe's Bylaws that limited tribal jurisdiction over non-Indians on the basis that the Bureau of Indian Affairs had imposed the terms of that provision on the Tribe, and thus the membership had no "meaningful choice" when they voted on the Tribe's Constitution and Bylaws. *Id.* at 6053. Carried to its logical extreme, that line of reasoning could lead to the invalidation of the entirety of the Tribe's Constitution and Bylaws if the Tribal Court of Appeals concluded the membership had no "meaningful choice" when they voted.

ABA's and SDBA's member banks do business on Indian reservations and with tribal members living on reservations.⁵ They do so because it presents a business opportunity for them and the communities they serve. However, other businesses in the communities served by ABA's and SDBA's members limit the amount of business they do on-reservation or with tribal members living on the reservations not because of their race, but rather because the risk associated with not knowing the rules before the game begins simply outweighs the potential economic benefit to

⁵ SDBA members operate at least nine main office or branch banks on Indian reservations. Numerous additional banks are located near reservations or on or near "disestablished" or "diminished" reservations. *See DeCoteau v. District County Court*, 420 US 425 (1975) (holding that Lake Traversie Indian Reservation had been "terminated and returned to the public domain").

them⁶ and the greater economy, both on-reservation and off-reservation.⁷

The need for more trade with reservation Indians is dramatically demonstrated by a comparison of net income and poverty levels on and off South Dakota's Indian reservations. Bureau of Economic Analysis

⁶ Describing the reasons for the lack of any meaningful flow of capital onto South Dakota's Indian reservations, a 2003 article in the University of South Dakota Business Research Bureau's "South Dakota Business Review," stated that "[w]hat is missing in many cases is very fundamental, that is, the *rule of law*." Brown & Selk, *Economic Trends on the American Indian Reservations in South Dakota*, 41 S.D. Business Review 4, p. 14 (June 2003) (emphasis added).

⁷ This uncertainty is not strictly limited to that relating to the "rules of the game" imposed by Indian tribes. Like the Cheyenne River Sioux Tribe, many of South Dakota's Indian tribes have prohibited the use of so-called self-help repossession. See *Long Family*, 491 F3d at 882. Creditors may use "self-help repossession" elsewhere in South Dakota, S.D. Codified Laws Ann. § 57A-9-609(b), and it is generally available throughout the United States. UCC § 9-609(b). Insofar as certain easily-movable chattels, such as motor vehicles, furniture and appliances are concerned, the use of self-help repossession can greatly reduce the cost of liquidating collateral in the case of default. However, when some banks doing business with Indians living on South Dakota reservations factored the increased cost resulting from the inability to use self-help repossession on Indian reservations into the interest rate charged on loans to reservation Indians, they were subject to complaints of racial discrimination and investigations commenced by the U.S. Department of Justice. See, e.g., *United States v. First National Bank*, No. 96-5035, Consent Decree (D.S.D. May 7, 1997). This sort of "Catch 22" only adds to the uncertainty and the reluctance of off-reservation businesses to trade with Indians living on reservations.

data for 2005 show average per capita income of \$21,688.00 and \$17,253.00 for the two counties that make up the Cheyenne River Sioux Reservation, while the averages for the three non-reservation counties directly to the east are \$30,821.00, \$27,248.00 and \$39,401.00. The 2005 average per capita income for South Dakota as a whole, on the other hand, was \$32,523.00. U.S. Dept. of Commerce, Bureau of Economic Analysis, *available at* <http://www.bea.gov/regional/reis/drill.cfm>.

According to the 2000 Census, 38.5% of those living on the Cheyenne River Sioux Reservation were at or below the poverty level – nearly three times the 13.2% of South Dakota as a whole. United States Census Bureau, Profile of General Demographic Characteristics: 2000, South Dakota, *available at* <http://censtats.census.gov/data/sd/280460605.pdf> and United States Census Bureau, Profile of General Demographic Characteristics: 2000, Cheyenne River Reservation and Off-Reservation Trust Land, SD, *available at* <http://censtats.census.gov/data/sd/04046.pdf>. If one were to remove the Indian reservations from the state-wide average, then the difference would be even more pronounced.

ABA and SDBA respectfully submit that greater certainty concerning the limits of tribal court jurisdiction will help fuel the economic engine, both on-reservation and off. Expanding the *Montana* exceptions to grant tribal courts civil-adjudicatory jurisdiction over non-members will lead to greater uncertainty and thus limit the amount of fuel available to drive that

engine. Limiting the *Montana* exceptions to prohibit the exercise of tribal court adjudicatory jurisdiction over non-members will promote greater certainty and the “sound policy” of greater economic development both on reservations and in the surrounding communities. Accordingly, ABA and SDBA respectfully request that the Court take these important considerations into account when rendering its decision.



CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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