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 REPLY BRIEF

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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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INTRODUCTION

Plains Commerce Bank has standing both because it was a defendant in Tribal Court and because the jury's undifferentiated damages award was based in part on discrimination liability. The Tribal Court lacked jurisdiction to adjudicate the Longs' discrimination claim as an "other means" of regulating the Bank's conduct with respect to land the Bank owned on the Reservation that it leased to the Long Company. The Bank did not have a consensual relationship with the Tribe or its members that would support tribal regulation.

The power to adjudicate disputes between members and nonmembers, with limited exceptions inapplicable here, does not lie with tribal courts because of the dependent domestic status of the tribes themselves. *Montana*'s consensual-relationship exception did not directly address nonmember-defendant adjudicatory jurisdiction. *Montana v. United States*, 540 U.S. 544 (1980). *Williams* speaks only to nonmember-plaintiff jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959).

Nonmember defendants are uniquely vulnerable in tribal court. They have no ability to participate in tribal government or tribal law. Tribal common law is frequently unavailable to them. Because federal courts do not undertake a substantive review of the underlying merits, tribal courts have the final word on fairness and justice for nonmembers. In the tribes' struggle for the power to assert adjudicatory

jurisdiction of nonmembers like the Bank, the Court must be mindful not to overlook the Bank's rights, and that sovereignty derives from the consent of the governed. *See Duro v. Reina*, 495 U.S. 676, 694 (1990), *superseded by statute on other grounds*, 105 Stat. 646 (1990).

The Bank had a contractual relationship with a South Dakota corporation, closely held by tribal members. The Longs' corporate-form choice protected them from personal liability. This choice has consequences. It is inconsistent for the Long Company to be a corporation for limited-liability purposes and a tribal member for jurisdictional purposes. That would make the existing jurisdictional maze a morass of unpredictability.

The Bank's contractual relationship with the Long Company did not provide the Tribal Court with civil-adjudicatory jurisdiction over the Longs' discrimination claim. The Bank owned the land underlying the lease. There was no relationship between the Bank and the Longs that would support tribal regulation. Even assuming the contrary, the relationship that existed would not support civil adjudication. And even if it could, regulation through civil adjudication of a tort claim against a nonmember should be impossible. Torts are nonconsensual.

Tribes do not possess sovereignty comparable to that of a foreign country; they are not an equal partner in the scheme of federalism. This Court can review federal court decisions. Courts in the state

system are both potentially subject to review by this Court and operate subject to a qualified right of removal to federal courts.

The tribal-court system, however, is separate and unique. It is wholly distinct from traditional courts of general jurisdiction. Other than jurisdictional questions, federal courts provide no substantive review of tribal-court proceedings. The tribal-court system lacks adequate structural protections against abridging nonmember defendants' constitutional rights.

For that reason, tribal courts' power to adjudicate members' claims against nonmembers should be constrained. This Court should deny tribal courts broad jurisdiction over nonmember defendants who stand outside members' political relationships to their tribes. Nonmember defendants should not be exposed to proceedings in tribal courts under *Montana*'s consensual-relationship exception without their actual acceptance of the tribe's jurisdiction to resolve a particular claim. This is the heart of the consensual-relationship exception. And there can be no question that the Bank did not voluntarily submit to tribal jurisdiction to adjudicate the Longs' discrimination claim.

I. THE LONGS' FACTUAL RECHARACTERIZATION IS IRRELEVANT TO RESOLVING THE QUESTION PRESENTED.

A. This Court Should Disregard the Longs' Attempts to Insert Facts From Outside the Federal-Court Record.

Throughout the Longs' brief, they improperly reach beyond the certified record to present facts and arguments not made to federal courts below. Inexplicably, and without seeking leave to do so, the Longs now rely on documents and testimony from the Tribal Court record not presented to the Federal District Court, and documents from other courts and proceedings that are irrelevant to this case. They do so generally, usually without notation, and without attaching cited documents in an addendum to their brief. Supreme Court Rule 32.3 provides a procedure for explicitly requesting consideration of non-record material, which they have chosen to ignore.

This Court should not consider items that do not appear in the certified record when determining the question presented. *Lawn v. United States*, 355 U.S. 339, 354-355 (1958) (citations omitted). Therefore, the Court should disregard all citations to non-record facts and the arguments stemming therefrom. *See, i.e.*, Resp. Br. at 1, 6-10, 17-19, 30-32.

To answer the question presented, this Court need only consider a handful of undisputed jurisdictional facts. The Bank owned the 2,230 acres of land at issue by virtue of a personal representative's deed.

JA 113-15. It entered two contracts with the Long Company: a lease with an option to purchase, and a separate loan agreement. JA 96-106. The Longs signed these contracts in their capacities as company officers. JA 101, 106. Despite the tribal identity of its owners at the time of the contracts, the Long Company is not an "Indian" and is not a member of the Tribe. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977).

The BIA's involvement is immaterial to the jurisdictional analysis. The Long Company was structured with at least 51% member ownership to facilitate the BIA's loan guarantees. And the Bank's contemplated loans to the Long Company were loans the Bank would not have made without BIA guarantees.

But Congress, while providing for BIA guaranteed lending, has not authorized tribal-court adjudicatory jurisdiction over nonmember defendants for disputes arising out of BIA guaranteed loans. Congress's silence on this point strengthens the conclusion that the Tribal Court lacked jurisdiction over the Bank. It makes no sense to suggest that, simply by establishing a program designed to facilitate nonmember loans to tribes, their members, and Indian-owned entities, Congress actually intended to place a thumb on the jurisdictional scale.

B. The Longs Make Significant Factual Misstatements.

Although there are many misstatements and mischaracterizations in the Longs' brief, the Bank draws the Court's attention only to the most relevant and egregious issues: the Longs' inaccurate characterization of the contracts, the procedural history of this case in Tribal Court, and their contention that the Bank waived its jurisdictional challenge to the discrimination claim.

The Longs characterize the Bank's conduct as "predatory lending." Resp. Br. at 1. Although the merits of the underlying dispute are not before this Court, the Bank cannot let that stand without comment. It worked with the Longs to find a solution to their problem of not having enough money to run their business. When Kenneth Long died, the Long Company's debts greatly exceeded its assets. Entering into a new relationship with the Long Company, the Bank as the fee owner of the land attempted to keep the Longs' ranching operation running. This was a business-loan workout.

The Longs' brief misstates the terms and conditions of the loan agreement. They ignore the fact that the requirement of a BIA guaranty increase was a condition precedent to the loans. Compare Resp. Br. at 10 with JA 104-06. The Longs claim that the Bank "agreed to make a $70,000 loan to the Long Company," and "agreed to make a $37,500 loan to the Long Company." JA 105. Under the terms of the

agreement, however, the Bank was required to "request a 90% BIA guaranty on a $70,000.00 annual operating loan," and "[i]f the BIA guaranty requests are approved, then the Bank of Hoven will make a loan to Long Family Land and Cattle Co. Inc. for . . . $37,500." *Id.*

The Longs also incorrectly assert that the Bank initiated the action in Tribal Court. Resp. Br. at 13. It never appeared as a plaintiff in Tribal Court. Although the Longs argue that the Bank could have served the Long Company's registered agent, they fail to acknowledge that its agent is Ronnie Long, who resided on the Reservation. JA 16.

South Dakota law prohibits service by state officials or private process servers on an enrolled Indian or resident on reservation lands. *See Bradley v. Deloria*, 587 N.W.2d 591, 593 (S.D. 1998) (interpreting S.D. Codified Laws § 15-6-4(c)); *Annis v. Dewey County Bank*, 335 F. Supp. 133, 136 (D.S.D. 1971). As such, the Bank sought help from the Tribal Court to properly serve the Long Company's registered agent with respect to a state court proceeding, but never filed suit against the Longs or the Long Company in Tribal Court. JA 146-47.

The Longs further contend that the Bank waived its jurisdictional challenge to the discrimination claim. Resp. Br. at 14-15. The Bank has challenged tribal-court jurisdiction over the tort claim at every stage of this proceeding. JA 181; A-1-2, A-32, A-49. Although the Bank asserted jurisdiction in its counterclaim

seeking eviction from the leased property, that claim was pled in the alternative should the Tribal Court find, as it did, that it had jurisdiction over the Bank's objection. This was not consent to tribal-court jurisdiction generally. JA 184.

In the context of its summary-judgment motion on its counterclaim, the Bank stated that the Tribal Court had jurisdiction. JA 187-88. That was not a concession that the Tribal Court had jurisdiction over the Longs' and Long Company's claims against the Bank. The Tribal Court had already denied the Bank's motion to dismiss for lack of jurisdiction. A-48. The Bank therefore pursued its alternative counterclaim. The Bank's statement will not bear the broad, after-the-fact interpretation the Longs attempt to imbue it with. The Bank reiterated its jurisdictional objection to the discrimination claim before the jury trial (A-5), after trial (A-79-80), and on appeal to the Tribal Court of Appeals (A-49-50).

Subject-matter jurisdiction may not be waived nor consented to by the parties. *Gosa v. Mayden*, 413 U.S. 665, 707 (1973). It either exists or it does not, as a matter of law. Therefore, the Longs' assertion that the Bank consented to or waived its jurisdictional challenge to their discrimination claim is without merit. The Tribal Court lacked subject-matter jurisdiction.

II. THE BANK HAS STANDING BECAUSE IT WAS A DEFENDANT IN TRIBAL COURT AND THE LONGS WON THEIR DISCRIMINATION CLAIM THERE.

The Longs' freshly coined standing argument is a tortured distraction. They allege the Bank lacks standing because it has not been injured. They base this remarkable conclusion in a labyrinthine analysis that ultimately rests on the premise that the Bank won the discrimination claim without anyone – including the jury – noticing. It is telling that they discovered such a core jurisdictional defect after years of litigation before two tribal courts, two lower federal courts, and the grant of certiorari by this Court. The record compels the conclusion that the Longs' standing argument is without merit.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004). In order to establish Article III standing, the plaintiff must have suffered an "injury in fact" that is actual, concrete and "fairly trace[able] to the challenged action," and there must be a "substantial likelihood that the requested relief will remedy the alleged injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

Federal law provides nonmember defendants recourse to challenge tribal-court jurisdiction in federal court. *See* 28 U.S.C. § 1331; *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-853

(1985) (challenging tribal-court jurisdiction over a non-Indian in federal court presents a question "arising under" federal law). In this action, the Bank challenged the Tribal Court's improper assertion of subject-matter jurisdiction over a tort claim brought by members against a nonmember.

Asking whether the Bank prevailed on the underlying merits in Tribal Court misses the mark. This case does not turn on whether the Bank was successful in Tribal Court. The Bank's actual and concrete injury was the Tribal Court's improper exercise of jurisdiction, and the precedent established when it ultimately entered judgment on the merits that the Bank had engaged in abhorrent racial discrimination. This injury is the direct result of the Longs' suit being improperly brought in Tribal Court. A favorable outcome in this Court will remedy the Bank's injury.

The Longs nevertheless contend that a favorable outcome for the Bank would not matter because there are other grounds for sustaining the Tribal Court jury's damages verdict. That is not true. There was a final judgment in Tribal Court. The Bank appealed to the Tribal Court of Appeals. The Longs could have addressed any perceived deficiency in the judgment that they chose to. But they did not do so. They did choose, however, to submit the case to the jury for a general verdict – one that did not allocate or differentiate its damage award. If there was no jurisdiction over the discrimination claim, then the Tribal Court judgment is, quite simply, a nullity.

The Longs are also incorrect that the Bank prevailed on the discrimination claim in Tribal Court. They argue that they neither requested nor received monetary damages for the discrimination claim and, thus, the Bank has suffered no redressable injury. Resp. Br. at 28-31. This argument, however, cannot be reconciled with the record. It ignores special interrogatory 6 of the jury verdict form, the jury's finding that the Bank had discriminated against the Longs (JA 191), and their explicit prayer for relief requesting "such other and further relief as is just and equitable under these circumstances." JA 179.

The jury returned a general verdict of $750,000 in damages with special interrogatories finding the Bank had breached its contracts with the Company and discriminated against the Longs. JA 190-92. The jury did not differentiate its lump-sum damages award. JA 192. The Longs presented an exhibit at trial stating their contract damages to be more than a million dollars. JA 197-200. In awarding a lesser amount, but premising it on additional claims, the jury made some compromise – the precise nature of which is now unknowable.

As instructed, the jury predicated its damages verdict on its liability findings. JA 191. Nothing in the Tribal Court's supplemental judgment changed that fact. The Longs now attempt to impose their own speculative interpretation on the damage award. Resp. Br. 32-35. This Court should not accept the invitation to join in this exercise.

The Bank was improperly haled into Tribal Court and forced to defend itself there. The tribal jury held the Bank liable for discrimination. A ruling by this Court that the Tribal Court lacked subject-matter jurisdiction will require *vacatur* of the Tribal Court judgment, and will redress those wrongs. The Bank has suffered an injury in fact from the Tribal Court proceedings that can be redressed by a favorable federal court judgment.

III. THE LONGS PROVIDE NO COMPELLING REASON FOR THIS COURT TO DISREGARD *MONTANA*'S GENERAL RULE THAT TRIBES LACK JURISDICTION OVER NONMEMBERS.

The Bank does not seek to upset this Court's established framework for determining jurisdiction over nonmembers established in *Montana*. It does, however, seek clarification of how that framework applies to it as a nonmember defendant. *Montana*'s general rule controls here, rather than its exceptions.

The Bank did not consent to tribal regulation under *Montana*'s consensual-relationship exception, and the Tribal Court lacked civil-adjudicatory jurisdiction over the nonmember Bank under the second exception. The commercial lending agreements between the Bank and the Long Company do not, as a matter of law, directly affect the Tribe's ability to govern itself or control the internal relations of its members – the only circumstances this Court has

suggested would support the notion that tribal courts may exercise civil-adjudicatory jurisdiction over nonmember defendants.

The Longs' request for this Court to find tribal-court civil-adjudicatory jurisdiction over a dispute involving a nonmember defendant is at odds with *Montana*'s general rule and well beyond the narrow scope of its two exceptions. Affirming the Eighth Circuit's decision would find for the first time that a tribal court had civil-adjudicatory jurisdiction over a nonmember, non-consenting defendant – a result with significant and far-reaching consequences. *See Nevada v. Hicks*, 533 U.S. 353, 358 n.2. (2001).

It is not this Court's responsibility to delegate that power to tribes. Congress presumably could pass legislation to broadly delegate adjudicatory jurisdiction over nonmember defendants to tribal courts. As the National Network to End Domestic Violence's brief shows, Congress has sometimes provided for specific grants of tribal-court adjudicatory jurisdiction over nonmember defendants. *See* 18 U.S.C. § 2265(e). But because Congress has not granted the broader jurisdictional authority here, the inescapable conclusion is that the tribes lack such power. Just as this Court declined as a categorical matter in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to find such power as to criminal proceedings involving non-Indians, it should be reluctant to expose nonmembers to tribal-court jurisdiction on the basis of consent when such consent has never actually been given – as is unquestionably the situation here.

A. The Bank's Ownership of the Leased Land Weighs Strongly Against Exercise of Retained Inherent Tribal Authority.

Montana suggests a tribe may regulate nonmember consensual relationships even on nonmember fee land within a reservation. But it does not necessarily follow that the power to regulate includes the ability to adjudicate. And even if it did, what the Longs assert here is a broad power, never before recognized by this Court, that extends to non-consensual tort claims.

Montana and *Strate* both rejected tribal authority to regulate nonmember activity within a reservation on nonmember fee land because the tribes had no retained inherent authority. *Montana*, 540 U.S. at 564-65; *Strate v. A-1 Contractors*, 520 U.S. 438, 456-59 (1997). In *Hicks*, on the other hand, this Court noted that land ownership was but one factor to consider in the jurisdictional analysis, but then rejected tribal authority to regulate nonmember activity on member land within the reservation. *Hicks*, 533 U.S. at 360, 374-75.

The Longs' efforts to cast doubt on the Bank's land ownership indicate the significance of nonmember land ownership in the context of the *Montana* analysis. *See* Resp. Br. at 47. Indeed, with a single exception, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) – a zoning case with no majority opinion – this Court has

"never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360. The Longs' assertion that this case involves both nonmember fee land and tribal trust land is incorrect. Resp. Br. at 54.

Whether the Long Company grazed cattle on tribal trust land within the Reservation is irrelevant to the jurisdictional analysis. It does not change the fact that the leased land is nonmember owned. The Bank owned the land it leased to the Long Company. It had a deed. JA 113-15. Since deciding *Montana*, 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. As dependent domestic sovereigns, tribes retain only those powers necessary for self-government and to control internal relations, *id.* – circumstances in no way implicated by the contractual lending agreement between a member-owned South Dakota corporation and the nonmember Bank.

B. The Bank Did Not Consent to Tribal-Court Jurisdiction Under *Montana*'s Consensual-Relationship Exception.

Even assuming nonmember ownership of the land does not preclude *Montana* exception analysis, the consensual-relationship exception is not applicable here. If making BIA guaranteed loans to member-owned corporations means tribes may regulate, as

well as adjudicate, members' contract disputes against nonmembers, as well as any other related claims, then making BIA guaranteed loans is a riskier proposition than was previously appreciated.

1. The Long Company is not a tribal member.

Montana's consensual-relationship exception requires the existence of a relationship between a member and a nonmember that amounts to consent by the nonmember to regulation by the tribe. *See Montana*, 450 U.S. at 565-66. The Bank had a contractual relationship with the Long Company to lease it land, and to request BIA guarantees to facilitate loans. It had no contractual relationship with Ronnie and Lila Long under the December 1996 agreements. Because no relationship existed between a member and a nonmember, the consensual-relationship exception is inapplicable.

The Longs rely on the South Dakota Supreme Court's decision in *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (2003), *vacated in part on partial reh'g*, 674 N.W.2d 314 (S.D. 2004), to suggest the Long Company should be considered a tribal member. *Pourier*, however, does not support this proposition. *Pourier* involved tribal state-tax immunity. The court concluded that a corporation owned by a tribe or an enrolled tribal member, residing on an Indian reservation for the benefit of reservation Indians, is an

enrolled member for the limited purpose of protecting state-tax immunity. *Pourier*, 658 N.W.2d at 404.

This lawsuit, however, has nothing to do with state-tax-immunity issues. The Longs offer no sound reason for concluding that the Long Corporation is a tribal member for purposes of the consensual-relationship exception. Interestingly, *Pourier* cites this Court's decision in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), noting that "[t]he United States Supreme Court has stated that a corporation has no racial identity and cannot be the target of alleged discrimination." Because the Long Company, a South Dakota corporation, has no racial identity, it cannot be a tribal member for purposes of analyzing the consensual-relationship exception.

2. The Bank did not consent to tribal regulation of its contracts with the Long Company.

Even assuming this Court determines the Long Company was a tribal member, the consensual-relationship exception remains inapplicable. The Bank did not consent to tribal regulatory jurisdiction when it entered into contracts with the Long Company. The Longs offer no valid support for their conclusory assertion to the contrary. Nowhere in the contractual agreements between the Bank and the Long Company did the parties agree that the Tribe could regulate the parties' business relationship.

JA 96-106. The absence of a choice-of-law or forum-selection clause in the lending contract cannot be read as acquiescence to tribal regulation.

Montana established a general rule that Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. A contract that does not explicitly consent to tribal regulation should therefore be interpreted consistent with that rule rather than its exceptions. To conclude otherwise would be to turn the general rule on its head. Determining whether a nonmember has knowingly stepped across the line "where tribal jurisdiction begins and ends" requires more than contractual silence. *See Hicks*, 533 U.S. at 383 (Souter, J., concurring).

3. Tribal-court adjudication of nonmembers activities is not an "other means" of regulating their conduct under the consensual-relationship exception.

Even assuming the Long Company was a tribal member, and that the Bank consented to tribal regulation of its contractual relationship with the Long Company, the consensual-relationship exception is still inapplicable because adjudication is not an "other means" of regulating nonmember conduct.

Contrary to the Longs' assertions, and the Eighth Circuit's decision, adjudication and regulation are not the same. Indeed, this Court knows the difference.

See, e.g., *Bank One Chicago N.A. v. Midwest Bank & Trust, Co.*, 516 U.S. 264, 273 (1996) ("Congress no doubt intended rules regarding interbank losses and liability to be developed administratively. But nothing in § 4010(f)'s text suggests that Congress meant the Federal Reserve Board to function as both regulator and adjudicator in interbank controversies. Rather, subsections (f) and (d) fit a familiar pattern: *agency regulates, court adjudicates*.") (emphasis added); *see also Rapanos v. United States*, 547 U.S. 715, 780-81 (2006) ("Through regulations *or* adjudication, the Corps may choose to identify categories of tributaries.") (emphasis added).

Had this Court wanted to recognize tribal-court adjudicatory jurisdiction over claims against nonmember defendants as an "other means" of regulating their conduct under the consensual-relationship exception, it could have put this language in the exception. But it did not. Instead, when contemplating regulation, this Court referred to only "taxation, licensing," and "other means." It then created the second exception, which contemplated non-consensual tribal-court civil authority in circumstances affecting the tribe's inherent powers to govern itself, control internal relations amongst its members, or the health or safety of the tribe – circumstances not at issue here. *Montana*, 450 U.S. at 565-66.

Congress has not explicitly granted tribal courts the power to adjudicate rights of nonmembers against whom tribal members have brought claims (particularly claims rooted in tribal law). Dependent status

has divested tribes of that power. Without delegation of that power from Congress, tribes have no such right.

The Longs and the United States both argue that where a tribe has authority to regulate nonmember conduct under the consensual-relationship exception, it must have the power to adjudicate as well. But all that the *Iowa Mutual*, *Nat'l Farmers*, *Strate*, and *Hicks* line of decisions establish regarding this issue is that adjudicatory jurisdiction does not exceed regulatory jurisdiction. *See, e.g.*, *Strate*, 520 U.S. at 453. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers*, 471 U.S. 845; *Hicks*, 533 U.S. 353. *Hicks* goes further, however, raising the question whether adjudicatory jurisdiction exists under the consensual-relationship exception. *Hicks*, 533 U.S. at 374. *Strate* set a ceiling; *Hicks* cast doubt on the foundation. Whether regulatory and adjudicatory jurisdiction are coextensive, "surely deserves more considered analysis." *Hicks*, 533 U.S. at 374.

The Longs' and United States' argument that *Williams v. Lee*, 358 U.S. 217, provides adjudicatory jurisdiction where there is regulatory jurisdiction under the consensual-relationship exception misunderstands its context. *Williams* involved a question of state adjudicatory authority. In that case, a nonmember sought to sue a tribal member in Arizona state court. This Court held that the nonmember's only recourse was to sue the member in tribal court. *Williams* does not stand for the proposition that tribal civil adjudication of a member's claim against a

nonmember defendant is an "other means" of regulation under the consensual-relationship exception.

4. The Bank did not consent to tribal adjudication of the Long Company's contract claims.

The Bank limited its question presented to whether the Longs' discrimination claim was properly brought before the Tribal Court as an "other means" of regulating its conduct under the consensual-relationship exception. The Longs, however, principally rely upon the contractual relationship between the Long Company and the Bank as a jurisdictional justification to support the Tribal Court's adjudication of the Longs' tort claim. By making this argument, the Longs widen the discussion to permit consideration of the associated jurisdictional deficiencies.

Even assuming, for the sake of argument, that the Bank consented to tribal regulation of its contract with the Long Company, such consent would not include consent to adjudicate the Long Company's contractual claims in tribal court. Consent to regulatory and adjudicatory jurisdiction are two entirely different propositions. A consensual relationship for one purpose, *e.g.*, taxation, is not tantamount to consent to adjudication of tort claims in tribal court. As this Court said in *Atkinson*, consent is not, "in for a penny, in for a Pound." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). Nevertheless, the Longs assert that because tribes can regulate nonmembers

as a price of doing business with members, it follows that tribes can enforce that regulation through adjudication. Resp. Br. at p. 44. This Court has never directly ruled on this question.

The Longs nevertheless maintain that this case fits comfortably within the model of consensual relations described in the cases supporting consensual-relationship exception. Resp. Br. at 43. Yet the two cases they claim support this assertion have nothing to do with tribal-court adjudicatory jurisdiction. *See Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); and *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (discussing circumstances in which a tribe can tax a nonmember as a way of regulating its conduct). Indeed, in *Atkinson*, this Court concluded a tribe has no taxing authority over nonmembers' activities on land held by nonmembers in fee. *Atkinson*, 532 U.S. at 659. As a practical matter, tribal taxation as a means of regulating nonmembers on fee land within a reservation is not analogous to civil adjudication of claims against that nonmember in tribal court. Here, the Longs wholly fail to identify any form of regulation the Tribe could properly exercise over the Bank, given that the Bank owned the land in question.

This Court's disposition of the consensual-relationship exception in *Strate* and *Atkinson* highlights the need to identify with care the foundational "consensual relationship" with the tribe and the connection– or *quid pro quo* – between that relationship and the tribal regulation or claim in dispute. Adjudication of a tribal claim in tribal court is far

different than tribal taxation or licensing of a nonmember. Consent to tribal adjudication should be actual and clear, as opposed to the type of consent implied in the taxation decisions cited by the Longs, where there was no express consent by the nonmember to the regulation as the price for being permitted to engage in the regulated activity. No such consent exists here.

The Longs also acknowledge that the reason the Bank sought assistance from the Tribal Court relating to the land was because it believed off-reservation process servers could not effectuate service of process on the Reservation. Resp. Br. at 13. The Bank asked the Tribal Court to serve the notice to quit. The notice stated the Bank's intent to seek damages under South Dakota law. JA 144. Appointment of a process server by a court is not analogous to filing an action in tribal court as a plaintiff. The Bank used the Tribal Court for the sole purpose of effecting service in connection with a state court proceeding – much like the search warrant issued in *Hicks*.

The Bank did not consent to adjudication of any claims (contract or tort) in tribal court by entering into two contracts with the Long Company, a business entity not even recognized under tribal law. *See* Cheyenne River Sioux Tribe's Amicus Brief at 20, n.20. The Longs organized the Long Company under South Dakota law to take advantage of limited liability, as well as the increased borrowing capacity afforded under the BIA loan-guarantee program to Indian-owned entities. But they now ask this Court to

imbue the Long Company with tribal-membership status. They seek to force the Bank to defend claims in Tribal Courts under the auspices of "regulation."

But they miss the point. The Bank and the Long Company are both South Dakota corporations. Fundamental principles of American law counsel that a dispute arising between such entities should be brought in South Dakota state court – a forum equally accessible and open to the parties.

In any event, it would be a mistake to conclude, as the Longs urge, that the Tribal Court properly exercised jurisdiction over the Long Company's contract claims. This issue becomes pertinent only if it were to be the basis for concluding that the Tribal Court properly exercised jurisdiction over the discrimination claim.

5. The Bank did not consent to tribal adjudication of the Longs' discrimination claim.

Although there was no contractual relationship between the Bank and the Longs in their personal capacities, it was the latter who brought the discrimination claim against the Bank in Tribal Court. For the sake of argument, even assuming the Bank consented to tribal-court adjudication of the Long Company's contract claims, it did not consent to adjudication of the discrimination claim.

The Longs ignore the Bank's argument that a tort is, by definition, a claim predicated upon an injury sustained that does not arise out of a contract. Instead, they argue that because there is a connection between the Bank's contract with the Long Company and their discrimination claim against the Bank, tribal-court adjudicatory jurisdiction over the contract claim also extends to their tort claim. This argument is unsound.

Tribal authority to regulate nonmembers is extremely limited. The several principles of the consensual-relationship exception must be satisfied. The further leap to adjudication as a stand-alone "other means" of regulation is inconsistent with the nature of the exception. But further permitting tribal adjudication of all claims connected in some fashion to a consensual relationship goes too far. It would expand the scope of "consensual" tribal-court jurisdiction over nonmember defendants to essentially any claim bearing some connection to a commercial relationship.

C. Because This Case Does Not Involve the Tribe's Ability to Govern Itself or Control Its Internal Relations, *Montana*'s Second Exception Is Inapplicable.

The Longs' representation that "neither the district court nor the court of appeals addressed application of the second exception" is incorrect. In

fact, the District Court determined this case patently did not fall within the second exception. A-33-34. The Longs failed to appeal that determination, and the Eighth Circuit did not explicitly reach this issue, having determined tribal-court adjudication to be an "other means" of regulating the Bank's conduct under the consensual-relationship exception. A-14, n.7.

The second exception is inapplicable. A rudimentary commercial-lending relationship between a bank and a member-owned South Dakota corporation does not implicate the rights of reservation Indians to make their own laws and be ruled by them. *See Strate*, 520 U.S. at 459. If the second exception were so broadly interpreted, it would swallow the general rule. Indeed, since formulating the second exception in 1981, this Court has never applied it to find tribal civil-adjudicatory jurisdiction over a nonmember defendant. It should not do so here.

Moreover, the Longs have entirely adequate remedies before federal or state courts. There is no basis to conclude that tribal-court authority is essential to preserving internal self-governance, which under *Strate* is the test for determining the reach of the second exception. *Strate*, 520 U.S. at 459.

CONCLUSION

This Court should vacate the judgment of the Eighth Circuit Court of Appeals, and remand this case for further proceedings.

Respectfully submitted,

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