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

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTION PRESENTED

Whether this Court should revisit its rulings in *Williams v. Lee*, 358 U.S. 217 (1959), and *Montana v. United States*, 450 U.S. 544 (1981), that American Indian tribal courts may adjudicate claims arising out of on-reservation commercial dealings between tribal members and nonmembers?

## CORPORATE DISCLOSURE STATEMENT

Respondent Long Family Land and Cattle Company, Inc., states that it is not a publicly held company and does not have any parent corporations. Respondent further states that no publicly held company owns ten percent (10%) or more of its stock.

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## STATEMENT OF THE CASE

This case involves a straightforward application of the rule announced in *Williams v. Lee*, 358 U.S. 217, 223 (1959), and *Montana v. United States*, 450 U.S. 544, 565-566 (1981), that Indian tribes may exercise jurisdiction over claims arising out of the on-reservation commercial dealings and consensual relationships between tribal members and nonmembers.

Petitioner, a nonmember bank doing business in Indian country, voluntarily entered into a loan agreement with respondents, tribal members. Petitioner breached its agreement with respondents and intentionally discriminated against them. Respondents sued petitioner in tribal court, raising claims sounding in contract and tort. Those claims were directly linked to the parties' commercial dealings. The tribal court exercised jurisdiction over respondents' claims. The federal district court and court of appeals upheld the tribal court's exercise of jurisdiction as an appropriate means of regulating petitioner's on-reservation conduct under the first *Montana* exception.

Petitioner asks this Court to review the case and reverse the decisions below. The only way this Court can grant the relief petitioner seeks is to reverse its well-settled rulings in *Williams* and *Montana*. Under the circumstances, review by this Court is not warranted.

### A. Petitioner's Commercial Dealings With The Longs.

This case involves various contract and tort claims brought by Ronnie Long, Lila Long, and the Long Family Land and Cattle Company against Plains Commerce Bank in the Cheyenne River Sioux Tribal Court. Those claims arose out of an on-reservation loan agreement made by the Longs and the bank in 1996.

Ronnie and Lila Long are husband and wife. They are members of the Cheyenne River Sioux Tribe in South Dakota. They have lived on the Cheyenne River Indian Reservations all their lives. They are cattle ranchers. Ronnie Long's parents, Maxine and Kenneth Long, were cattle ranchers from the time Ronnie was a young boy. They, too, lived on the reservation their whole lives. *See* Longs' Appendix in U.S. Court of Appeals (hereafter "L.App.") at 18, 38, 47.

The Long Family Land and Cattle Company was incorporated in 1987. It is a South Dakota family farm corporation. The company was incorporated to qualify for loans guaranteed by the Bureau of Indian Affairs ("BIA") under 25 C.F.R. Part 103. It has always been owned and controlled by Long family members. These family members have at all times owned at least 51% of the corporation's stock, as required by its articles of incorporation. L.App. 13, 23. Petitioner concedes that 51% of Long Company is owned and controlled by tribal members Ronnie and

Lila Long. *See* Petition for Writ of Certiorari (hereafter "Pet.") at 2.

For over forty years, Kenneth and Maxine Long jointly owned 2,230 acres of agricultural land located within the reservation. This land was ultimately deeded to petitioner in the loan agreement at issue in this case. L.App. 18, 40, 43 para. 16.

The Long's company owned cattle, horses, and machinery, and grew crops on the reservation fee land owned jointly by Kenneth and Maxine Long. The company also pastured its livestock year-round on 6,400 acres of Indian trust land leased by Ronnie Long from the Tribe.

From 1989 to 1996, petitioner made numerous loans to the Longs' cattle company. L.App. 18, 41, para. 10. Petitioner required the company to grant petitioner security interests in its livestock, machinery, crops, and feed located on the reservation. L.App. 18, 41, para. 10. Petitioner required Kenneth and Maxine Long to mortgage their land to provide collateral for petitioner's loans. L.App.12, 18, 22, 49-58.

Petitioner's loans to the Longs and their cattle company were guaranteed by the BIA. The BIA guaranteed the loans because the Longs had good credit and because their company was Indian-owned and controlled. Petitioner benefited from the BIA loan guarantees. It received BIA interest subsidy payments and the BIA loan guarantees substantially reduced petitioner's risk of loss. In the event the

cattle company could not repay the loans, petitioner would be paid by the BIA under the guarantees. L.App. 16- 17, 36-37.

There can be no question that petitioner engaged in a longstanding course of commercial dealings with the Longs. Petitioner conceded as much in the tribal court proceedings:

> Plains Commerce Bank, formerly Bank of Hoven, has been doing business with various members of the Long Family and entities owned by them since approximately 1989. Kenneth and Maxine Long, husband and wife, as well as their son, Ronnie Long, and his wife, Lila Long, and Long Family Land and Cattle Company, Inc., the corporation owned by them, all did business with Plains Commerce Bank.
>
> The Bank made numerous loans to Long Family Land and Cattle Company, Inc. Kenneth Long and Maxine Long mortgaged all of the land, which they owned in Dewey County, which was approximately 2,230 acres, to the Bank as collateral for these loans. Both Kenneth Long and Maxine Long personally guaranteed the debt of Long Family Land and Cattle Company, Inc. to the Bank.

Pet. Br. in Support of Motion for Summary Judgment (reprinted in Cheyenne River Sioux Tribe's Appendix in U.S. Court of Appeals [hereafter "C.App."] at 14-15).

Petitioner made an operating loan each year to the Longs to pay ranch expenses. The loan was paid back when the annual calf crops were sold. Kenneth Long died in July of 1995, and after his death petitioner refused to make an operating loan to the Longs. Over a year passed, and the Longs were in dire need of operating money. Petitioner knew that an operating loan was absolutely necessary for the Longs to continue their cattle ranching business. The Longs requested an immediate operating loan and a loan to purchase additional cattle.

In the spring of 1996, petitioner came on the Longs' reservation land and proposed a new financing scheme. Petitioner would make the requested operating and cattle purchase loans, provided that the Longs deed their house and reservation land to petitioner, and petitioner would sell the land back to them on a 20 year contract for deed.

Sometime later petitioner changed the terms. In a letter to Ronnie, petitioner refused the Longs financing to buy back their land on a contract, because of "possible jurisdictional problems" if petitioner sold the land on a contract "to an Indian owned entity on the reservation." L.App. 2, 7; Trial Exhibit (hereafter "Tr.Ex.") 4. The only option petitioner offered the Longs was two years to pay petitioner $478,000 in a lump sum or lose their land. Petitioner's Appendix in U.S. Court of Appeals (hereafter "A.App.") at 4, 28-31.

Petitioner and the Longs entered a consensual agreement on December 5, 1996. It contained several provisions:

- Petitioner agreed to make a $70,000 operating loan to the Long's cattle company to feed and care for the company's cattle;
- Petitioner agreed to make a $37,500 loan to the Longs' company to purchase 110 additional cattle;
- The Longs deeded their 2,230 acres of agricultural land and their house to petitioner for a credit of $478,000 on their debt of $750,000 to petitioner;
- The Longs assigned their federal Conservation Reserve Program ("CRP") contract payments of $44,000 a year to petitioner;
- Petitioner leased the 2,230 acres back to the Longs for two years; and
- Petitioner granted the Longs an option to pay petitioner $478,000 in a balloon payment in two years to buy their land back from petitioner.

L.App. 5-6, 18, 42-43, para.13-14; A.App.5, 33

The Longs' land and house were deeded to petitioner, but petitioner refused to make the Longs the promised $70,000 operating loan or the $37,500 cattle purchase loan. L.App. 18, 6-7.

The Longs had hauled some hay to the winter pastures where the cattle were located, but additional hay had to be moved to the cattle to provide adequate winter feed. Petitioner knew the Longs did not have $20,000 to hire trucks to move their 2,000 tons of hay 20 miles from their 2,230 acres of land, where they baled it, to Ronnie Long's 6,400 acres of leased Indian trust land where the cattle were located. Petitioner knew that without the operating loan the Longs' 625 cattle would not have adequate feed to survive the winter. Petitioner knew that the cattle needed the hay, and that cattle cannot survive winter weather conditions for long without adequate feed. L.App. 18, 44. For decades the Longs wintered their cattle all year in the same pastures, and with adequate feed the cattle weathered severe winter storms without incident. Petitioner knew that without the operating loan the Longs' cattle ranching business would fail, and they could not buy their land back.

Petitioner refused to loan even part of the promised $70,000 operating loan to hire trucks for $20,000 to move the hay to the cattle, or to insure the cattle for winter death loss at a cost of $2,000. L.App. 18, 44; Tr.Ex. 13, p. 2. Petitioner could have made an immediate protective advance emergency loan to move the hay to the cattle under 25 C.F.R. Part 103. Such loans are automatically guaranteed by BIA, without application or BIA approval. Toward the end of December of 1996, with winter setting in and no operating loan from petitioner, Ronnie Long and tribal officer John Lemke requested that

petitioner make such emergency loan, but petitioner refused to do so.

Severe winter storms hit the area in January of 1997, with intense cold, high winds, and deep snow that blocked the roads for days. The cattle ran out of feed and over 500 cows and calves died. As a direct result of petitioner's breach of the loan agreement, refusal to make the promised operating loan to move the hay, and refusal to make a BIA automatically guaranteed emergency loan to move the hay and insure the cattle, the Longs' cattle ran out of feed and over 500 cattle died in the winter storms. L.App. 18, 43-44. Petitioner's breach of the loan agreement caused the Longs disastrous cattle losses, and ruined the cattle ranching business they had successfully operated on the reservation for five decades.

The tribal court jury determined that petitioner acted in bad faith in connection with the loan agreement. L.App.1, 5. The jury also determined that petitioner breached the loan agreement. L.App. 1, 1.

Without income from their cattle, the Longs could not buy their land back from petitioner. L.App. 18, 43-44, para.17. The jury determined that petitioner's breach of the loan agreement prevented the Longs from recapturing their land. L.App.1, 2.

Without their land and cattle, the Longs were out of business. The Longs' actual damages were $1,236,792 for loss of their cattle and loss of use of their land. L.App. 18, 7; Tr.Ex. 14, 23. The tribal

court jury awarded the Longs $750,000 plus prejudgment interest. L.App.1, 6.

In 1999 petitioner sold to non-Indians 1,270 acres of the Longs' land. Petitioner sold the land to non-Indians on terms substantially more favorable than petitioner allowed the Longs, who are Indian tribal members. L.App. 18, 8-9, para. 22. Petitioner required the Longs to pay the full purchase price of $478,000 in a lump sum cash payment in only two years. A.App.4, 29. In contrast, the contract for deed terms Petitioner allowed the non-Indians required payments to petitioner of only $23,229 a year, which were paid by annual federal FSA farm payments on the land. The non-Indians essentially became owners of the Indians' land at no cost. Petitioner's terms of sale for the non-Indians were substantially more favorable than the terms petitioner required of the Longs as Indian tribal members. L.App.18, 46. If the Longs were permitted the same financing terms as petitioner allowed the non-Indians, the Longs would have had little problem buying their land back. The jury determined that petitioner refused such favorable financing to the Longs solely because they are Indian tribal members. L.App.1, 4.

Petitioner made substantial profits over the years from its commercial agreements with the Longs and their cattle company. The Longs paid a substantial amount of interest to petitioner on various loans. In addition, under the 1996 consensual agreement involved in this case, petitioner received well over $1,060,000. Petitioner received deeds to the Longs' house and land valued by petitioner at $478,000, and

petitioner received $88,396 in federal CRP contract payments, $392,968 from the federal BIA guarantees, $100,000 from the assignment of Kenneth's life insurance, several years of federal BIA interest subsidy payments, and several years of federal FSA farm program payments as owner of the land.

Petitioner admits that it went on the reservation to make money from tribal members:

> The bank admits that they were dealing with the tribal members to make money. It wasn't just to help tribal members. The bank was doing it with the intent of making money. That's what any business does. And how much money they made from tribal members, is really nothing for us to even worry about.

Trans. of Oral Arg. in Tribal Ct. App. (reprinted in C.App.1-5).

There is nothing wrong with petitioner making money on the reservation, provided that its activity does not involve unfair, discriminatory conduct that causes damage to tribal members. Petitioner acted in bad faith in its performance of the 1996 consensual agreement. Petitioner intentionally breached the contract, which caused the death of the Longs' cattle and made it impossible for the Longs to buy back their land from petitioner. The intentional wrongful acts of petitioner caused the Longs' family cattle ranching business to fail. They lost their livestock

and their land, and the reservation community lost a productive Indian-owned family business.

**B. The Discrimination Claim.**

The Longs claimed that the petitioner intentionally discriminated against them in connection with the 1996 loan agreement. In the negotiations that led up to the formation of the 1996 loan agreement, petitioner proposed that the Longs deed their house and land on the reservation to petitioner, for a credit of $478,000 against the $750,000 debt owed by the Longs and their cattle company. In return, petitioner would finance the Longs' purchase of their land back from petitioner on a 20-year contract for deed. Petitioner knew that favorable financing terms were critical to the Longs' success in repurchasing their land.

Later in the negotiations, petitioner changed the terms of the proposed deal. In a letter to Ronnie, petitioner told Ronnie that it decided it would not finance the sale of the land back to the Longs on a contract for deed, because of "possible jurisdictional problems" if petitioner sold the land on a contract "to an Indian owned entity on the reservation." L.App.2, 7; Tr.Ex. 4. Petitioner changed the proposed agreement to a two-year lease with an option to purchase. This permitted the Longs only two years to pay the full lump sum of $478,000 to petitioner. Otherwise, they would lose their land. A.App. 3, 28.

The Longs were desperate to reach an agreement because petitioner refused to make any loans to

operate the ranch after Kenneth Long died in July of 1995, and it was fast approaching the end of 1996. They urgently needed operating money to prepare their cattle for the approaching winter. The Longs agreed to the two-year lease and option to purchase, provided that petitioner agreed immediately to make the $70,000 ranch-operating loan. Among other things, they needed $20,000 right away to move their 2,000 tons of hay 20 miles to where their cattle were located to provide their 625 cattle with winter feed. They also requested a $37,500 loan to purchase additional cattle to increase their income so they could buy their land back from petitioner.

In the consensual agreement signed by petitioner and the Longs on December 5, 1996, petitioner agreed to make the $70,000 ranch operating loan, which would enable the Longs to hire trucks to haul their hay to their cattle and prepare the cattle for the rapidly approaching winter weather. Petitioner knew that without the operating loan the Longs had no chance at all to stay in business and buy back their land. After petitioner received the deeds to the Longs' house and land, however, petitioner refused to make the promised loans. The Longs had no money to feed or care for their cattle. Without feed most of their cattle died in the winter storms, and without their cattle income they could not buy back their land from petitioner. The Longs requested an extension of time to buy back their land but petitioner refused. L.App. 9, 11.

The tribal court jury determined that petitioner acted in bad faith in connection with the loan

agreement. L.App. 1, 5. The jury determined that petitioner breached the loan agreement. L.App.1, 1. The jury also determined that petitioner's breach of the loan agreement prevented the Longs from buying back their land. L.App.1, 2.

Petitioner sold 1,270 acres of the Longs' Indian owned land to non-Indians. Petitioner sold the land on terms substantially more favorable than the terms petitioner allowed the Longs, who are Indian tribal members. L.App. 18, 8-9, para. 22. The Longs' discrimination claim arose directly from the Longs' preexisting, ongoing commercial consensual relationship with petitioner. In the 1996 consensual agreement, petitioner required the Longs to pay the full purchase price of $478,000 in a lump sum cash payment in only two years. A.App. 4, 29. In contrast, the financing terms petitioner allowed the non-Indians required payments to petitioner of only $23,229 a year, which were paid by the annual federal FSA farm payments on the land. The non-Indians essentially became owners of the Indians' land for free. Petitioner's terms of sale for the non-Indians were substantially more favorable than terms petitioner required of the Longs in the 1996 consensual agreement. L.App. 18, 46. If the Longs were permitted the same financing terms as petitioner allowed the non-Indians, the Longs would have had little problem buying their land back.

The Longs claimed in their complaint in tribal court that the sale of their land to non-Indians on term more favorable than petitioner required of them in the 1996 contract, constituted unequal treatment

and unfair discrimination against them as Indians. A.App.20, 71. There is a close factual nexus between the Longs' discrimination claim and the 1996 consensual agreement. The facts of this case show that petitioner refused financing to the Longs to buy back their land, solely because they are Indians and tribal members. The jury agreed and determined that petitioner "intentionally discriminated" against the Longs "based solely upon their status as Indians or tribal members." L.App. 1, 4.

The jury's verdict that petitioner "intentionally discriminated" against the Longs "based solely upon their status as Indians and tribal members" has been affirmed by the Tribal Court of Appeals, the United States District Court, and the United States Court of Appeals for the Eighth Circuit.

**C. The Proceedings Below.**

Petitioner filed this action against the Longs in the United States District Court for the District of South Dakota. Petitioner sought a declaratory judgment that the tribal court judgment upholding the jury verdict against petitioner for discriminatory lending practices was null and void. Cross motions for summary judgment were filed by petitioner and the Longs. The district court granted the Longs' motion for summary judgment. The court held, among other things, that:

- Petitioner had entered into numerous consensual relationships with the Longs and their cattle company;

- Petitioner's tortious conduct was directly related to its consensual relationships with the Longs and their company;

- Petitioner was not deprived of due process of law in the tribal court proceedings; and

- The tribal court had jurisdiction over the Longs' discrimination claim against petitioner under the Supreme Court's decision in *Montana*.

Petitioner appealed, and the Eighth Circuit Court of Appeals affirmed. The court held, among other things, that:

- Petitioner's transactions with the Longs and their cattle company were "consensual relationships" within the meaning of the first *Montana* exception;

- The Longs' contract and tort claims had a close nexus to the petitioner's consensual relationship with the Longs and their cattle company;

- Adjudication of the Longs' contract and tort claims was an appropriate means for the tribe to regulate petitioner's conduct on the reservation; and

- Petitioner was not denied due process of law in the tribal court proceedings.

## REASONS FOR DENYING THE WRIT

### I. The Cheyenne River Sioux Tribal Courts' Exercise Of Civil Jurisdiction Over Petitioner Is Precisely The Kind Of Tribal Regulation Of Nonmember Activity Authorized By This Court In *Montana v. United States* (1981).

American Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Although they accepted "the protection of the United States of America" through treaties, see, e.g., Treaty with the Teton, 1815, Art. 3 (7 Stat. 125), Indian tribes retain the sovereign status of "domestic dependent nations," *Oklahoma Tax Comm'n v. Potawatomi*, 498 U.S. 505, 509 (1991); *accord Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and continue to "'possess[] attributes of sovereignty over both their members and their territory,'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *United States v. Mazurie*, 419 U.S. 544,. 557 (1975)); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

"Tribal courts play a vital role in tribal self-government ... and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (citations

omitted). Tribal courts are categorically barred from exercising criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), yet they may, in certain circumstances, exercise civil jurisdiction over non-Indians and other non-tribal-members.

*Montana v. United States*, 450 U.S. 544 (1981), is the "pathmarking case" concerning tribal civil authority over nonmembers. *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). *Montana* provides that, as a general matter, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S., at 565. However, this general proposition is subject to controlling provisions in treaties, congressional legislation enlarging tribal court jurisdiction, and the two exceptions identified in *Montana*. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

The *Montana* Court stated that, "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." 450 U.S., at 565. The Court set forth the so-called "*Montana* exceptions" as follows:

> [1] 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. [2] 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.

450 U.S., at 565-565 (citations omitted).

The case *sub judice* involves the straightforward application of the first *Montana* exception. Petitioner, a nonmember bank, voluntarily entered into a loan agreement with the Longs and their cattle company in 1996. The Longs' breach of contract and discrimination claims against petitioner arose out of that loan agreement and the negotiations and dealings associated therewith. Adjudication of the Longs' claims in tribal court was an appropriate exercise of tribal authority over petitioner.

The Eighth Circuit correctly ruled that petitioner had "engaged in the kind of consensual relationship contemplated by *Montana*" since it "transacted business" with the Longs' cattle company—"a corporation of conspicuous tribal character"—and since it "formed concrete commercial relationships with the Indian owners of that corporation." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 491 F.3d 878, 886 (8th Cir. 2007) (reprinted in Petitioner's Appendix [hereafter "Pet. App."] at A-12).[1]

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[1] As has been noted, petitioner entered into many consensual agreements with the Longs individually, and with

Petitioner cannot argue—and, indeed, *does not* argue in its petition—that it did not have a consensual relationship with the Longs and their cattle company. Similarly, petitioner cannot argue that the tribal court's exercise of jurisdiction did not have a "nexus to the consensual relationship itself." *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). Indeed, the Eighth Circuit correctly found that the Longs' claims "arose directly from their preexisting commercial relationship with the bank." 491 F.3d, at 887 (Pet. App. 13).

Under these circumstances, the Eighth Circuit's decision upholding the jurisdiction of the Cheyenne River Sioux Tribal Courts is wholly unremarkable. The court held that, "in that narrow set of circumstances where the consensual relationship exception is otherwise completely satisfied," *Plains Commerce Bank*, 491 F.3d, at 887 (Pet. App. A-14), a tribe has the authority—through tort law, licensing requirements, or other statutory provisions—to "hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members." *Id.*

The Eighth Circuit recognized that tribes have the "inherent authority 'to prescribe the terms upon which noncitizens may transact business'" with tribal

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their cattle company, including loan agreements, promissory notes, mortgages, security agreements, individual loan guarantees, an assignment of CRP contract payments, an assignment of life insurance, a lease of the land, and an option to purchase the land. *See* L.App.18, 41, 43, 58.

members. *Plains Commerce Bank*, 491 F.3d, at 887 (Pet. App. A-13-A-14) (quoting *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905)).

Petitioner intentionally breached its loan agreement with the Longs and intentionally discriminated against the Longs. Petitioner's conduct caused the Longs to suffer substantial damages and ruined the their family cattle ranching business. The tribal tort of discrimination in this case provided a standard of conduct to govern petitioner's consensual agreements and preexisting consensual relationship with tribal members. By subjecting petitioner to civil liability for violating tribal antidiscrimination law in the course of its business dealings with the Longs, the Tribe was properly setting limits on how nonmembers may engage in commercial transactions with members inside the reservation.

## II. The Only Way This Court Can Grant The Relief Petitioner Seeks Is To Reverse Its Rulings In *Williams v. Lee* (1959) And *Montana* That Tribal Courts May Adjudicate Claims Arising Out Of Commercial Dealings Between Tribal Members And Nonmembers.

Petitioner argues that, even though it may have entered a consensual relationship with the Longs and their cattle company, it was not properly subject to the civil jurisdiction of the tribal court since tort law is not a valid form of tribal regulation under the first *Montana* exception. Pet. at 5.

Petitioner attempts to fabricate a false dichotomy between the two *Montana* exceptions. Petitioner asserts that the two exceptions "differentiat[e] the scope of a tribe's regulatory and civil authority over nonmembers." Pet. 13. According to petitioner, tribal authority under the first exception is "limited to taxation, licensing, or other similar legislative controls." *Id.* Tribes may not exercise civil adjudicatory authority over nonmembers under the first *Montana* exception. Rather, a "tribe's civil-adjudicatory authority [is] defined and limited by the second *Montana* exception." Pet. 9. The second exception authorizes civil court jurisdiction, but according to petitioner it does not authorize taxation, licensing, or other legislative controls.

This interpretation of the *Montana* exceptions is at odds with the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959). It is also at odds with *Montana* and the Court's subsequent decisions applying the principles announced in *Montana*. Under these precedents, it is well settled that Indian tribal courts may adjudicate common law causes of action, including contract and tort claims, as an appropriate means of regulating the activities of nonmembers who enter consensual relationships with tribal members. Further, the Court's decisions make clear that the two *Montana* exceptions do not differentiate between the types of authority tribes may exercise. Rather, they differentiate between the categories of nonmember conduct over which *all* forms of tribal civil authority, including adjudicatory authority, may be asserted.

### A. *Montana* And Its Progeny Recognize That Tribal Adjudication Of Common Law Claims Is A Valid Means of Regulating The Conduct Of Nonmembers Who Enter Consensual Relationships With Tribal Members.

In *Montana*, the Supreme Court held 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." 450 U.S., at 565-566. The Court cited four cases in support of this proposition: *Williams v. Lee*, *supra*; *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, *supra*; and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The consensual relationship exception must be construed in light of these cases. Indeed, in *Strate*, the Court stated that, "*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind," *Strate*, 520 U.S., at 457, when it affirmed tribal authority over nonmembers who enter consensual relationships with tribes or tribal members.

Three of these cases cited by the *Montana* Court—*Morris*, *Buster*, and *Colville*—concerned tribal authority to tax or license the on-reservation activities of non-Indians.[2] The fourth—*Williams*—

[2] *Morris* upheld application of the Chickasaw Nation's annual permit tax and licensing requirements on non-Indians

concerned the authority of Indian tribal courts to adjudicate disputes involving non-Indians. The Court held in *Williams* that, "the right of Indians to govern themselves" includes the right to exercise jurisdiction over civil suits involving non-Indians who transact business with tribal members in Indian country. 358 U.S., at 223. The suit at issue in *Williams* was a common law contract action between a non-Indian general store proprietor and two tribal members who had entered a consensual relationship for the sale of goods on the Navajo Indian Reservation. *Id.*, at 217-218.

The *Montana* Court's citation of *Williams* makes clear that tribal court adjudication of common law claims is included within the "other means" by which tribes may "regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members." *See Montana*, U.S., at 565-566. *See also Strate*, 520 U.S., at 457, 458.

Construing the language of the first *Montana* exception without regard to the cases cited in support of it has led petitioner astray. Petitioner's suggestion that taxation, licensing, and other similar

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grazing livestock on Chickasaw land under contracts with individual tribal members. 194 U.S., at 393. *Buster* upheld the Creek Nation's annual permit tax on non-Indians engaging in trade with tribal members within limits of the Creek Nation. 135 F. at 950. *Washington* upheld the imposition by the Colville, Makah, and Lummi tribes of sales taxes on non-Indians purchasing cigarettes from Indian vendors on tribal lands. 447 U.S., at 152-154.

practices are the only means by which tribes can regulate nonmembers who enter consensual relationships with tribal members is simply incorrect.

Since *Montana*, this Court has recognized tribal adjudication of common law claims as a valid means of regulating the on-reservation conduct of nonmembers who enter into consensual relationships with tribal members. On four occasions, the Court has addressed the power of Indian tribal courts to adjudicate tort claims brought by tribal members against nonmembers. In none of these cases did the Court suggest that tribal tort law—or, to be more precise, the adjudication in tribal court of tort claims against nonmembers—was an inappropriate means for tribes to regulate the on-reservation conduct of nonmembers.

*National Farmers Union* (1985), involved a tort claim filed in the Crow Tribal Court by the guardian of a Crow Indian child against a non-Indian insurance company and a state-chartered school district. 471 U.S., at 847. The child was struck by a motorcycle in the parking lot of a school located within the Crow Indian Reservation. *Id.* The child's guardian sued the school district for damages. *Id.* The school district and its insurance company filed suit in federal court to challenge the jurisdiction of the tribal court. *Id.*, at 848. The Court declined to rule on the jurisdictional challenge. Instead, it remanded the case to allow the tribal court to examine in the first instance the existence and extent of its jurisdiction under the *Montana*

exceptions. The Court required the non-Indian litigants to "exhaust the remedies available to them in the Tribal Court system." *Id.*, at 857. The Court did not reject tribal tort law as a method of regulating the on-reservation activities of nonmembers.

Similarly, in *Iowa Mutual* (1987), the Court refused to enjoin a tort suit brought in the Blackfeet Tribal Court by a member of the Blackfeet Indian Tribe against a non-Indian insurance company. The tribal member's tort claim sought compensatory and punitive damages against the insurance company for bad-faith refusal to settle an insurance claim. 480 U.S., at 11. As in *National Farmers Union*, the Court remanded the case to allow the tribal court to examine in the first instance the existence and extent of its jurisdiction under the *Montana* exceptions. *Id.*, at 16-18. Once again, the Court could have, but did not, reject tribal tort law as a basis for regulating the conduct of nonmembers under *Montana*'s first exception.

In *Strate* (1997), the Court again considered "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not members of the tribe." 520 U.S., at 442. In this case, Gisela Fredericks, a non-Indian woman brought a tort action against a non-Indian-owned contracting company (and others) in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation for injuries she sustained in an on-reservation motor vehicle collision with one of the contractor's employees. *Id.*, at 442-444. The

contractor was present on the reservation pursuant to a contract with a tribally-owned corporation to perform landscaping work related to the construction of a tribal community building. *Id.*, at 443.

The *Strate* Court rejected the jurisdiction of the tribal court under first *Montana* exception because there was no nexus between the tort action and the contractor's consensual relationship with the tribes:

> The first exception to the *Montana* rule covers activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The tortious conduct alleged in Fredericks' complaint does not fit that description. The dispute ... is distinctly non-tribal in nature. It arose between two non-Indians involved in a run-of-the-mill highway accident. Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident.

520 U.S., at 456-457 (internal quotation marks and citations omitted).

The *Strate* Court did not hold that tribal tort law is an inappropriate basis to regulate the on-reservation conduct of nonmembers who enter consensual relationships with tribes or tribal

members. Instead, the *Strate* Court based its holding on the absence of a nexus between the tort action itself and the underlying consensual relationship.

Unlike *Strate*, this case involves the adjudication of tribal common law claims that are directly linked to a consensual relationship between a nonmember, petitioner, and tribal members, the Longs. These claims, arising under tribal contract and tort law, are inextricably linked to the commercial dealings and the formation and negotiation of the contracts between petitioner and the Longs.

Finally, in *Hicks* (2001), the Court held that a tribal court did not have jurisdiction over "civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." 533 U.S., at 355. Among the civil claims at issue were the common law tort claims of "trespass to land and chattels" and "abuse of process." *Id.*, at 357. These common law claims were "brought under ... tribal ... law." Id. The Court concluded that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations ..." *Id.*, at 364. The Court was careful, however, to note the limited nature of its holding: "Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.*, at 358 n.2.

In *Hicks*, the Court did not rule—indeed, the Court has *never* categorically ruled—that tribal courts lack jurisdiction under the first *Montana* exception over common law tort claims brought by tribal members against nonmember defendants.

Against this backdrop, the Eighth Circuit correctly held that tribal tort law is an appropriate means by which a tribe may regulate nonmember conduct under the first *Montana* exception. The court recognized that, like "licensing requirements" and "statutory provision[s]," tort law is "a means of regulating conduct." *Plains Commerce Bank*, 491 F.3d, at 887 (Pet. App. A-14) (citing W. Page Keeton, *et al.*, PROSSER AND KEENON ON TORTS 25 (5th ed. 1984)). It is also "an important aspect of tribal self-governance." *Id.* (citations omitted). The court further recognized that, in many cases, the adjudication of common law claims is functionally equivalent to the enforcement of statutory provisions. *Id.* (citing *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

The Eighth Circuit's decision is consistent with *Williams*, *Montana*, and the Court's cases applying *Montana*. To grant the relief petitioner seeks, this Court would have to revisit and reverse its holding in *Williams* that tribal courts have jurisdiction over claims arising out of on-reservation commercial dealings between tribal members and nonmembers. It would also have to cast aside the reasoning and logic of the *Montana* exceptions as articulated and developed in *Montana* and the cases decided thereunder.

### B. The *Montana* Exceptions Are Distinguished Not By The Types Of Tribal Powers They Authorize, But By The Types Of Nonmember Conduct Over Which Tribal Powers Are Authorized.

Petitioner argues that by affirming tribal adjudicatory authority under the first *Montana* exception, the Eighth Circuit has somehow allowed the first *Montana* exception to engulf or envelope the second exception, rendering the latter meaningless and unnecessary. Pet. 13. Petitioner argues that the two *Montana* exceptions are distinguished by the types of tribal authority they authorize. According to petitioner, the first *Montana* exception authorizes tribal regulation, including taxation and licensing, and the second exception authorizes tribal court adjudication of disputes involving nonmembers. Petitioner argues that by upholding tribal court adjudicatory jurisdiction under the first exception, as opposed to the second, the Eighth Circuit rendered meaningless the distinction between the two exceptions. This argument misses the mark entirely.

As has been shown, the first *Montana* exception is as much about tribal adjudicatory authority as it is about taxation, licensing or other forms of regulation. Similarly, the second *Montana* exception has as much to do with taxation and regulation as it does the adjudication of lawsuits.

The *Montana* Court cited four cases after its statement of the second *Montana* exception: *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*,

*supra*; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); and *Thomas v. Gay*, 169 U.S. 264 (1898). "[E]ach of those cases raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Strate*, 520 U.S., at 458. Two of the cases concerned the relative competence of state and tribal courts to adjudicate certain claims arising in Indian country. In both cases, the Court found tribal jurisdiction to be exclusive. *See Fisher*, 424 U.S., at 386 (1976) (exclusive tribal jurisdiction over adoption proceedings when all parties are tribal members residing on the reservation); *Williams*, 358 U.S., at 220 (exclusive tribal jurisdiction over claims arising out of on-reservation commercial dealings between nonmember merchants and tribal members). The other two cases concerned taxation. Both dealt with "objections to a county or territorial government's imposition of a property tax on non-Indian-owned livestock that grazed on reservation land." *Strate*, 520 U.S., at 458. In both cases, the Court found that the state taxes did not unlawfully intrude on core tribal interests. *See Montana Catholic Missions*, 200 U.S., at 128-129; *Thomas*, 169 U.S., at 273. The *Montana* Court's citation of these tax cases confirms that the second exception applies to all types of tribal authority, not just "civil-adjudicative power," as petitioner asserts. Pet. at 5.

Since it decided *Montana*, the Court has addressed, on three occasions, the power of Indian tribes to impose regulations or taxes on nonmembers. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S.

408 (1989) (tribal zoning of fee land owned by nonmembers within reservation); *South Dakota v. Bourland*, 508 U.S.679 (1993) (tribal regulation of hunting and fishing by nonmembers on non-trust land within reservation); and *Atkinson Trading Co.*, *supra* (2001) (tribal taxation of nonmember guests of on-reservation hotel). Had the Court followed petitioner's logic, it would have analyzed these cases only under the first *Montana* exception, since that exception is the only one to refer explicitly to tribal "regulat[ion]" and "taxation." *See* 450 U.S., at 565. However, in each of the cases, the Court analyzed the extent of tribal power under both of the *Montana* exceptions. Indeed, in *Brendale*, the Justices invoked the second *Montana* exception, not the first, to uphold the tribal zoning laws as applied to non-Indian fee land within the closed area of the Yakima Indian Reservation.

*Brendale*, *Bourland*, and *Atkinson* confirm that the second *Montana* exception, like the first, pertains to all forms of tribal authority, including adjudicatory, regulatory, and taxing authority.

Petitioner attaches far too much importance to use of the word "regulate" in the first *Montana* exception and the use of the phrase "exercise civil authority" in the second exception. These terms are, for all intents and purposes, synonymous. A sovereign's ability to regulate is no different than its ability to exercise civil authority over its subjects. Indeed, the *Montana* Court used the terms interchangeably. In deciding whether either exception justified tribal regulation of non-Indian

hunting and fishing on the Crow Reservation, the *Montana* Court stated:

> Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to *tribal civil jurisdiction*. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify *tribal regulation*.

450 U.S., at 566 (emphasis added).

The *Montana* exceptions are differentiated not according to the types of tribal power they authorize, but according to the type of nonmember conduct at issue. The first exception concerns the activities of nonmembers who enter consensual relationships with tribal members. The second exception concerns conduct that imperils core tribal interests. Both exceptions authorize tribal adjudicatory authority as well as regulatory authority.

In the end, Petitioner's argument as to the structure of, and interplay between, the two *Montana* exceptions must give way. So, too, must petitioner's case, for petitioner makes no other argument as to why it might be inappropriate or unfair to allow tribes to exercise civil adjudicatory authority over nonmembers who voluntarily do

business with tribes or tribal members in Indian country.[3]

## III. The Eighth Circuit's Decision Does Not Create New Law Or A Split Among The Circuits.

Petitioner attempts to create alarm in this Court by suggesting that the decision of the Eighth Circuit held—for the first time by any court—that: (1) tribes may exercise adjudicatory jurisdiction over nonmembers under *Montana*'s first exception; and (2) tribes may regulate nonmember conduct on non-Indian fee land within Indian country. Petitioner is mistaken on both counts.

### A. The Eighth Circuit's Decision Does Not Expand The Scope Of Tribal Authority Under The First *Montana* Exception.

Petitioner's suggestion that the Eighth Circuit's decision expanded exponentially the scope of tribal court jurisdiction over nonmembers is disingenuous. Since *Montana* was decided, the lower federal courts have routinely upheld the adjudicatory jurisdiction of Indian tribal courts over tribal law causes of action arising out of the commercial dealings, contracts, and other consensual relationships of nonmembers and Indian tribes and tribal members. These courts have not questioned the propriety under *Montana*'s

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[3] Petitioner received a full and fair trial in the tribal court and has explicitly asked this Court *not* to review the Eighth Circuit's ruling that petitioner was not denied due process of law in the tribal court proceedings. Pet. i.

first exception of using the tribal common law as a means of regulating non-Indian conduct in Indian country.

In *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir.), *cert. denied*, 126 S. Ct. 2893 (2006), the court invoked *Montana*'s first exception to uphold the authority of an Indian tribal court to hear a tort action between a non-Indian and a tribally-controlled community college. The suit concerned an on-reservation motor vehicle accident and "allegedly tortious acts committed on tribal lands." 434 F.3d at 1134. In *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989), the court cited the first *Montana* exception and upheld tribal court jurisdiction over a tribal law divorce proceeding filed by a tribal member against her non-Indian spouse. 864 F.2d at 632-633. The marriage itself constituted a consensual relationship justifying the exercise of tribal adjudicatory jurisdiction. Id. The Ninth Circuit also affirmed the application of tribal tort law against a nonmember defendant in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

The federal district courts have reached similar results.[4] These lower court precedents—and those of

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[4] *See, e.g., Malaterre v. Amerind Risk Management*, 373 F.Supp.2d 980, 985 (D.N.D. 2005) (common law negligence action); *Fidelity and Guaranty Insurance Company v. Bradley*, 212 F.Supp.2d 163 (W.D.N.C. 2002) (action for indemnification); *Warn v. Eastern Band of Cherokee Indians*, 858 F.Supp. 524, 527 (W.D.N.C. 1994) (common law breach of contract action); *Tom's Amusement Company, Inc. v. Cuthbertson*, 816 F.Supp. 403, 406 (W.D.N.C. 1993) (common law contract dispute). *See*

this Court—make it clear that tribal court adjudication of common law claims, including common law tort claims, is an appropriate method for tribes to regulate the activities of non-Indians who enter consensual relationships with the tribes or their members.

In this case, the Longs' common law contract and tort claims against the petitioner arose directly out of—and were inextricably linked to—their commercial dealings and contracts with the petitioner. There was a direct nexus between the Longs' causes of action and the underlying consensual relationship.

### B. The Eighth Circuit's Decision Does Not Extend The Territorial Reach Of Tribal Authority.

Petitioner misapprehends the *Montana* exceptions when it argues that "neither the first nor second *Montana* exceptions apply because the land at issue is not Indian-owned." Pet. 14. Petitioner ignores the fact that the *Montana* exceptions were set forth specifically to define the scope of tribal authority over nonmember activity on "non-Indian fee lands" within Indian country. *Montana*, 450 U.S., at 565.

While it is true, as petitioner states, that in *Montana* and *Strate* the Court rejected tribal

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*also Cheromiah v. U.S.*, 55 F.Supp.2d 1295, 1304 (D.N.M. 1999).

authority over nonmember activity on land that was not tribally owned or controlled, Pet. 13 (citing *Hicks*, 533 U.S., at 359), it did so not because the land had been alienated or encumbered, but because neither of the *Montana* exceptions had been satisfied in those cases. *See Montana*, 450 U.S. at 566, and *Strate*, 520 U.S., at 457-459.

In this case, the first *Montana* exception has been satisfied. Therefore, the Eight Circuit correctly held that the tribe has jurisdiction over petitioner notwithstanding the fact that the land at issue is non-Indian fee land.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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