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

PETITIONER'S REPLY BRIEF

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or publicly held company owning 10% or more of its stock.

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PETITIONER'S REPLY BRIEF

1. The Longs' factual characterization is irrelevant to the question the Bank presents for review.

The Longs spend nearly half of their brief in opposition to the Bank's petition for certiorari arguing about the facts. Although the Bank disagrees with their characterization, that is an issue to be addressed in briefing if this Court grants review. There is no record presently before this Court that would enable a full review of the facts.

It is important to keep in mind, however, the procedural posture of this case. The Bank and the Longs brought cross-motions for summary judgment in the district court. The district court determined that there was no genuine issue as to any material fact. The Court of Appeals agreed.

For purposes of this petition, the operative facts are undisputed. The Bank had a contract with a South Dakota corporation, a 51% majority of shares of which was held by tribal members, concerning land the Bank owned in fee on the reservation. The dispute between the Bank and the Longs that was litigated in tribal court arose out of that relationship. The Bank is an off-reservation bank, and the contract was signed off reservation in the Bank's offices. Whether that is a consensual relationship with a tribe or its members and whether there is a sufficient nexus between the relationship and the claim to support tribal court jurisdiction under the Montana test is a question for this Court to decide.

2. Montana didn't authorize tribal-court civil jurisdiction over nonmember defendants as an "other means" of regulating consensual relationships.

After establishing the general rule that, "the inherent sovereign powers of an Indian tribe do not extend to nonmembers of the tribe," this Court recognized two exceptions. Montana v. U.S., 450 U.S. 544, 565 (1981). Indian tribes have the power to regulate activities of nonmembers who enter consensual relationships with the tribe or its members through licensing, taxation or *other means.* Id. at 565. And tribes can exercise civil authority over nonmembers on fee lands within their reservations when nonmember conduct threatens the political integrity, economic security, or health or welfare of the tribe. Id. at 566. This case concerns only the first and not the second exception.

This Court, however, has never interpreted the first Montana exception to include civil adjudication of claims against nonmembers as an "other means" of regulating consensual relationships. In Hicks, this Court explicitly left that question open. Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001).

3. Williams restricted state-court jurisdiction over tribal members; it did not address tribal-court jurisdiction over nonmember defendants.

The Longs reliance on Williams v. Lee, 358 U.S. 217 (1959), is misplaced. It is true that Montana cites Williams as providing a historical basis for

developing both the first and second Montana exceptions. See, e.g., Montana, 450 U.S. at 565-66. But that does not change what Williams actually held.

The question in Williams was whether an Arizona state court had jurisdiction to hear a claim by a nonmember storekeeper against tribal members who bought goods on credit. Williams, 358 U.S. at 217-18. This Court held that it did not. Id. at 223. Williams does not directly define the scope of tribal-court jurisdiction over nonmembers. It was not a broad statement about tribal-court jurisdiction. Instead, it was a statement about the limits of state-court jurisdiction over tribal members. Williams sheds no light on the question of whether a nonmember can be made a defendant in tribal court.

A tribal court having jurisdiction over a nonmember defendant presents a more difficult situation than a tribal court adjudicating a nonmember's claim against a member. Tribal courts presumably have jurisdiction over tribal members. A tribal member who is made a defendant in tribal court in a claim by a nonmember would presumably be unsuccessful in raising a challenge to the tribal court's jurisdiction.

It isn't enough, though, under the first Montana exception analysis to find that there is a consensual relationship between a tribe or tribal member and a nonmember, and that there is a nexus between the relationship and the claim. A tribe may regulate a consensual relationship through licensing

or taxation. But it does not follow that the nonmember may be forced to defend against civil tort claims in tribal court. Tribal courts do not have civil adjudicatory jurisdiction to litigate claims against nonmember defendants based on consensual relationships because that is not an "other means" of regulation under the first Montana exception. On the other hand, a tribal court would have civil adjudicatory jurisdiction to litigate claims against a nonmember defendant whose conduct on fee land within the reservation threatens the political integrity of the tribe.

The Longs argue that the citation of Williams in Montana "makes clear" that tribal court adjudication of common law claims is included within the other means by which tribes may regulate activities of nonmember who engage in consensual relationships. It is far from clear, however. Williams did not hold that. And neither did Montana. Indeed, this Court has never held that.

The Longs' citation of National Farmers, Iowa Mutual, Strate, and Hicks to support this argument is inapposite. National Farmers and Iowa Mutual are both exhaustion cases. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). This Court's decision to send a case back to tribal court to have it determine its own jurisdiction in the first instance is not an endorsement of jurisdiction over nonmember defendants. Strate involved a suit in tribal court between two nonmembers where there was no nexus between the claim and the tribal

consensual relationship, and the tort occurred on non-Indian fee land. Strate v. A-1 Contractors, 520 U.S. 438 (1997). It does not follow from this Court's rejection of jurisdiction because of a lack of a nexus that it would find jurisdiction over a nonmember where there is a nexus. Hicks ultimately rejected tribal-court jurisdiction. Nevada v. Hicks, 533 U.S. 353 (2001). The Longs read the comment in Note 2 of the Hicks opinion as an endorsement of jurisdiction over nonmember defendants; the Bank reads it as an admonition that nothing in the opinion should be read as an expansion of tribal-court jurisdiction over nonmembers. Only this Court can clarify what it meant.

The Longs' position is that this Court has never categorically ruled that tribal courts lack jurisdiction under the first Montana exception over common-law tort claims brought by members against nonmembers. That is true. The Bank, however, is equally correct in its observation that this Court has never categorically endorsed such jurisdiction. It is because of this void and the resulting confusion that this Court should grant the Bank's petition.

4. The distinction between the regulation authorized by the first Montana exception and the civil authority authorized by the second Montana exception comes from this Court's language in Montana.

The Bank disagrees with the Longs' assertion that the second Montana exception necessarily encompasses taxation and licensing, whereas the first Montana exception necessarily encompasses civil

adjudication. If this Court meant for "regulation" and "civil authority" as used in the two Montana exceptions to be synonymous, there would be no need to distinguish the two exceptions as it did.

The distinction appears significant, however. In addressing consensual relationships, the first Montana exception recognizes licensing and taxation as modest administrative powers that the tribe can exercise over consenting nonmembers. Montana, 450 U.S. at 565. The second Montana exception, addressing nonmember conduct that threatens the political integrity, economic security, or health or welfare of the tribe, authorizes more substantial "civil authority." Id. at 566. The Bank's interpretation is that "civil authority" is synonymous with civil adjudication, whereas "regulation" is not. This interpretation, that there is a spectrum of increasing severity created by the distinction between regulatory and civil adjudicatory authority, is consistent with the nuanced analysis this Court has previously applied to questions regarding tribal power over nonmembers. See, e.g., Oliphant v. Suquamish Indian Tribe 435 U.S. 191, 205 (1978) (holding tribes lack criminal jurisdiction over nonmembers).

One commentator has suggested that this Court's decisions in Strate and Hicks adopted a "new analytic framework." F. Cohen, Handbook of Federal Indian Law 232 (2005). The elevated threshold for satisfying the two Montana exceptions discussed in Strate "appears to have effected a diminishment of both Montana exceptions," while extending the general rule's presumption against tribal authority

over nonmembers. Cohen, *supra* at 233-34. Hicks continued this recent trend of decisions disfavoring tribes' power to govern the conduct of nonmembers. Cohen, *supra* at 234.

As this Court noted in Hicks, a tribe's adjudicative jurisdiction does not exceed its legislative (or regulatory) jurisdiction. Hicks, 533 U.S. at 358. The Hicks opinion left open the question of whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction; it may well be less. This Court applied a close contextual reading to first Montana exception in Hicks. 533 U.S. at 359 n.3. Such a reading makes it clear that "other means" referred to in the first Montana exception are regulatory, not adjudicative, means. The Longs' interpretation of the scope of the two Montana exceptions cannot be reconciled with this Court's cautionary language in Hicks.

The Longs cite inapposite cases in support of their interpretation that the scope of the two Montana exceptions is coextensive. Brendale applied the second Montana exception to permit zoning of nonmember fee land within the reservation. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). It didn't address tribal-court jurisdiction over nonmember defendants. In Bourland and Atkinson, this Court concluded that the tribe had no power to regulate and no power to tax, respectively. South Dakota v. Bourland, 508 U.S. 679 (1993); and Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001). Taken together, these three cases do not support the Longs' broad

generalization about the alleged coextensive scope of the two Montana exceptions.

And even if it could be argued that the second Montana exception encompasses a power to regulate, it does not follow that the first Montana exception encompasses a power to adjudicate disputes involving nonmember defendants. There is a substantial difference between the authority to tax or license a nonmember in a consensual relationship with a tribe and forcing a nonmember defendant to come to tribal court as a defendant in litigation.

There is, for example, no right of removal from tribal court to federal court as there might be for a non-resident defendant in state court. Hicks, 533 U.S. at 368-69. The Bill of Rights and the Fourteenth Amendment do not apply in tribal court. It is a different legal system. As Justice Souter observed:

> Tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.' . . . . The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out.

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

Because this case concerns only the first Montana exception, the sole question is whether the scope of this exception is coextensive with the civil authority authorized by the second exception so as to encompass tribal-court jurisdiction over nonmember defendants. The Bank urges this Court to grant its petition to explain that this is not so.

5. This Court, as opposed to lower courts, should determine whether tribal courts have jurisdiction over tort claims against nonmember defendants in consensual relationships arising out of non-Indian fee land.

Just because some lower courts have not questioned the propriety of extending the first Montana exception to include tribal-court jurisdiction over tort claims against nonmember defendants does not mean that their analysis is correct. And the cases the Longs cite in support of this argument do not extend nearly as far as they suggest.

In Smith, the 9th Circuit Court of Appeals considered the situation of a nonmember plaintiff bringing a claim against the tribe in tribal court. Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir.), *cert. denied,* 126 S.Ct. 2893 (2006). In concluding that there was jurisdiction, the court used the fact of the plaintiff having brought a claim (albeit as a defendant's counterclaim later repositioned as a plaintiff's claim) as the consensual relationship that provided a basis for jurisdiction. Such jurisdictional bootstrapping seems inherently unsound. Sanders was a marital-dissolution action in tribal court

involving a nonmember defendant. Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert denied*, 490 U.S. 1110 (1989). That is an entirely different posture than tort litigation against a nonmember defendant. And McDonald was a case involving a tort claim against a nonmember defendant that occurred on a tribal road that was Indian fee land. McDonald v. Means, 309 F.3d 530 (9th Cir. 2002). The McDonald court acknowledged that if the land had been non-Indian fee land, the general rule would exempt the road from tribal jurisdiction – tribes lack authority over the conduct on nonmembers on non-Indian fee land within a reservation.

The district-court cases the Longs cite in support of this argument – Malaterre, Fidelity, Warn, and Tom's – are wholly inapposite. Malaterre v. Amerind Risk Mgmt., 373 F. Supp. 2d 980 (D.N.D. 2005); Fidelity & Guarantee Ins. Co. v. Bradley, 212 F. Supp. 2d 163 (W.D.N.C. 2002); Warn v. Eastern Band of Cherokee Indians, 858 F. Supp. 524 (W.D.N.C. 1994); and Tom's Amusement Co., Inc. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993). All four are exhaustion cases. None of them firmly establish tribal-court jurisdiction to adjudicate tort claims against a nonmember defendant based on a consensual relationship. Cheromiah, on the other hand, does not even directly address an actual question of tribal-court jurisdiction. Cheromiah v. U.S., 55 F. Supp. 2d 1295 (D.N.M. 1999). It merely analogizes to tribal-court jurisdiction in analyzing a choice-of-law issue. Cheromiah is therefore inapplicable to the present case.

6. Tribal-court jurisdiction over claims against nonmember defendants arising out of non-Indian fee land – if it even exists – is no broader than necessary to protect tribal self-government or to control internal relations.

There is no dispute that the land in this case was non-Indian fee land. If neither of the Montana exceptions apply, then the tribal court lacks jurisdiction over the Bank. As the Longs acknowledge, the second exception is inapplicable here. That leaves a narrow but important question for this Court to resolve. Does a tribal court have civil adjudicatory jurisdiction over a nonmember defendant to litigate tort claims as an "other means" of regulating a consensual relationship regarding non-Indian fee land? This Court's decisions in Montana, Strate, and Hicks suggest – but do not definitively resolve – that the tribal court here lacked jurisdiction over the Longs' claim against the Bank.

CONCLUSION

Plains Commerce Bank respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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