No. 07-411

In the Supreme Court of the United States

PLAINS COMMERCE BANK, PETITIONER

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims arising out of private commercial agreements between a nonmember bank owning fee land on a reservation and a member-owned corporation.

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INTEREST OF THE UNITED STATES

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government" through means including the "development" of "[t]ribal courts." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). Finding that "tribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), Congress provided federal support for tribal courts in the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.* The United States has consistently participated as amicus curiae in cases implicating tribal courts' authority. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353 (2001); *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997); *Duro* v. *Reina*, 495 U.S. 676 (1990). The Uni-

ted States also has a substantial interest in this case by virtue of its role, under the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, as guarantor of loans that underlie the dispute.

STATEMENT

1. "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut.*, 480 U.S. at 14-15 (citation omitted). The Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.,* "manifest[s] a congressional purpose to protect tribal sovereignty from undue interference," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 63 (1978). More recently, in the Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. 3651 *et seq.*, Congress reiterated that "tribal justice systems are an essential part of tribal governments" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(5) and (6); see also *Santa Clara Pueblo*, 436 U.S. at 65. To support the development of tribal courts, Congress has established special federal programs in the Department of the Interior and the Department of Justice. See 25 U.S.C. 3611, 3661, 3662, 3681; see also Bureau of Justice Assistance, U.S. Dep't of Justice, *Fact Sheet: Tribal Courts Assistance Program* 1-2, 4 (Winter 2007) <http://www.ojp.usdoj.gov/BJA/grant/TCAP_Fact_Sheet.pdf> (describing Tribal Courts Assistance Program and identifying recent grant recipients, including the Cheyenne River Sioux Tribe).

In part because of such initiatives, the number of tribal courts and the number of cases on their dockets

have increased sharply, and there have been significant advances in the professional qualifications of tribal judges and lawyers.[1]

Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law. See, *e.g.*, *Santa Clara Pueblo*, *supra* (recognizing authority to enforce Indian Civil Rights Act); 25 U.S.C. 1911(a) (authorizing exclusive jurisdiction over disputes under the Indian Child Welfare Act); 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage-foreclosure actions against reservation homeowners in tribal or federal court). And, although federal law requires full faith and credit for tribal-court judgments only in certain areas,[2] some States generally afford full faith and credit,[3] and others routinely enforce tribal-court judgments under principles of comity.[4]

2. This case arises from a series of commercial contracts between petitioner (a South Dakota banking corporation), respondents Ronnie and Lila Long (both enrolled members of the Cheyenne River Sioux Tribe (CRST or Tribe)), and respondent Long Family Land

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[1] See Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

[2] See, *e.g.*, 18 U.S.C. 2265 (2000 & Supp. V 2005) (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders); 25 U.S.C. 3106(c) (National Indian Forest Resources Management Act); 25 U.S.C. 3713(c) (American Indian Agricultural Resource Management Act).

[3] See *Halwood* v. *Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1089 (N.M. Ct. App. 1997); *Sheppard* v. *Sheppard*, 655 P.2d 895 (Idaho 1982).

[4] See, *e.g.*, *Day* v. *State Dep't of Soc. & Rehab. Servs.*, 900 P.2d 296, 301 (Mont. 1995); *Barrett* v. *Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger* v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995); *Teague* v. *Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 918-920 (Wis. 2003); N.D. Rules of Court 7.2.

and Cattle Company (the Company), a closely held family farming and ranching business incorporated under the laws of South Dakota in 1987. J.A. 14-17, 159. In accordance with its articles of incorporation, J.A. 17, at least 51% of the Company's outstanding shares have at all times been Indian-owned in order to qualify for federal loan guarantees. Pet. App. A2.

The Company operated its cattle ranch solely within the boundaries of the CRST Reservation. Pet. App. A2. Its operations were located on 6400 acres of tribal trust land that were leased for grazing, Resp. Br. 4-5, and on 2230 acres of land that were jointly owned by Kenneth and Maxine Long (the parents of respondent Ronnie Long), and then, after tribal member Maxine Long's death in 1992, solely by Kenneth Long (a nonmember), J.A. 159-160.

Beginning in 1989, petitioner made a series of commercial loans to the Company. Pet. App. A45. As part of the loan agreements, Kenneth and Maxine Long used their home and the 2230 acres of land as collateral, petitioner received a security interest in the Company's livestock and equipment, and Kenneth, Maxine, Lila, and Ronnie Long each personally guaranteed loans extended to the Company. J.A. 21-38, 42-45.

Petitioner's loans to the Company were also repeatedly guaranteed by the U.S. Department of the Interior's Bureau of Indian Affairs (BIA). J.A. 39-40, 70-72, 77-85; Pet. App. A2-A3. Under the Indian Financing Act, Congress has authorized federal "guarantee[s]" of up to 90% of "the unpaid principal and interest due on any loan made to any organization of Indians" or "to individual Indians," "[i]n order to provide access to private money sources which otherwise would not be available." 25 U.S.C. 1481. The BIA will thus guarantee a

loan made to an "Indian-owned * * * business activity" organized "pursuant to state, federal or tribal law," as long as "Indian ownership" is at least 51%. 25 C.F.R. 103.1, 103.7 (1996).[5] The loans to be guaranteed are "for financing economic enterprises which contribute beneficially to the economy of an Indian reservation." 25 C.F.R. 103.2 (1996).

Kenneth Long died in July 1995, and petitioner filed a claim of almost $700,000 against his estate. J.A. 160; Pet. Br. 5; Resp. Br. 6-7. Respondents argue that his land and interest in the Company were inherited by his children, who assigned their interests to Ronnie Long. J.A. 160; Resp. Br. 6-7. Petitioner asserts that its claim against the estate prevented the distribution of assets to Kenneth Long's heirs. Pet. App. A2 & n.2; Pet. Br. 7.

In the spring of 1996, petitioner's representatives came onto the Reservation to inspect the Company's operations and assets. Pet. App. A3. Petitioner and respondents began discussing revised loan terms. *Ibid.* Some of their negotiations took place at the Tribe's offices and were facilitated by tribal officers and BIA employees. *Ibid.* Respondents claim that petitioner offered to make operating loans to the Company, provided that Kenneth Long's land and house were deeded to petitioner, which would then sell the land back to the Company on a 20 year contract for deed. J.A. 91; Pet. App. A3. Petitioner later changed the terms of the offer, stating that on the advice of counsel, it would not sell the land under a contract because of "possible jurisdictional problems if [petitioner] ever had to foreclose on [the]

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[5] The regulations cited in the text were effective at the time the dispute arose. The BIA revised Part 103 in 2001, and the majority-ownership requirement now appears at 25 C.F.R. 103.25 (2007).

land when it is contracted or leased to an Indian owned entity on the reservation." J.A. 91; Pet. App. A3.

On December 5, 1996, petitioner and the Company entered into two agreements during a meeting at petitioner's offices, located off the Reservation. J.A. 96-106. The parties entered into a new loan agreement, which stated that petitioner had received a deed for Kenneth Long's land from his estate. J.A. 104. The agreement credited $478,000 for the land and house against the outstanding loan balance. J.A. 104. Petitioner agreed to request BIA loan guarantees for an additional $70,000 operating loan and a $37,500 loan to purchase new calves. J.A. 105. In a second agreement, the Company received a two-year lease of the land, with an option to purchase the land at the end of the lease for $468,000. J.A. 96-100. The estate deeded the 2230 acres to petitioner on December 10, 1996. J.A. 113-115.

Respondents later alleged that petitioner did not make loans required by the agreement, J.A. 164-165, while petitioner claimed that it did make at least some of the loans, and that the loans were contingent upon BIA loan guarantees, which were not provided.[6] Pet. App. A28. Without the money, the Company could not move feed to its livestock on the grazing land, and hundreds of them died during the harsh winter of 1996-1997. J.A. 165. The Company was thus unable to exercise its option to repurchase the land when the lease expired. J.A. 167. Petitioner later submitted a claim on the fed-

[6] In response to petitioner's application for another loan guaranty, the BIA requested additional information, which petitioner never provided. J.A. 118-119.

eral loan guarantees and received $392,968.55 from the BIA.[7] Pet. App. A35.

On May 19, 1999, petitioner initiated proceedings in state court to evict respondents from the 2230-acre parcel and asked the tribal court to serve them with a notice to quit. J.A. 144-147. Petitioner then contracted to sell the land to non-Indians, but respondents continued to occupy 960 acres. J.A. 141; Pet. App. A4.

3. a. In July 1999, respondents filed suit against petitioner in the Cheyenne River Sioux Tribal Court, seeking an injunction to prevent their eviction from the ranch land and its sale by petitioner. J.A. 1. Filing an amended complaint in January 2000, they asserted a variety of claims, including breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. J.A. 158, 163-174. The discrimination claim—the only claim still at issue—alleged that petitioner had sold the land to nonmembers on more favorable terms than those it had offered to respondents. J.A. 172-173.

Petitioner's answer included a general statement that the tribal court lacked subject-matter jurisdiction, and a claim that the court lacked jurisdiction over petitioner because its main place of business was outside the boundaries of the Reservation. J.A. 181. Petitioner also stated a counterclaim, "in the event the Court finds that it does have jurisdiction," alleging that respondents were in wrongful possession of the 960 acres of land and seeking their eviction. J.A. 184-185.

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[7] In return for its payment to petitioner, the BIA obtained assignments of two loans in 2000. See 05-CV-3002 Docket Entry No. 38, Attach. 22 (D.S.D. Dec. 9, 2005). This Office has been informed by the BIA that the Company made some payments in November 2002, but the outstanding balance on the two loans is more than $350,000 (including interest).

Before trial, petitioner unsuccessfully moved for summary judgment on its counterclaim, pursuant to Rule 56 of the Rules of Civil Procedure, in which it stated that the tribal court had jurisdiction over respondents because "the majority ownership of the corporation is owned by Ronnie Long and Lila Long, enrolled members of the Cheyenne River Sioux Tribe." J.A. 187-188. Petitioner also conceded in that motion that "the Court has jurisdiction over the subject matter of this action," without repeating or adverting to the jurisdictional objection that had appeared in its answer. J.A. 188.

The judge submitted four of respondents' causes of action to the jury: breach of contract, bad faith, discrimination, and violation of tribal-law self-help remedies. J.A. 190-192; Pet. App. A5. As submitted, the discrimination claim was only by Ronnie and Lila Long, not the Company. J.A. 191. Shortly before the jury was charged, petitioner argued that the court lacked jurisdiction over the discrimination claim because it arose under federal law. Pet. App. A5. The court rejected that argument. *Ibid*.

The jury found in respondents' favor on three of the four causes of action—breach of contract, bad faith, and discrimination—and awarded damages of $750,000 plus interest. Pet. App. A73; J.A. 190-192. It found, however, that petitioner had not engaged in impermissible self-help by selling the land. J.A. 191.

Petitioner filed a post-trial motion for judgment notwithstanding the verdict, in which it renewed its challenge to the court's jurisdiction over the discrimination claim (but not the other claims). Pet. App. A79-A80. The tribal court denied the motion, finding that it had

jurisdiction over a discrimination claim brought under federal law. *Id.* at A80-A81.

The tribal court entered judgment awarding respondents $750,000 plus interest. J.A. 194-196. The Company then filed a "request to exercise its option to purchase all of the land conveyed * * * from the estate of Kenneth Long to [petitioner], including the land" that had been purchased by nonmembers. Pet. App. A69. The tribal court issued a supplemental judgment finding that respondents maintained an option to purchase only the 960-acre parcel they still occupied, and not the lands that petitioner had already sold. *Id.* at A70. The court also ordered that the price for exercising the option could be offset against the damages award if petitioner filed a quitclaim deed. *Id.* at A71.

b. Petitioner appealed to the Cheyenne River Sioux Tribal Court of Appeals, raising six non-jurisdictional issues and repeating its challenge to tribal-court jurisdiction over the discrimination cause of action. Pet. App. A49-A50 (listing issues); see also *id.* at A51 (noting that petitioner "does *not* challenge (on appeal) the general jurisdiction of the Cheyenne River Sioux Tribal Court over the lawsuit"). The Tribal Court of Appeals affirmed the trial court on all issues. *Id.* at A68.

In rejecting petitioner's jurisdictional challenge, the court first held that respondents' discrimination claim did not arise under federal law, but rather arose under the traditional common law of the Tribe, which—in what the court called a "direct and laudable convergence of federal, state, and tribal concern"—prohibits discrimination on the basis of race or tribal affiliation. Pet. App. A55-A56.

The court then analyzed tribal-court jurisdiction under the standards in *Montana* v. *United States*, 450 U.S.

544 (1981). Pet. App. A56-A57. It noted *Montana*'s general rule that "tribal courts generally do *not* have jurisdiction over non-Indians involving matters that arise on fee land within the reservation." *Id*. at A56. But it held jurisdiction over petitioner was appropriate in this case under both of the exceptions to that general rule. With regard to *Montana*'s first exception, the court found the case to be "the prototype for a consensual agreement," because it involves a contract between "a tribal member and a non-Indian bank" that dealt solely with ranching operations located on the Reservation and was negotiated in part on the Reservation, with the personal involvement of tribal officials and BIA personnel. *Id*. at A56-A57. With regard to the second *Montana* exception, the court found that the case "clearly involves the 'economic security' of the Tribe," as evidenced by the "large role" that tribal officials played in the dealings between petitioner and respondents in order to foster the success of a members' "ranching operation on the Reservation." *Id*. at A57.

4. a. Petitioner then filed this action in the District Court for the District of South Dakota seeking a declaratory judgment that, *inter alia,* the tribal courts had lacked subject-matter jurisdiction over respondents' discrimination claim (but not their claims for breach of contract or bad faith). Pet. App. A24, A33. The district court granted summary judgment in favor of respondents. *Id*. at A24-A44.

Applying the first *Montana* exception, the district court considered whether petitioner had entered into a contractual agreement with the Tribe or its members. Pet. App. A34-A40. The court concluded that petitioner had entered into a loan agreement with respondent Long Company with "tribal membership in mind," and

that the loans likely would not have been possible but for the BIA guarantees that were available only because the Company is a majority-owned Indian business. *Id.* at A35. The district court considered it important that the case "involves a non-member's direct contractual involvement with a Native American owned corporate entity and concerns land located wholly within the boundaries of the CRST reservation." *Id.* at A35-A36. The court also found that the "claimed tortious conduct of [petitioner] has a clear nexus with the contractual dealings between [petitioner] and the Long Company," and that in such circumstances, tort law is an appropriate means of tribal regulation under *Montana*. *Id.* at A36-A38. Finally, the district court noted that petitioner had conceded the jurisdiction of the tribal court in briefing its counterclaim that respondents were wrongfully holding over on the 960-acre parcel. *Id.* at A39.

b. The court of appeals affirmed. Pet. App. A1-A23. It concluded that petitioner had "engaged in the kind of consensual relationship contemplated by *Montana*" when it "transacted with a corporation of conspicuous tribal character" and "formed concrete commercial relationships with the Indian owners of that corporation." *Id*. at A12. It also found that there was a sufficient "nexus" between the tribal regulation and "the consensual relationship," because the Tribe had subjected petitioner to "liability for violating tribal antidiscrimination law in the course of its business dealings with [respondents]." *Id.* at A12, A14.[8]

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[8] Finding jurisdiction appropriate under the first *Montana* exception, the court of appeals declined to address the second. Pet. App. A14 n.7. Thus, petitioner errs in stating (Br. 30) that "the Circuit Court properly concluded this was not a second *Montana* exception case."

The court rejected petitioner's argument that respondents' discrimination claim was beyond tribal-court jurisdiction because it was actually a federal-law claim,[9] as well as the argument that petitioner was denied due process in the tribal court. Pet. App. A15-A23. Petitioner "explicitly" excluded those arguments from its petition for a writ of certiorari. Pet. i n.1.

SUMMARY OF ARGUMENT

I. A. In *Montana* v. *United States*, 450 U.S. 544 (1981), this Court recognized that there are exceptions to the general proposition that a Tribe's "inherent sovereign powers * * * do not extend to the activities of nonmembers of the tribe." *Id.* at 565. In particular, it recognized that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Ibid.* That framework—including the exception for consensual relationships—governs a tribal court's jurisdiction over nonmembers. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997).

B. Petitioner claims that the *Montana* exceptions can never apply in cases involving non-Indians and non-Indian fee land. That contention, however, is inconsistent with *Montana*'s own language and with later decisions that evaluated the availability of jurisdiction under the exceptions even when the conduct in question involved non-Indian fee land. See, *e.g.*, *South Dakota* v.

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[9] Although petitioner argued in the tribal courts and in the federal district court that the discrimination claim arose under 42 U.S.C. 1981, it argued in the Eighth Circuit that it arose under 42 U.S.C. 2000d. Pet. App. A8, A15.

Bourland, 508 U.S. 679, 695-696 (1993); *Strate*, 520 U.S. at 451-453.

C. The *Montana* exceptions logically include tribal authority to regulate through adjudication in tribal courts, including through the enforcement of common-law tort rules of conduct and liability. That conclusion is supported by this Court's decisions, which have consistently treated *Montana*'s acknowledgment of tribal authority as encompassing adjudicatory jurisdiction. See *Strate*, 520 U.S. at 451-453; *Nevada* v. *Hicks*, 533 U.S. 353, 359 n.3, 372 (2001); *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 654-656 (2001). It is also bolstered by policy considerations, since limiting tribal-court jurisdiction over matters within Tribes' regulatory authority would greatly impinge upon their powers of self-government.

II. Petitioner engaged in a series of private commercial transactions with respondents. In light of the parties' course of dealing, petitioner was subject to tribal jurisdiction over disputes arising out of those transactions. The course of dealing was indispensably predicated on respondents' Indian status, which made it possible for the federal government to guarantee the loans under the Indian Financing Act—and ultimately to compensate petitioner for a sizable portion of respondents' default. The subject-matter of the negotiations involved a single ranching operation on both tribal and private land within the CRST Reservation; some of the negotiations directly involved tribal officials; and the same course of dealing spawned closely related contract claims that were adjudicated in tribal court without objection from petitioner.

For *Montana* purposes, a member-owned corporation should be treated as a tribal member—especially

when the corporation is (as here) closely held, doing business on the reservation, and imbued with an Indian identity by virtue of a federal program that is a necessary part of the underlying commercial dealings.

Nor should the Court impose a heightened standard for establishing a nonmember's consent to tribal jurisdiction. It would be inconsistent with federal policy supporting tribal self-determination to create an equivalence between the level of consent necessary for private individuals to be sued in tribal court and the standard for waiver of a Tribe's immunity to suit in state courts.

ARGUMENT

THE TRIBAL COURTS HAD JURISDICTION OVER RESPONDENTS' DISCRIMINATION CLAIM BECAUSE IT AROSE DIRECTLY OUT OF PETITIONER'S CONSENSUAL CONTRACTUAL DEALINGS WITH TRIBAL MEMBERS AND A MEMBER-OWNED COMPANY

Indian Tribes possess "inherent powers of a limited sovereignty which has never been extinguished." *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (emphasis and internal quotation marks omitted). Tribal authority includes "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of [tribes'] dependent status." *Id.* at 323. In *Montana* v. *United States*, 450 U.S. 544, 565 (1981), the Court explained that Tribes retain inherent power to "regulate * * * the activities of nonmembers who enter consensual relationships" with Tribes or their members, "through commercial dealing, contracts, leases, or other arrangements." Petitioner's categorical attacks on the availability of such jurisdiction are inconsistent with *Montana* itself, with this Court's subsequent application of *Montana*, and with the principles on which it is based.

This case falls comfortably within *Montana*'s terms because petitioner's consensual dealings with respondents were overwhelmingly tribal in character.[10]

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[10] Respondents argue (Br. 25-37) that petitioner lacks standing to challenge the tribal courts' jurisdiction over their discrimination claim because petitioner suffered no injury from the adjudication of that claim. Although this point is raised for the first time in respondents' brief on the merits, the Court has "an obligation to assure [itself] of litigants' standing under Article III." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340 (2006) (internal quotation marks omitted). Petitioner, as the plaintiff, would have had the burden of presenting evidence of injury, causation, and redressibility sufficient to survive summary judgment if its standing had been challenged by respondents through adequate averments or clear evidence. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, however, respondents' challenge is not of that character. To the extent an evidentiary basis for standing is nonetheless required, this Court may examine the record before it to determine whether standing exists. See, *e.g.*, *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 330 (1999).

At this point, the principal question appears to be whether, on the basis of tribal-court documents in the record, petitioner would receive any concrete benefit from a declaration that the tribal courts lacked jurisdiction over the discrimination claim. Respondents present (Br. 25-37) a plausible argument that the legal and equitable relief they received is entirely attributable to their other claims. That argument appears to be based primarily on legal conclusions regarding the course of proceedings in the tribal courts, not the absence of any further *factual* submission by petitioner in federal district court. Because petitioner has not yet had a chance to answer respondents' arguments concerning the proceedings in the tribal courts and the resulting absence of injury and standing —and because that response may shed further light on the nature and proper legal characterization of the particular proceedings and judgment in the tribal courts—the United States does not take a position on the standing question at this juncture.

I. *Montana* v. *United States* Provides The Proper Framework For Evaluating Tribal-Court Jurisdiction

A. *Montana* Generally Governs Tribal-Court Jurisdiction Over Nonmembers

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). Accordingly, tribal courts are an "appropriate forum[]"—sometimes the exclusive forum—for the adjudication of "disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). This Court has rejected attacks on the institutional competency of tribal courts as contrary to its own precedents, *id.* at 65-66, and to "congressional policy," *Iowa Mut.*, 480 U.S. at 19.

The Court has upheld tribal courts' exercise of civil adjudicatory jurisdiction in various contexts affecting non-Indians. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (tribal court has exclusive jurisdiction to adjudicate on-reservation contract dispute brought by non-Indian against Indian; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Santa Clara Pueblo*, 436 U.S. at 65-66 (tribal courts have jurisdiction to vindicate rights created by the Indian Civil Rights Act); *Kennerly* v. *District Ct.*, 400 U.S. 423 (1971) (per curiam).

The Court has also articulated a prudential rule that, in deference to "tribal self-government and self-determination," federal courts should generally refrain from considering challenges to a tribal court's exercise of ju-

risdiction over a case until the challenge has been considered by the tribal court itself. See *Iowa Mut.*, 480 U.S. at 15; *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985). Both of those cases arose out of suits in tribal court against non-Indian defendants based on their conduct within a reservation, and *Iowa Mutual* recognized that such suits are "presumptively" within a tribal court's jurisdiction, "unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. Those decisions thus presuppose that tribal courts may exercise jurisdiction over suits against non-Indian defendants in appropriate circumstances.

The circumstances that are appropriate for the exercise of that jurisdiction are in turn governed by *Montana*, which for more than 25 years has supplied the framework for evaluating tribal civil authority over nonmembers for a variety of purposes. The Court has described *Montana* as "pathmarking," *Strate*, 520 U.S. at 445, and as "the most exhaustively reasoned of [the Court's] modern cases addressing" Tribes' "retained or inherent sovereignty." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 650 (2001); see also *Nevada* v. *Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana*.").

In *Montana*, the Court explained that, "through their original incorporation into the United States as well as through specific treaties and statutes," Indian Tribes have been "implicit[ly] divest[ed]" of sovereignty over "relations between an Indian tribe and nonmembers of the tribe." 450 U.S. at 564 (internal quotation marks and emphasis omitted). The *Montana* Court thus articulated 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. Nevertheless, *Montana* also recognized that there are two exceptions to that general proposition:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-566 (citations omitted).

In *Strate*, the Court held that *Montana* governed its analysis of whether a tribal court had jurisdiction over a car accident between two nonmembers on a state highway that ran through an Indian reservation. *Strate* concluded that, in the absence of "congressional direction enlarging tribal-court jurisdiction," *Montana*'s "main rule and exceptions" apply not only to Tribes' general regulatory authority but also to the "adjudicative jurisdiction" of tribal courts. 520 U.S. at 453; see also *Atkinson Trading Co.*, 532 U.S. at 652; *Hicks*, 533 U.S. at 359 n.3, 360-361.

Accordingly, *Montana*'s general proposition and its two exceptions provide the proper framework for determining the extent of tribal jurisdiction in this case.

B. The Confluence Of A Nonmember And Non-Indian Fee Land Does Not Categorically Foreclose The Applicability Of *Montana*'s Exceptions

Notwithstanding *Montana*'s well-entrenched framework, petitioner argues (Br. 21) that there is simply no need to "determine whether either [*Montana*] exception applies" in this case, "because the land at issue is non-Indian-owned fee land." Thus petitioner contends (Br. 25) that the identity of the landowner "alone precludes tribal-court" jurisdiction. Petitioner's broad attack on tribal jurisdiction is squarely refuted by *Montana* and the cases that have applied it.

Petitioner's categorical assertion that activities pertaining to non-Indian fee land cannot be subject to tribal jurisdiction ignores the plain language of *Montana* itself. The very purpose of the *Montana* exceptions was to identify when Tribes may exercise "civil jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands*." 450 U.S. at 565 (emphasis added).[11]

Petitioner's contention also ignores the Court's subsequent decision in *National Farmers Union*, which involved a tort suit by a tribal member against a school district (a political subdivision of the State) arising out of a motorcycle accident on state land within the Crow Reservation. See 471 U.S. at 847. The Court declined to find that tribal-court jurisdiction in such a case is "automatically foreclosed," *id.* at 855, and instead held that the tribal court should be given the opportunity to determine its own jurisdiction in the first instance. If petitioner's categorical rule were correct, jurisdiction

[11] In describing the second exception, *Montana* again stated that a Tribe's civil authority can extend to "the conduct of non-Indians on fee lands within its reservation." 450 U.S. at 566.

would have been "automatically foreclosed," and tribal-court exhaustion would have been futile.

Petitioner's argument is further belied by the primary case on which it relies, *South Dakota* v. *Bourland*, 508 U.S. 679 (1993). Although petitioner contends (Br. 23) that "*Bourland* controls here" and that it establishes a rule divesting Tribes of all jurisdiction over nonmember-owned land within a reservation, that assertion is simply wrong. In *Bourland*, the Court held that certain statutes had abrogated the CRST's authority to regulate non-Indian hunting and fishing on specific lands that had been taken by the United States for a federal flood-control project. 508 U.S. at 690-691. More importantly, even after concluding that the CRST did not retain inherent authority to exclude persons from the land in question as a general matter, the Court proceeded to acknowledge the two *Montana* exceptions as "other potential sources of tribal jurisdiction over non-Indians *on these lands*." *Id.* at 694-695 (emphasis added). It then remanded the case for a determination whether the terms of either exception were satisfied. *Id.* at 696. If petitioner's view were the law, that remand would have been pointless, because it was already clear that the land was owned by the United States.

Petitioner also puts great stock in the Court's statement in *Hicks* that, "with one minor exception, [this Court has] never upheld under *Montana* the extension of tribal civil authority of nonmembers on non-Indian land." Pet. Br. 24 (quoting *Hicks*, 533 U.S. at 360). But *Montana* itself contemplates that there are situations in which the exercise of such jurisdiction is proper. See p. 18, *supra*. And *Hicks* decided only the narrow proposition that "tribal courts lack jurisdiction over state officials for causes of action relating to their performance of

official duties," regardless of who owns the land on which they act. 533 U.S. at 369; see also *id.* at 358 n.2 (leaving "open the question of tribal-court jurisdiction over nonmember defendants in general").[12]

The Court has not yet had occasion to consider the significance of land status in a case where there were extensive contractual relations between Indians and a nonmember that were relevant to the underlying dispute. In *Strate*, for example, the dispute arose between "two non-Indians involved in [a] run-of-the-mill [highway] accident," who had no "'consensual relationship' of the qualifying kind." 520 U.S. at 457 (brackets in original). Similarly, in *Atkinson Trading Co.*, the Court found that "a nonmember's actual or potential receipt of tribal police, fire, and medical services" did not form the requisite relationship, and that there was not a sufficient nexus between a hotel operator's federal license to transact business with the Navajo Nation and the occupancy tax imposed on the hotel's nonmember guests. 532 U.S. at 655-656. Nevertheless, in both cases the Court still *applied* the first *Montana* exception—evaluating whether the criteria under that exception were satisfied, but concluding on the merits that they were not—even after it was clear that the relevant property was owned or controlled by non-Indians.

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[12] While *Hicks* did not address the question of adjudicatory jurisdiction over non-Indians in general, it did observe that "there was little doubt that the tribal court had jurisdiction over [the] tort claims" in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999), which were brought by tribal members against non-Indian corporations. *Hicks*, 533 U.S. at 368 (citing 526 U.S. at 482 n.4). While the claims in *Neztsosie* arose on Indian land, the statement in *Hicks*, like the other decisions discussed above, refutes any notion that tribal courts can *never* entertain tort suits against non-Indians.

Thus, as it did in *National Farmers Union*, *Strate*, and *Hicks*—as well as *Montana*, *Bourland*, and *Atkinson Trading*—the Court should decline to adopt a categorical rule that precludes consideration of the *Montana* exceptions in cases involving conduct of non-Indians that occurs on land owned by non-Indians. That is especially so here, because the assertedly non-Indian land at issue in this case was itself a principal subject of the contractual arrangements, which conferred on respondents an option to purchase the land (and thus restore it to Indian ownership).

C. *Montana*'s Exception For Consensual Relationships Permits Tribal Regulation Through Adjudication Or Tort Law

Petitioner presses (Br. 27) another categorical argument: that the first *Montana* exception recognizes only Tribes' regulatory or legislative jurisdiction, and never encompasses the adjudicatory jurisdiction of tribal courts. But that alleged exclusion is inconsistent with *Montana* and other decisions of this Court, and is not supported by the principles underlying those decisions.

1. *Montana*'s first exception recognizes tribal authority to "regulate" nonmembers "through taxation, licensing, or other means," and cites four illustrative cases. 450 U.S. at 565-566. In *Strate*, the Court emphasized that those cases "indicate[] the type of activities the Court had in mind" for the first exception. 520 U.S. at 457. Three of the cases dealt with the authority of a Tribe to impose taxes on nonmembers. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904); *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905). The fourth, however, addressed the authority of tribal

courts over suits brought by nonmembers. See *Williams* v. *Lee*, 358 U.S. 217 (1959). In *Williams*, a non-Indian who operated a general store on the Navajo reservation brought suit in state court to collect for goods sold to two Navajo Indians. The Court held that the state courts had no jurisdiction. Rather, the suit fell within the jurisdiction of the Navajo tribal courts, since the storeowner was "on the Reservation and the transaction with an Indian took place there." *Id.* at 223. Thus, *Montana*'s first exception clearly contemplates that civil adjudications are one "other means" of exercising tribal jurisdiction over nonmember conduct. Accordingly, when a non-Indian enters into a consensual relationship with a Tribe or its members, that relationship is brought within the legitimate reach of tribal governmental authority, as this Court held in *Colville*, *Morris*, *Buster*, and *Williams*, and that authority may be exercised through tribal courts as well as other organs of government.

In cases following *Montana*, the Court has consistently confirmed that the first exception may encompass tribal-court authority. *Strate* even called "unremarkable" the proposition that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 453 (brackets and internal quotation marks omitted). That statement directly contradicts petitioner's assertion that a Tribe may have regulatory jurisdiction under *Montana*'s first exception yet could never possess adjudicatory jurisdiction over the same conduct. *Strate* also held that *Montana* governs the scope of *tribal-court* jurisdiction over nonmembers, without making any distinction between the first and second exceptions, *id.* at

451-452, and it specifically evaluated the availability of tribal-court jurisdiction under *Montana*'s first exception, *id.* at 456-457, as well as the second, *id*. at 457-459—thus defeating petitioner's attempt (Br. 36-39) to associate adjudicatory jurisdiction exclusively with the second exception. Later cases also show that the first *Montana* exception is relevant to the scope of tribal-court jurisdiction. See *Hicks*, 533 U.S. at 359 n.3, 372; *Atkinson Trading Co.*, 532 U.S. at 654-656.

2. The Court's consistent approach is supported by sound policy, for it would make no sense to read civil adjudicatory authority out of the first *Montana* exception. If a Tribe has the authority to impose "regulatory" restrictions on nonmembers who enter consensual relationships with the Tribe or its members (which petitioner does not dispute), it ought to have its own means of enforcing those requirements. See *Cohen's Handbook of Federal Indian Law* 598 (Nell Jessup Newton et al. eds., 2005) ("If a tribe has power to apply its law to govern a dispute involving a nonmember, then its courts likely can hear the claim.").

"Tribal courts play a vital role in tribal self-government." *Iowa Mut.*, 480 U.S. at 14; accord 25 U.S.C. 3651(5). They are therefore appropriate forums for adjudications arising out of law that a Tribe adopts in the exercise of self-government and permissibly applies to non-Indians under *Montana*. While their jurisdiction may not be exclusive, a sovereign Tribe should be entitled to interpret and enforce its own law in the first instance.[13] Tribal authority over nonmembers on non-Indian land is already limited to those instances that fall

[13] Cf. *Pernell* v. *Southall Realty*, 416 U.S. 363, 368-369 (1974) (discussing deference to state court's interpretation of state laws).

under one of *Montana*'s two exceptions; but when those criteria are met, tribal courts should be entitled to consider claims of noncompliance with legitimate tribal requirements.

Under petitioner's theory, however, Tribes and tribal members would be forced to seek out state courts to enforce tribal laws governing a nonmember's contractual relationships with them. In most cases, federal courts will not have jurisdiction over a contract or regulatory dispute between a Tribe or its members and a nonmember, because no statute generally provides for such jurisdiction. Even assuming that state courts would be available for such suits, see, *e.g.*, *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984), that would make one sovereign's law subject to the interpretation of and enforcement by other sovereigns' courts, which would seriously undermine federal policies recognizing the centrality of tribal courts to tribal self-governance. See *Iowa Mut.*, 480 U.S. at 16 ("Adjudication of [reservation affairs] by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."); see also pp. 2-3, *supra*. Indeed, because certain areas of the law—such as those governing contracts and torts—are typically developed in a common-law manner by courts, rather than through legislative enactment, petitioner's position would deprive Indian Tribes of an essential means of law*making*.

3. Petitioner and its *amici* offer no sound reason to distinguish tribal "regulation" via taxes, licensing, or statutory requirements from "regulation" via tort law.[14]

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[14] In finding that Tribes had been implicitly divested of adjudicatory jurisdiction in criminal matters, the Court relied in substantial part on

For that matter, neither petitioner nor its amici proffer a rationale that would explain why the tribal courts had jurisdiction over respondents' breach-of-contract and bad-faith claims, which petitioner appears to have conceded in the tribal trial court and has not since challenged, but lacked jurisdiction over respondents' discrimination claim, which arose out of the same contractual relationship. Cf. *Hicks*, 533 U.S. at 402 (Stevens, J., concurring in judgment) (noting that *Strate* "discusses the question whether a tribal court can exercise jurisdiction over nonmembers, irrespective of the type of claim being raised").

As a general matter, tort law is a well-recognized means of governmental regulation of conduct. See, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (explaining that "a liability award [for a state common-law tort] can be, indeed is designed to be, a potent method of governing conduct and controlling policy") (internal quotation marks omitted). Here, as the federal court of appeals recognized, "[b]y subjecting [petitioner] to liability for violating tribal antidiscrimination law in the course of its business dealings with [respondents], the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reser-

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the fact that Congress had established *federal* jurisdiction over crimes committed by non-Indians against Indians on a reservation. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 201-204 (1978). By contrast, Congress has never granted federal courts general jurisdiction over civil disputes between Indians and non-Indians, and a seminal 1855 opinion of the Attorney General noted the significant difference between civil and criminal jurisdiction. *National Farmers Union*, 471 U.S. at 853-855; 7 Op. Att'y Gen. 175 (1855). Thus, because there are no distinct principles of implied divestiture of jurisdiction in civil cases, whether tribal courts have jurisdiction over a particular suit against non-Indians is properly governed by the general standards of *Montana*.

vation." Pet. App. A14. Indeed, the arbitrariness of distinguishing tort law from statutory or regulatory law is underscored by the fact that the tort-law norm here was found essentially indistinguishable from non-discrimination obligations imposed by federal *statutes*.

Nor is there any basis in statute, treaty, or this Court's decisions on the "implied divestiture" of tribal sovereignty to distinguish between a Tribe's authority to control nonmember conduct through legislative regulation as opposed to common-law rules. Tribes have historically regulated conduct among their people and on their reservations through customs and informal dispute resolution, and codification of those standards has been a comparatively recent phenomenon. It would be perverse to conclude that the Tribes have been divested of their historic common-law authority and retained only the authority to regulate through newfound means.

Petitioner and some of its amici suggest that tribal common-law claims may present a trap for unwary nonmembers. See Pet. Br. 41-44. But this Court has previously "rejected * * * attacks on tribal court jurisdiction" predicated on allegations of "local bias and incompetence," *Iowa Mut.*, 480 U.S. at 18-19, and the facts do not bear out petitioner's concerns. Tribal courts take different forms and draw from varied traditions, but, like the CRST's own courts (Pet. App. A55 n.5, A80), many of them look to federal or state law to govern disputes where no established tribal law applies.[15] Indeed,

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[15] See, *e.g.*, Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 739 (2006) (noting tribal law "tends to mirror American laws" because Tribes "must be able to function in the American political system in a seamless manner"); *id.* at 734-735 (discussing tribal-court use of Anglo-American legal constructs and state and federal common law; concluding there is little

when the Cheyenne River Sioux Tribal Court of Appeals recognized the principle of judicial review, it relied not only on Lakota tradition but also on this Court's opinion in *Marbury* v. *Madison*. See *Cohen's Handbook of Federal Indian Law* 274 n.545 (citing *Clemente* v. *LeCompte*, 22 Indian L. Rep. 6111 (Chy. R. Sx. Ct. App. 1994)).

In this case, petitioner cannot plausibly claim it was unfairly exposed to an unusual and unknowable claim. In the tribal court, petitioner had the option of requesting a jury that included nonmembers, and the judge who presided over the trial was a non-Indian law professor. Resp. Br. 13-14, 16. The Chief Justice of the Tribal Court of Appeals was also a non-Indian law professor (and a second member of the three-member panel was a non-Indian). *Id*. at 17. The only "uncertainty" (Pet. Br. 43) about the discrimination claim was the *source* of the obligation not to discriminate; its content so closely paralleled federal antidiscrimination law that petitioner repeatedly argued it was in fact a federal cause of action. See Pet. App. A7, A51, A79. Both federal courts rejected petitioner's suggestion that it had somehow been prejudiced by asserted indeterminacy of tribal law, *id*. at A21-A22, A41-A44, and petitioner has abandoned any claim that the tribal-court proceedings violated due process, Pet. i & n.1.

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evidence that tribal courts are unfair to nonmembers); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable "to those in state courts" even when tribal codes do not).

II. Tribal-Court Jurisdiction Over Respondent's Discrimination Claim Was Appropriate Under *Montana*'s Exception For Consensual Relationships With Tribal Members

In the absence of any categorical basis for precluding jurisdiction, the tribal courts' jurisdiction turns on application of the *Montana* exceptions. Here, the tribal courts properly exercised jurisdiction in this case over the tort claim arising out of the parties' commercial transactions, because there is a clear nexus between the Indian status of all three respondents and the underlying transactions that gave rise to the tort claim, and other factors demonstrate the "overwhelmingly tribal" nature of the parties' interactions. Pet. App. A11.

1. The first *Montana* exception applies when a nonmember has consented to commercial dealings with the Tribe or its members, thereby submitting to tribal jurisdiction over matters tied to that relationship. See, *e.g.*, *Hicks*, 533 U.S. at 371-372. The dealings between the parties in this case reflect exactly the sort of "consensual relationship" contemplated by *Montana*, and they developed in the "private commercial" context associated with that exception. *Id.* at 372. The course of commercial dealings between the parties was also the basis for the dispute to which tribal antidiscrimination law applied. There was thus a close nexus between the consensual relationship and the Tribe's assertion of jurisdiction. Cf. *Atkinson Trading Co.*, 532 U.S. at 656 ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another.").

Petitioner took advantage of the fact that the tribal members possessed majority ownership of the respondent Company to obtain BIA loan guarantees and interest subsidies. J.A. 118-119. When respondents defaulted, the BIA paid off the guarantees. See pp. 6-7 &

note 7, *supra*. In addition to the critical Indian status of respondents, a host of other facts about the parties' course of dealing makes the assertion of tribal jurisdiction appropriate. The subject-matter of the negotiations and resulting contractual arrangements involved a single ranching operation on both tribal and private land within the CRST Reservation; the collateral included cattle and equipment on both tribal and private lands; petitioner had entered the reservation to inspect the Long Company's operations and collateral, and some of the negotiations between the parties took place at tribal offices on the reservation, with the direct assistance of tribal and BIA officials; and the same course of dealing spawned closely related contract claims that were adjudicated in tribal court without objection. See pp. 4-6, *supra*.

Furthermore, petitioner's activities are precisely the type of nonmember conduct that Tribes have a sovereign interest in regulating. See, *e.g., Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (recognizing Tribe's "general authority, as sovereign, to control economic activity within its jurisdiction").

2. Petitioner argues (Br. 31-32) that the particular contract in the overall arrangement most directly tied to the discrimination claim—the lease of the 2230-acre parcel with an option to purchase that land—was with the Company, which is a South Dakota corporation and thus, in petitioner's view, not a Tribe "member" under *Montana*. But the *Montana* rule and its exceptions come from "an opinion, bear in mind, not a statute," *Hicks*, 533 U.S. at 372, and there is no reason to conclude that a member-owned corporation should be a *non*member for *Montana* purposes—especially when the corporation is (as here) closely held, doing business on the reserva-

tion, and imbued with an Indian identity by virtue of a federal program that is a necessary part of the underlying commercial dealings.

It is not unusual for a corporation to assume an identifying attribute from its owners—especially where the government has a policy interest in treating the company differently in light of its owner's identity. See, *e.g.*, 28 U.S.C. 1603(b)(2) (an entity is an instrumentality of a foreign state for sovereign-immunity purposes when a majority of its shares are "owned by a foreign state or political subdivision thereof"). In fact, in *Pourier* v. *South Dakota Department of Revenue*, 658 N.W.2d 395, 404 (S.D. 2003), vacated in part on other grounds, 674 N.W.2d 314 (S.D. 2004), cert. denied, 541 U.S. 1064 (2005), the Supreme Court of South Dakota held that "a corporation owned by * * * an enrolled tribal member * * * and doing business on the Indian reservation for the benefit of reservation Indians is an enrolled member" for purposes of determining whether "the legal incidence of an excise tax rests on a tribe or on tribal members" under the approach described in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 459 (1995).

Identifying the corporate respondent in this case as the functional equivalent of a tribal member is strongly supported by the terms and purposes of the Indian Financing Act and its implementing regulations. The BIA loan guarantees were, legally and factually, a *sine qua non* for the repeated loan transactions between the parties here. As described above, see pp. 4-5, *supra*, an "organization of Indians" must have majority-Indian ownership to qualify for federal loan guarantees, which the BIA could have denied had it appeared that respondents could "obtain the loan without a guaranty," 25 C.F.R.

103.16 (1996), since the program is intended to "provide access to private money sources which otherwise would not be available," 25 U.S.C. 1481. The Indian Financing Act's policy of encouraging economic development on reservations, including the development of Indian-owned businesses, would be undermined if such businesses were treated as nonmembers with a limited ability to resolve their disputes in tribal forums.

Petitioner's assertion—that member-owned, state-chartered corporations are always "nonmembers"—would also lead to absurd results inconsistent with the logic of *Montana* itself. For example, a Tribe would obviously have a strong interest in regulating a transaction between two businesses owned by tribal members that operate on the reservation and enter into a contract with each other. See *Merrion*, 455 U.S. at 137. Yet, under petitioner's view, if those businesses happen to be corporations organized under state law, their transaction would be considered one between two *nonmembers* and thus fall beyond the Tribe's jurisdiction in many instances. As the Eighth Circuit recognized, "[t]he Tribe's interest in regulating commercial transactions between its members and nonmembers does not disappear just because a corporation is also a party to those transactions." Pet. App. A12.

3. Some of petitioner's amici (States Amicus Br. 20-22; Association of Am. R.R. Amicus Br. 17-24) suggest that this Court should adopt a heightened standard for establishing tribal-court jurisdiction over nonmembers under the first *Montana* exception, alleging that there is a need for "[s]ymmetry" (States Amicus Br. 21) with the standard used to determine when a Tribe has waived its sovereign immunity from suits in state court. See *C&L Enters., Inc.* v. *Citizen Band Potawatomi Tribe*,

532 U.S. 411, 418 (2001). But there is, of course, no underlying parity between the status of a sovereign and a private party, and declaring symmetry between unequals would vitiate clear federal policy about tribal self-government. See, *e.g.*, 25 U.S.C. 3651(5) and (6).

Amici's suggestion is also inconsistent with the decisions on which the first *Montana* exception is based. In *Morris*, *Buster*, and *Colville*, the non-Indians did not expressly consent to the exercise of tribal jurisdiction (in those cases, jurisdiction to tax). In those cases (as in *Merrion*), the voluntary commercial relationship was itself sufficient to warrant the exercise of tribal authority. Similarly, in *Williams*, the Court held that the on-reservation commercial dealings with a tribal member were sufficient to require the nonmember to submit its contract dispute to tribal court. The same principle applies to petitioner's contractual dealings here.

That conclusion is supported by the established rule that no express consent to jurisdiction is required to subject a private party to suit in state courts. Fair warning of the prospect of such jurisdiction arises from the requisite purposeful contacts with a forum and its citizens, as long as the dispute arises out of those contacts. See generally *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985). In the absence of, for example, a forum-selection clause to the contrary in the contract itself, the same should be true for suits in tribal courts in the limited circumstances where *Montana*'s exceptions apply.

CONCLUSION

If the Court is ultimately satisfied that petitioner has standing to bring this suit (see note 10, *supra*), the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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