No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Indian tribal courts inherently lack jurisdiction to hear claims between members and nonmembers. In Montana v. U.S., 450 U.S. 544, 565 (1981), this Court identified two narrow exceptions. The first relates to regulation of nonmembers who enter into consensual relationships with the tribe or its members. The second relates to civil authority concerning activity that directly affects the tribe's political integrity, economic security, health, or welfare. This Court, however, has never upheld tribal-court, civil-adjudicatory jurisdiction over a nonmember defendant under the first Montana exception, and expressly left this question open in Nevada v. Hicks, 533 U.S. 353, 360 (2001).

The question presented is:

Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation?[1]

[1] Petitioner made two additional arguments to the Eighth Circuit Court of Appeals that it is explicitly not asking this Court to review. Namely, that tribal courts lack jurisdiction to adjudicate claims based on federal law and that the tribal court's judgment should be denied comity because the Bank was denied due process.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

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

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Plains Commerce Bank respectfully petitions this Court for a writ of certiorari to review the June 26, 2007 Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit. The circuit court affirmed the district court's grant of summary judgment for Respondents, holding that the Cheyenne River Sioux Tribal Court has subject-matter jurisdiction over Respondents' claims against Petitioner because of inherent tribal authority to regulate nonmembers' activities arising out of consensual relationships with tribal members.

OPINIONS BELOW

The June 26, 2007 Opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at Plains Commerce Bank v. Long Family Land & Cattle Company, Inc., 491 F.3d 878 (8th Cir. 2007), and is reprinted in the Appendix to this Petition, pp. A-1 through A-23. The prior opinion of the United States District Court for the District of South Dakota, entered July 17, 2007, is reported at Plains Commerce Bank v. Long Family Land & Cattle Company, Inc., 440 F. Supp. 2d 1070 (D.S.D. 2006), and is reprinted in the Appendix to this Petition, pp. A-24 through A-44.

The prior decision of the Cheyenne River Sioux Tribal Court of Appeals, case number 03-002-A, entered November 22, 2004, is unreported, and is reprinted in the Appendix to this Petition at pp. A-45 through A-68. The prior decisions of the Cheyenne River Sioux Tribal Court, case number R-120-99, entered February 18, 2003, and January 3, 2003, respectively, are unreported, and are reprinted in the Appendix to this Petition at pp. A-69 through A-71 and pp. A-72 through A-83.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal courts have jurisdiction to review tribal jurisdiction pursuant to 28 U.S.C. § 1331, which provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

See Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53 (1985).

STATEMENT OF THE CASE

Petitioner Plains Commerce Bank ("Bank") is a South Dakota banking corporation. The Bank is wholly owned by tribal nonmembers. It loaned money to Respondent Long Family Land and Cattle Company, Inc. ("Long Company"), which also is a South Dakota corporation. Fifty-one percent of the Long Company is owned by Respondents Ronnie Long and Lila Long ("The Longs"), who are both members of the Cheyenne River Sioux Tribe ("CRST").

On December 5, 1996, the Bank and the Long Company entered into two agreements signed at the Bank's off-reservation offices: a loan agreement providing that the Bank would loan money to the Long Company upon certain conditions, and a two-year lease with the option to purchase certain ranching real estate on the CRST reservation owned

by the Bank, which had served as collateral for the Bank and was transferred to the Bank in lieu of foreclosure by a non-tribal member.

The Long Company continued in possession of this ranching real estate during the two-year term of the lease. The Long Company never exercised its option to purchase. After the lease expired on December 5, 1998, the Long Company continued to hold over and occupy a portion of this real estate. The Bank subsequently moved to sell the remaining unoccupied portion of the real estate in two parcels and, in June 1999, sought to serve a Notice to Quit on the Long Company as a prerequisite to an action for forcible entry and detainer it filed in South Dakota Circuit Court.

Because off-reservation process servers cannot effectuate valid service on the CRST reservation, the Bank sent the notice to the CRST Tribal Court ("Tribal Court") asking that the Tribal Court authorize service. The Notice was then served by a tribal process server. In response, Ronnie and Lila Long commenced the underlying Tribal Court action, seeking a temporary restraining order barring the Bank from completing the sales of the remaining parcels of the real estate. The Bank denied Tribal Court jurisdiction and sought dismissal. The Tribal Court upheld jurisdiction and did not dismiss the Complaint.

The Longs then amended their Complaint, added the Long Company as a Plaintiff, and asserted several additional causes of action – including discrimination and breach of contract. The Bank answered, again denying Tribal Court jurisdiction. It then stated a Counterclaim in the alternative, "in the event the Court finds that it does have jurisdiction," seeking eviction of the Long Company from the real estate it continued to hold and damages for holding over under the lease.

The parties tried the matter before a Tribal Court jury. The jury returned a general verdict against the Bank in the amount of $750,000.00 plus interest. On post-trial motions, the Tribal Court upheld jurisdiction over the Bank, added interest to the judgment, and gave the Long Company an option to purchase the remaining held-over land owned by the Bank for a sum to be offset against the judgment against the Bank.

The Bank appealed this judgment to CRST Court of Appeals ("Tribal Court of Appeals"). The Tribal Court of Appeals affirmed the Tribal Court judgment, holding in particular that the Tribal Court had jurisdiction.

The Bank then filed suit in the United States District Court for the District of South Dakota, seeking a declaration that the Cheyenne River Sioux Tribal Court lacked subject-matter jurisdiction to adjudicate Respondents' claims against Petitioner. The United States District Court for the District of South Dakota had jurisdiction over the matter pursuant to 28 U.S.C. § 1331. The court decided the parties' cross-motions for summary judgment finding no genuine issue of material fact and that Respondents were entitled to judgment as a matter of law. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. The Eighth Circuit Court of Appeals affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

This Court should review the judgment of the United States Court of Appeals for the Eighth Circuit because the judgment's expansion of tribal-court, civil-adjudicatory jurisdiction over nonmember defendants is inconsistent with

this Court's pathmarking jurisdictional precedents. Even assuming, for the sake of argument, that the nonmember Bank had a consensual relationship with tribal members so as to subject it to some level of tribal regulation under the first Montana exception, the tribal court lacked civil-adjudicatory jurisdiction to entertain tribal tort claims brought by tribal members against the Bank as a defendant. Such an exercise of tribal-court, civil-adjudicatory power exceeds the scope of tribal regulatory power, which extends only to what is necessary to protect tribal self-government or to control internal relations and is limited to taxation, licensing, or similar legislative controls. The scope of tribal regulatory power over nonmembers under the first Montana exception is not co-extensive with the narrower scope of civil-adjudicative power under the second Montana exception. Moreover, the land out of which the dispute arose, although within the tribal reservation, was fee land owned by the Bank.

1. The Eighth Circuit's holding that the tribal court had jurisdiction over the Bank is irreconcilable with the governing general principle: the inherent sovereign powers of a tribe do not extend to the activities of nonmembers.

In analyzing tribal-court jurisdiction regarding a dispute between tribal members and nonmembers, the starting point is that tribes, with their diminished status as sovereigns, have lost any "right of governing every person within their limits except themselves." Oliphant v. Suquamish Indian Tribe, 435 U.S.191, 205 (1978) (holding that Indian tribes lack criminal jurisdiction over nonmembers). This Court's decisions have adhered to the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana v. U.S., 450 U.S. 544, 565 (1981) (holding tribe had no power to regulate nonmember fishing and hunting on reservation land

owned in fee by nonmembers of the tribe). This is because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564.

In Montana, this Court established two exceptions to the general rule that tribes lack jurisdiction over nonmembers. First, tribes may regulate activities of nonmembers who enter consensual relationships (such as commercial dealings, contracts, or leases) with the tribe or its members through taxation, licensing, or other – presumably similar – means. Id. at 565. Second, tribes may exercise civil authority over nonmembers on fee lands within their reservations when nonmember conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 566. "The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health or welfare." Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997) (holding tribal court lacked jurisdiction over tort claims in civil action against nonmembers arising out of accident on non-fee land on reservation).

The case at bar concerns only the first Montana exception. The district court and the circuit court did not find tribal-court jurisdiction under the second Montana exception. The agreements at issue between the Bank and the Long Company, both South Dakota corporations, regarding fee land owned by the Bank on the reservation simply does not implicate tribal integrity.

As this Court noted in Hicks, under the first Montana exception, the ownership status of land is "a factor significant

enough that it 'may sometimes be . . . dispositive'" in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations. Nevada v. Hicks, 533 U.S. 353, 370 (2001) (holding that tribal court did not have jurisdiction to adjudicate tort claims against nonmember state official executing process on tribal fee lands). Indeed, prior to Hicks, "with one minor exception" the absence of tribal ownership had been virtually conclusive of the absence of tribal jurisdiction (the exception being Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408 (1989), which upheld tribal authority to impose zoning regulation on fee land within the reservation owned by nonmembers). Hicks, 533 U.S. at 360. And in terms of civil-adjudicative authority, this Court has never upheld tribal-court jurisdiction regarding tort claims asserted against a nonmember defendant arising out of fee lands on the reservation owned by the nonmember. Because this is the precedent established by the circuit court's opinion in this case, and because that precedent is inconsistent with this Court's decisions in Montana, Strate, and Hicks, this Court should grant review.

Practically speaking, the Eighth Circuit's decision blurs the lines of an Indian tribe's authority to regulate, as opposed to adjudicate, nonmember activities on non-Indian fee lands on a reservation. This Court defined and limited tribal authority to regulate and adjudicate the activities of nonmembers in Montana as two narrow exceptions to the general rule that tribes lack inherent sovereign authority to regulate or adjudicate the activities of nonmembers.

But the circuit court determined that tribes may "regulate" nonmember activities falling within the first Montana "consensual relationship" exception by holding that nonmembers are subject to tribal-court jurisdiction as an "other means" of regulating nonmember conduct. As a result,

the first Montana exception now envelops the second Montana exception, which limited the scope of tribal civil authority over nonmembers to only those circumstances that threaten or directly affect the tribe's political integrity, economic security, or health and welfare – circumstances clearly not implicated by a private commercial agreement between a nonmember Bank and a South Dakota corporation owned by tribal members.

Indian tribe civil authority over nonmembers has been expanded exponentially by the Eighth Circuit's decision – a result seemingly at odds with this Court's prior decisions and the framework established by Montana and its progeny.

2. The Eighth Circuit's Decision Erroneously Extends The First Montana Exception Thereby Subjecting Nonmember Defendants To Tribal-Court Jurisdiction In Vastly Expanded Circumstances.

Montana established the controlling analysis courts must apply when determining the existence of tribal authority over nonmembers. As a general rule, Montana counsels that tribes lack jurisdiction over nonmembers because of their reduced sovereign status. Montana, 450 U.S. at 565 ("the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). But recognizing 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," this Court carved out two narrow exceptions to this rule. Id.

While Montana is generally considered the "pathmarking case" establishing the confines of Indian tribe regulatory and civil authority over nonmembers, its roots sprang from Oliphant, in which this Court generally determined that tribes lack criminal jurisdiction over nonmembers. Hicks, 533 U.S. at 358. The principles relied

upon by this Court in Oliphant to limit tribal jurisdiction over nonmembers in the criminal context have been repeated and applied in the regulatory and civil authority contexts under the Montana framework.

In Hicks, this Court reiterated the teachings in Oliphant that "[w]here nonmembers are concerned, the exercise of tribal authority beyond what is necessary to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 359. Indeed, Montana acknowledges that while "Oliphant determined only inherent criminal authority in tribal matters, the principles on which it relied support 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 358-59.

Here, the Eighth Circuit held that Plains Commerce Bank, a nonmember owning fee land on a reservation, subjected itself to tribal-court jurisdiction for a tribal discrimination tort claim by entering into an agreement with a member-owned South-Dakota corporation. By doing so, the circuit court created a loophole under the first Montana exception. Nonmembers like the Bank may now unknowingly be subjected to tribal claims in tribal court under the auspices of a tribes' authority to regulate consensual agreements by "other means."

The circuit court's holding necessarily permits tribal members to end-run the tribe's civil-adjudicatory authority defined and limited by the second Montana exception and the overarching principle taught by Oliphant – exercise of tribal authority over nonmembers beyond what is necessary to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Hicks, 533 U.S. at 360.

a. The Eighth Circuit's decision makes tribal regulatory and adjudicatory jurisdiction co-extensive under the first Montana exception and subjects nonmembers to tribal court and tribal law – an issue this Court expressly left open in Hicks.

The fundamental problem created by the Eighth Circuit's decision is that now whenever a consensual relationship is entered into between a tribal member and nonmember, the nonmember will be generally subjected to tribal-court jurisdiction for seemingly any type of non-criminal tribal claim as long at it relates, albeit even remotely, to the consensual relationship. As a threshold issue, this Court has never held a non-Indian subject to the jurisdiction of a tribal court:

> Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As Justice Souter's separate opinion demonstrates, it surely deserves more considered analysis.

Hicks, 533 U.S. at 374. The circuit court's decision in the present case, however, summarily decides this question in the affirmative.

Significantly, while the circuit court properly recognized that a non-member's consensual relationship in one area "does not trigger civil authority in another," having determined a consensual relationship existed between the

Bank and the Longs, it improperly relied upon the "other means" language of the first Montana exception to hold that tribal-court jurisdiction is an "other means" of regulating non-member conduct when a consensual relationship has been formed between a member and nonmember:

> We see no reason why a tribal tort cannot be applied against a nonmember in that narrow set of circumstances where the consensual relationship is otherwise completely satisfied. We therefore conclude that under Montana, the Tribe had inherent authority to regulate the bank's conduct arising out of its consensual relationship with the Longs by subjecting it to liability for tortious discrimination.

Plains Commerce Bank, 491 F.3d at 887-88.

If the circuit court's expansive definition of "other means" is accepted, so as to permit tribal-court adjudication of claims between members and nonmembers anytime a consensual relationship is determined to exist between a tribal member and nonmember, the first Montana exception necessarily engulfs the second exception and dramatically shrinks the general rule that nonmembers are not subject to tribal jurisdiction.

b. The circuit court's analysis renders the second Montana exception purposeless.

The Eighth Circuit's holding rests upon an over-expansive interpretation of the language "other means" set forth in the first Montana exception. By determining tribal-court adjudicatory authority to be an "other means" of regulating the conduct of nonmembers under the first Montana exception, the circuit court's decision renders the second exception, which limited a tribe's "civil authority"

over nonmembers to matters implicating only the political integrity and internal relations of a tribe, unnecessary.

As discussed above, the first Montana exception contemplates a tribe's authority to regulate nonmembers while the second exception contemplates a tribe's inherent power to exercise civil authority over nonmembers. Montana, 450 U.S. at 565-66. In Hicks and Strate this Court made clear that "[a]s to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority." Hicks, 533 U.S. at 353, citing Strate, 520 U.S. at 453. But this Court has never held that "tribal regulatory and adjudicatory jurisdiction are coextensive." Hicks, 533 U.S. at 374. Yet that is precisely what the circuit court has implicitly held here.

At issue is a private commercial agreement that existed between a nonmember Bank owning fee land on a reservation, and a member-owned South Dakota Corporation. The second Montana exception is patently inapplicable here, as in Hicks, because "[s]elf-government and internal relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not only to their own members, but to a narrow category of outsiders." Hicks, 533 U.S. at 371.

The tribe's authority to regulate the nonmember Bank under the first Montana exception is, at most, no broader than the scope of authority under the second "civil authority" exception. See Hicks, 533 U.S. at 367. Because the tribe lacked civil authority over Plains Commerce Bank under the second Montana exception, the tribe necessarily lacked authority to adjudicate tribal tort discrimination claims against Plains Commerce Bank under the first Montana exception as an "other means" of regulating the Bank's conduct. See id. at 374 ("Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a

non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As Justice Souter's separate opinion demonstrates, it surely deserves more considered analysis").

If upheld, the circuit court's decision would have the anomalous effect of rendering the tribal civil-authority limitation espoused in the second Montana exception meaningless. Tribal members would be free to pursue tribal claims against nonmembers under the auspices of an "other means" of regulating nonmember conduct under the first Montana exception – exactly what has happened here. Surely the Court did not have this in mind when it created the two narrow Montana exceptions differentiating the scope of a tribe's regulatory and civil authority over nonmembers.

3. The Eighth Circuit's Decision Extends Tribal Jurisdiction Over Nonmembers To Non-Indian Owned Fee Lands – A Result Inconsistent With This Court's Prior Decisions.

As a result of the circuit court's decision, non-Indians owning fee land on a reservation may now generally be subject to tribal civil and regulatory authority – a result repeatedly proscribed by this Court.

"Both Montana and Strate rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not assert a landowner's right to occupy and exclude." Hicks, 533 U.S. at 359. And while the "general rule of Montana applies to both Indian and non-Indian owned land ... [and] ownership status of land ... is only one factor to consider in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or

to control internal relations ... [it] may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction with one minor exception we have never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land." Id. at 360.

Here, the land at issue is non-Indian fee land on a reservation. Even if the Eighth Circuit properly determined that Long Company, a member-owned South Dakota corporation was, in effect, a "tribal member," and that the nonmember Bank entered into a consensual or commercial relationship with it, neither the first nor second Montana exceptions apply because the land at issue is not Indian-owned. Stated differently, because the tribe lacked authority to exclude or occupy the non-Indian fee land at issue, it lacked the authority to regulate it as well, which also precludes it from regulating the activities of nonmembers concerning the land by any "other means" – including subjecting the Bank to tribal court and tribal law.

CONCLUSION

The Eighth Circuit Court of Appeals' opinion in this case greatly expands the scope of tribal-court jurisdiction available under the first Montana exception. This expansion cannot be reconciled with this Court's decisions interpreting that exception. The Bank, as a tribal nonmember owning non-Indian fee land within a reservation, was subjected to tribal tort claims in tribal court as an "other means" of regulating the conduct of nonmembers who enter a consensual relationship with a member-owned, South Dakota corporation. The balance struck by the two narrow exceptions carving out tribal regulatory and adjudicatory authority over nonmembers set forth in Montana and its progeny has been undone. As a result of the circuit court's decision, a tribe's

authority to regulate the conduct of nonmembers has been made co-extensive with its civil authority to adjudicate claims against nonmembers – an issue this Court has, to date, left unanswered.

Whether a tribal court has jurisdiction over nonmembers, and, if so, to what extent, are questions this Court must decide, as any answer will have far-reaching impact. Accordingly, Plains Commerce Bank respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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Dated: September 21, 2007

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