No. 07-411

IN THE
SUPREME COURT OF THE UNITED STATES

PLAINS COMMERCE BANK,
Petitioner,
v.
LONG FAMILY LAND & CATTLE CO.,
RONNIE LONG, LILA LONG,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads ("AAR") is a non-profit national trade association whose members include the Nation's major railroads. AAR appears in this case as an *amicus curiae* because its members have a vital interest in ensuring that their property interests and their activities within Indian reservations and across Indian lands are subject to clear jurisdictional rules that will not hinder the railroads' ability to provide efficient and cost-effective interstate rail service. AAR represents its member railroads before courts, agencies, and the United States Congress on matters of common concern to its members. It has filed previous briefs *amicus curiae* before this Court.[2] All parties have consented to AAR's *amicus* participation.

AAR's members include intercity passenger, commuter, and freight railroads. The freight railroad members operate 72 percent of the line-haul mileage,

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity other than *amicus curiae* or its members has made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Norfolk S. Ry. v. Sorrell*, 127 S.Ct. 799 (2007); *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 128 S.Ct. 467 (2007); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14 (2004); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000); *Burlington N. R.R. v. Blackfeet Tribe*, No. 91-545 (U.S. Nov. 1, 1991), *cert. denied*, 505 U.S. 1212 (1992); *S. Pac. Transp. Co. v. Hernandez*, No. 91-293 (1991) *cert. denied*, 502 U.S. 952 (1991); *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

employ approximately 92 percent of the workers, and account for approximately 95 percent of the freight revenues of all railroads in the United States. In addition, some AAR member railroads operate on longstanding rights-of-way that cross a number of Indian reservations in the United States, and some of their rail lines also traverse areas located adjacent to Indian reservations, but within areas over which Indian tribes or groups assert civil jurisdiction.

It is critical to AAR members—and indeed, to all businesses in, or considering doing business in, areas potentially subject to tribal jurisdiction—to be able to determine efficiently which sovereign has jurisdiction over their activities and the law that will be applied. The decision below, by concluding that agreements that do not provide clear and unequivocal consent supported tribal court tort jurisdiction against a nonmember and that an unwritten tribal law authorized a substantial civil damage award, injects further risk into an already difficult jurisdictional calculus.

Because railroads may have few choices but to do business in relation to tribal lands or areas (rail lines generally cannot be abandoned without Surface Transportation Board approval), railroads have a particular need to voice their concerns about the decisions rendered below. Unlike banks, which may be able to choose whether to do business with tribes or their members, railroads often have limited options under federal law. The Nation's railroads, as common carriers, are required by federal law to transport interstate freight on their rails upon

reasonable request. *See, e.g.,* 49 U.S.C. § 11101. Rail lines often traverse Indian reservations or other lands on which tribes claim jurisdiction; and, in such circumstances, railroads are essentially required to interact with the Indian tribes to gain access to their rail lines to fulfill their common carrier obligations and to perform maintenance and other federally mandated activities. *See, e.g.,* 49 CFR §§ 213.233-237. Such interaction should not be deemed consent by a railroad to tribal court jurisdiction or the application of tribal laws. America's railroads, therefore, highlight a greater need for clear guidance as to the level of consent required to submit to the jurisdiction of tribal courts.

While this Court's previous decisions seek to limit tribal jurisdiction in reasonable ways, uncertainty regarding the proper scope of tribal jurisdiction over nonmembers under the first exception of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), has made it difficult to determine the proper forum and ascertain the applicable laws, regulatory requirements, and taxes. This uncertainty discourages business investment and economic development in Indian country.[3]

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[3] This brief uses the term "Indian country" in a descriptive rather than legal sense to refer to geographic areas over which tribes assert civil adjudicatory authority and, thus, potentially affect the jurisdictional uncertainty that is the focus of this proceeding. Tribes assert judicial jurisdiction over broad categories of lands, including reservation and non-reservation areas, and member and nonmember-owned lands and rights-of-way, broader categories of lands than are provided by the legal definition of Indian country in 18 U.S.C. § 1151. In any event, the Court has cautioned that the term "Indian country," as

SUMMARY OF ARGUMENT

As evidenced by the Court of Appeals' decision below, lower courts are misapplying this Court's opinions guiding the determination of the appropriate forum for resolution of disputes arising in Indian country. The Court should clarify the proper scope of tribal court jurisdiction over actions against nonmembers, and simplify the applicable standard in a fashion consistent with precedent, so that the courts, nonmembers, and tribes and their members may predict confidently whether tribal courts have jurisdiction.

Although this Court's recent decisions have sought to clarify the narrow scope of tribal court jurisdiction and bring rationality to dispute resolution in Indian country, its message has often gone unheard by the lower federal courts and some state and tribal courts. The courts below erred. They disregarded the general rule of *Montana v. United States*, 450 U.S. 544, 564 (1981), that tribes lack inherent jurisdiction over nonmembers. They improperly expanded the intended scope of the first *Montana* exception to permit tribal court adjudication of claims against a nonmember without clear consent to that jurisdiction, finding a consensual relationship "of the qualifying kind," *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997),

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defined by 18 U.S.C. § 1151, "simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001).

without any indication of express consent to tribal court adjudication or the application of tribal law.

Since Chief Justice John Marshall's early opinions, this Court consistently has premised its relevant jurisdictional standards on the fundamental principles that Indian tribes retained inherent jurisdiction sufficient to govern their internal affairs and tribal governments presumptively lack power over nonmembers. *See, e.g., Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823) (recognizing the "perfect independence" of broader society from tribal governance); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 517, 558-59 (1831) (acknowledging the right of self-government); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (tribes "have power to make their own substantive law in internal matters and to enforce that law in their own forums") (citation omitted). In a corollary principle, the Court has found consent to be a critical component of inherent tribal jurisdiction over nonmembers. *See Duro v. Reina*, 495 U.S. 676, 693 (1990), *superseded by statute*, Indian Civil Rights Act, Pub. L. No. 101-511, Act of Nov. 5, 1990, *as recognized by United States v. Lara*, 541 U.S. 193, 198-99 (2004).

This Court's opinions support a simple and clear rule to define what constitutes a qualifying consensual relationship to establish tribal court jurisdiction: Tribal courts lack inherent jurisdiction over claims against a nonmember absent the nonmember's clear and unequivocal consent to tribal court jurisdiction. Such a rule would ensure that tribal court jurisdiction over nonmembers will be

asserted only based on express agreement and would provide certainty to all concerned. And, such a rule will not undermine the ability of tribes and their members to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

ARGUMENT

Dispute resolution in Indian country is fraught with uncertainty, leaving tribes, residents, and the business community without guidance to determine jurisdiction efficiently. The question presented here, whether "other means" of tribal regulatory jurisdiction are so broad as to permit tribal adjudicatory jurisdiction over tort claims against nonmembers, exemplifies the current dysfunction. Lower court decisions frequently find a consensual relationship despite facts indicating tribal court jurisdiction either was not contemplated or was affirmatively rejected in the parties' dealings or agreements. Consequently, nonmembers cannot predict confidently whether they may be subject to tribal court jurisdiction and, once there, what law may apply or what rights they may have. The Court should reverse the decisions below and set clear standards that guide parties' and courts' determination of the forum and the law in Indian country. This case presents the opportunity for this Court to clarify that tribal courts may not exercise jurisdiction over claims against nonmembers absent clear and unequivocal consent to tribal court jurisdiction and, if applicable, tribal law.[4]

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[4] This standard is derived from *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S.

I. THIS COURT SHOULD CLARIFY AND SIMPLIFY *MONTANA*'S TEST TO DETERMINE TRIBAL COURT JURISDICTION OVER NONMEMBERS.

The issue here is whether a qualifying consensual relationship supporting tribal court jurisdiction can be established without clear and unequivocal consent. The Court in *Montana* established an outer boundary of tribal civil authority over nonmembers, holding that unless one of the two *Montana* exceptions is present, tribes lack inherent authority over nonmembers. *Montana v. United States*, 450 U.S. 544, 564-66 (1981). Under the first exception, "[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." *Id.* at 565-66 (citation omitted). Under the second exception, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citation omitted). Unless one of those two exceptions applies, sovereign authority over nonmembers, exercised

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411, 418-19 (2001), which held that an arbitration agreement satisfied the Court's standards for "clear[ly]" and "unequivocally" waiving tribal sovereign immunity. As discussed in Point III., *infra*, the same standards should apply here.

when a tribal court adjudicates disputes involving nonmembers, "cannot survive without express congressional delegation." *Id.* at 564. The first exception is at issue here.

This Court's recent decisions have sought to clarify the narrow scope of tribal court jurisdiction under the *Montana* exceptions and simplify the process by which courts may determine the scope of tribal court jurisdiction. Yet many lower federal courts and tribal and state courts have missed the point. As a result, tribes, tribal members, and nonmember parties embroiled in disputes continue to endure years of litigation just to determine the applicable court and law.

As demonstrated in Point I.A, the two *Montana* exceptions preclude tribal court jurisdiction unless the nonmember has expressly consented. Under Point I.B, below, AAR demonstrates that some federal and state courts continue to find consensual relationships based on transactions or interactions between a nonmember and a tribe or tribal members, notwithstanding the absence of the nonmember's consent. Frequently, they fail to glean the intent of the Court's decisions, *see, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 451-452 (1997), to narrow broad language in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).[5] Resulting decisions, such as the

[5] The erroneously broad perception of the jurisdiction afforded tribal courts under the consensual relationship exception also has led courts to persist in applying a "general rule of

decision under review here, have stood the presumption *against* tribal court jurisdiction on its head.

A. This Court's *Montana* Jurisprudence Contemplates Clear Consent As A Condition To Tribal Court Jurisdiction Over Nonmembers.

The Court's cases addressing the scope of the *Montana* exceptions make plain that nonmembers are not subject to tribal court tort claims absent their clear and unequivocal consent to tribal court jurisdiction and tribal law. In *Nevada v. Hicks*, 533 U.S. 353, 361 (2001), the Court reinforced the law

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exhaustion" of tribal court remedies, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), instead of the "prudential rule" articulated and narrowed in *Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997) ("In sum, we do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'"). Despite the Court's ruling in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 420 (2001), lower courts have required tribal court exhaustion instead of enforcing contracts requiring arbitration. *See, e.g., Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi*, 401 F.Supp. 2d 952, 958 (N.D. Iowa 2005) (requiring exhaustion of tribal remedies, despite arbitration clause and agreement that any dispute about arbitrability would be submitted first to a federal court, and relying on *Iowa Mutual* in concluding, "'civil jurisdiction over the activities of non-Indians on reservations [sic] lands presumptively lies in tribal courts, unless affirmatively limited by a specific treaty provision or federal statute'" (citation omitted)).

that tribal jurisdiction over nonmembers "must be connected to that right of the Indians to make their own laws and be governed by them." The Court stated that *Montana's* first exception contemplated a "*private consensual* relationship." *See id.* at 359 n.3 (emphasis in original). Justice Scalia's majority opinion explained *Montana* "was referring to private individuals who *voluntarily submitted themselves* to tribal regulatory jurisdiction by arrangements that they (or their employers) entered into." *Id.* at 372 (emphasis added).

Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001), also illuminates the Court's first exception analysis, holding a nonmember trader and hotel operator was not required to collect and remit Navajo hotel occupancy tax. Its acquisition of a federal Indian trader license permitting it to transact business within the Navajo Nation did not provide a qualifying consensual relationship. *Id.* at 656-57. "Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'" *Id.* at 657.[6]

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[6] *Atkinson*'s analysis of *Montana*'s second exception also is instructive. *Atkinson* rejected tribal taxing power because the hotel operator's drain on tribal resources did not meet *Montana*'s standard of being "so severe that it actually 'imperils' the political integrity of the Indian tribe." *Id.* at 657-58 (*quoting Montana*, 450 U.S. at 566).

Atkinson and *Nevada* followed the Court's emphasis in *Strate v. A-1 Contractors* on the practical need for the asserted tribal jurisdiction to preserve tribal self-government. *Strate* rejected the notion that tribal court tort jurisdiction could be founded on a subcontract agreement between A-1 and the Three Affiliated Tribes for work to be performed on the reservation. 520 U.S. at 457-58. Although A-1 had a "consensual relationship" with the Tribes, the injured plaintiff was not a party to the contract, and the Court found "no 'consensual relationship' of the qualifying kind." *Id.* at 457. More instructive is Justice Ginsburg's rationale for a unanimous Court, rejecting jurisdiction over a tort action based on *Montana's* second exception:

> Key to its proper application is the [*Montana*] Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." The *Montana* rule,

> therefore, and not its exceptions, applies to this case.

Id. at 459 (citation omitted)(brackets in original). Consequently, the Court held that, since the injured plaintiff might pursue her claim in the state court, "[o]pening the Tribal Court for her optional use is not necessary to protect tribal self-government." *Id.*

A single principal arises from this foundation: A tribal court's assertion of jurisdiction under *Montana* must be founded on the express consent of the nonmember, unless, notwithstanding the availability of state or federal judicial remedies, tribal court jurisdiction over a tort action against a nonmember is necessary to address conduct that imperils tribal internal self-government. A nonmember does not provide the consent required by merely engaging in business dealings with a tribe or tribal member.

B. Federal, State And Tribal Court Decisions Do Not Comport With *Montana*'s Clear Consent Requirement.

The lower federal courts, state courts, and tribal courts have not followed this Court's law requiring clear consent, creating a minefield of jurisdictional traps for even cautious businesses. Their decisions reflect the need for this Court to clarify and simplify *Montana*'s first exception.[7]

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[7] Nothing underscores more sharply the need to clarify the *Montana* rule than the very recent decision of Judge Charles Kornmann of the United States District Court for the District of

1. The Decisions Below Demonstrate The Need To Clarify And Simplify The Consensual Relationship Exception.

The decisions below exemplify the difficulties businesses face. The Cheyenne River Sioux tribal courts found they had jurisdiction over tort claims against a nonmember defendant that had entered into a contract with a South Dakota corporation, although the contract did not expressly or impliedly consent to tribal court jurisdiction. Indeed, the Bank's contract was not with the Tribe or a tribal member. Rather, the courts below held the tangential facts that the South Dakota corporation

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South Dakota, who entered the trial court decision in this case and plainly seeks guidance from this Court. Reflecting on the Eighth Circuit decision and this Court's issuance of its writ of *certiorari*, Judge Kornmann wrote:

> As I read the appellate opinion, I was struck by the fact that such opinion would clearly and substantially broaden the jurisdiction of tribal courts in the Eighth Circuit. It would allow tribal courts to decide what common law principles were to be applied in tribal courts. This would be a significant expansion of tribal court jurisdiction in civil cases. In the past few days I have noted that the United States Supreme Court has granted the petition of Plains Commerce for a writ of certiorari. Apparently, we will have further guidance from the Supreme Court.

Farmers Union Oil Co. v. Guggolz, No. Civ. 07-1004, 2008 U.S. Dist. LEXIS 5338, at *18 (D.S.D. Jan. 24, 2008).

was Indian-owned and the tribal member owners had had prior dealings with the Bank supplied a qualifying consensual relationship sufficient to support tribal court jurisdiction over tort claims against the Bank under the first *Montana* exception. The tribal appellate court found it had jurisdiction to impose a substantial money judgment against a nonmember defendant based on two unwritten Lakota customs that were never mentioned in the tribal trial court and were established solely by the Tribe's argument in a brief *amicus curiae*. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F.Supp. 2d 1070, 1081 (D.S.D. 2006). The federal district and appellate courts affirmed.

By treating tribal courts as capable of imposing tort remedies against nonmembers without their consent, the courts below misperceived this Court's carefully crafted delineation of the scope of tribal powers. The record below disclosed nothing that could be argued to have provided affirmative consent to tribal court jurisdiction. Accordingly, the courts below ignored this Court's guidance to consider whether the conduct alleged to support the consensual relationship reflected consent to tribal court jurisdiction.[8]

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[8] *See Atkinson*, 532 U.S. at 657 ("Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'"). Nor did the courts below address whether state courts could afford an adequate remedy. *See Strate*, 520 U.S. at 459 (state courts were available for plaintiff's "optional use").

2. In Fashioning Its Standard, This Court Should Consider The Range Of 'Nightmares' That Continue To Arise In Federal, State And Tribal Courts.

The startling decision in *First Specialty Insurance Corp. v. Confederated Tribes of the Grande Ronde Community of Oregon*, found a consensual relationship despite the parties' stipulation to non-tribal dispute resolution. No. 07-05-KI, 2007 U.S. Dist. LEXIS 82591 at *9-*10 (D. Or. Nov. 2, 2007). This case illustrates the type of "procedural nightmare" the Court's opinion in this case should address. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). In *First Specialty*, the tribes filed securities claims against their financial and investment advisor in state court, even though the relevant agreement provided for arbitration to resolve disputes. 2007 U.S. Dist. LEXIS 82591 at *3. The investment company prevailed in state court, which ruled that all parties were subject to binding arbitration. *Id.* Then, the arbitration panel dismissed the tribes' claims and awarded the investment company $1.4 million in attorneys' fees and costs, plus interest. *Id.* at *3-*4. The tribes then sought to have that award set aside in tribal court. *Id.* at *4. The tribal court vacated the arbitration award. *Id.* The federal district court upheld the tribal court, finding the tribal court had jurisdiction under *Montana*'s first exception, because the contract containing the arbitration agreement and the dealings under that

agreement formed a "consensual relationship" with the Tribe. *Id.* at *9-*10.

Similarly ignoring any consideration of whether the nonmember had expressed consent to tribal court, as compared to a relationship with a tribe or tribal member, is *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997). The court found that a nonmember company that engaged in a course of business dealings with a tribe had a consensual relationship sufficient to subject it to tribal adjudicative jurisdiction, even though no tribal court existed at the time the agreements were formed. *Id.* at 64. There was no contemplation of or consent to tribal court jurisdiction—nor could there have been because the tribe had no tribal court during all but the last three months of the five-year commercial relationship. *Id.* at 63-64. And, without any indication of any relationship consenting to tribal court, the court in *Philip Morris USA Inc. v. King Mountain Tobacco Co.*, No. CV-06-3073-RHW, 2006 U.S. Dist. LEXIS 87181, *11 (E.D. Wash. Dec. 1, 2006), held it was unclear under *Montana* whether Philip Morris's efforts to protect its trademarks by sending cease-and-desist letters to tribal members created a consensual relationship subjecting it to tribal court jurisdiction. Consequently, the court required the company to exhaust tribal court remedies on that question. *Id.*

State court litigants also fall prey to courts' misapprehension of the proper application of *Montana*'s consensual relationship exception. In

Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana, 965 So.2d 930, 937 (La. App. 3 Cir. 08/08/07), *cert. granted*, 2007-CC-2256, La. S. Ct. (02/15/2007), a Louisiana Court of Appeal found a "consensual relationship" sufficient to require exhaustion of tribal court remedies based on an agreement expressly requiring that all disputes should be resolved in state, not tribal, court and under state law. It required exhaustion of tribal remedies on the tribe's claims that it had not validly waived sovereign immunity. *Id.* at 937-38.

Such holdings illustrate the need for a clean and simple standard that will guide courts and prevent this range of misapplication of *Montana*'s first exception. The Court should clarify that, if tribal adjudicatory jurisdiction over tort claims against nonmembers can be premised on a consensual relationship, the consent must be clear and unequivocal.

II. THE PROPER SCOPE OF INHERENT TRIBAL JURISDICTION OVER NON-MEMBERS IS LIMITED; TRIBAL COURT JURISDICTION SHOULD NOT EXTEND TO NONMEMBERS ABSENT CLEAR AND UNEQUIVOCAL CONSENT.

This Court's decisions support the proposition that tribes' dependent status has necessarily divested them of the power to exercise adjudicatory jurisdiction over claims against a nonmember under the first *Montana* exception absent the clear and unequivocal consent of the nonmember.

A. Historical Conceptions Of Tribal Jurisdiction Reflect That Tribes' Principal Powers Relate To Internal Self-Government.

From the earliest days, tribal power has been grounded in internal self-government. In *Worcester v. Georgia*, Chief Justice John Marshall observed:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the *internal affairs of the Indians* . . . . The king . . . *never intruded into the interior of their affairs, or interfered with their self-government,* so far as respected themselves only.

31 U.S. (6 Pet.) 515, 517 (1832) (emphasis added). Chief Justice Marshall expressed a corollary principle, as well: members of the broader society have "perfect independence" from tribes. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823). From this historical foundation, when recognizing tribal inherent sovereignty, this Court has embraced the bedrock principle that Indian tribes have the "right of internal self-government" and "*the right to prescribe laws applicable to tribe members* and to enforce *those* laws by criminal sanctions." *United*

States v. Wheeler, 435 U.S. 313, 322 (1978) (emphasis added) (citations omitted).[9]

The core role of tribal government is to provide self-government for tribal members; tribal governments presumptively lack power over nonmembers. *See Montana v. United States,* 450 U.S. 544, 564-65 (1981) (noting that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), relied on "principles [that] support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978) (explaining that tribes "have power to make their own substantive law *in internal matters* and to enforce that law in their own forums") (emphasis added) (citations omitted).

B. The Status Of Indian Tribes In Our Federal System Reinforces The Need For Clear And Unequivocal Consent To Tribal Court Jurisdiction Over Nonmembers.

The unique substantive and procedural backdrop against which tribal courts function within the federal system further compels the conclusion

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[9] In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574, Chief Justice Marshall explained that the effect of discovery and the relationship between the European nations and tribes was that: "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [their] rights to complete sovereignty, as independent nations, were necessarily diminished . . . ."

that tribes should not have adjudicatory jurisdiction over tort actions against nonmembers absent clear consent. What Justice Kennedy observed in *Duro v. Reina* applies with full force here:

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." [F.] Cohen, [HANDBOOK OF FEDERAL INDIAN LAW] 334-335 [(2d ed. 1982)]. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.

Duro v. Reina, 495 U.S. 676, 693 (1990), *superseded by statute*, Indian Civil Rights Act, Pub. L. No. 101-511, Act of Nov. 5, 1990, *as recognized by United States v. Lara*, 541 U.S. 193, 198-99 (2004) (citations

omitted). Although Congress has subsequently enacted criminal legislation in response to *Duro*, and this Court has considered the effect of that legislation in *Lara*, and many tribes are strengthening their tribal courts, the structural concerns Justice Kennedy identified still prejudice nonmember litigants in tribal court.

As *Duro* and *Oliphant* reflect, in analyzing tribal powers, the Court has considered the unique insulation of tribes from fundamental guarantees of fairness otherwise applicable in the federal system, including constitutional protections. *See Oliphant*, 435 U.S. at 194 & nn.3-4 (explaining that the Bill of Rights of the United States Constitution does not apply to tribal governments and the Indian Civil Rights Act provides fewer protections to defendants than are provided in federal or state criminal proceedings). These considerations have led to a complete divestiture of certain tribal powers and narrow limits on others.

Unlike federal and state courts, which must heed the Constitution of the United States, tribal courts are subject to the more limited substantive and procedural requirements of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302. More problematic is that, under the lower federal courts' interpretations of *Santa Clara Pueblo*, the federal courts have neither original jurisdiction over injunctive or declaratory actions against tribal officials under the ICRA, nor review jurisdiction to rectify a deprivation of ICRA rights, even after exhaustion of tribal court procedures. *See, e.g.,*

Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1011-12 (10th Cir. 2007). While a federal court clearly has federal question jurisdiction to determine whether a tribal court had subject matter jurisdiction, *see National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985), the Court's existing case law does not establish lower federal court jurisdiction to examine any other issue.[10] Of course, there is no direct review of tribal court decisions by this Court.

These unique circumstances present unreasonable risks if businesses may be compelled to defend civil tort litigation in tribal court. It is impossible to evaluate risks of a law that one cannot identify with reasonable certainty. Even tribes with substantial written and reported law, like the Navajo Nation, apply unwritten customary or traditional law. Currently, the risk cannot be mitigated by agreement. The Navajo Nation Supreme Court recently relied on unwritten Navajo traditional law, holding, contrary to a ruling of the Ninth Circuit Court of Appeals in *Arizona Public Service Company v. Aspaas,* 77 F.3d 1128, 1135 (9th Cir. 1996), that a 40-year-old lease provision stating that a power plant would not be subject to Navajo regulation is invalid and unenforceable as it relates to tribal employment

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[10] Lower courts are not encouraging on this point. *See AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("federal courts may not readjudicate questions—whether of federal, state or tribal law – already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason") (citation omitted).

regulation. *See Thinn v. Navajo Generating Station, Salt River Project*, No. SC-CV-25-06, slip op. at 2, 6-10 (Navajo S. Ct. Oct. 19, 2007).[11]

Businesses facing tort litigation in tribal court are prejudiced because federal review of constitutional and federal rights deprivations arising under the ICRA or other federal laws may be unavailable. Constitutional limitations on the size of tort judgments for punitive damages have warranted much of this Court's attention. *See, e.g., Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S 408 (2003). The lack of impartial review of constitutional rights issues in tort cases also may prejudice nonmembers on issues including the composition of juries and the adequacy of procedure, in addition to the magnitude of judgments.[12]

These concerns counsel against tribal court jurisdiction over tort actions against nonmembers absent clear and unequivocal consent. Given the substantial differences between tribal and federal or state courts, nonmembers should have reasonable assurance they will not inadvertently be subject to tribal, rather than state or federal, courts and law. Requiring a clear and unequivocal consent to tribal court jurisdiction and, if applicable, tribal law, would

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[11] *Available at* http://www.navajocourts.org/index3.htm.

[12] This Court has had occasion to consider a tribal court tort verdict of $250,000,000 entered by an all tribal-member jury against one of AAR's members. *Burlington N. R.R. Co. v. Red Wolf*, 522 U.S. 801 (1997) (vacating and remanding *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997)).

have the beneficial effect of allowing nonmember businesses, tribes, and tribal members to fashion their agreements to efficiently afford the dispute resolution mechanisms they intend.

III. THE COURT SHOULD DETERMINE THAT TRIBAL COURTS LACK JURISDICTION OVER CLAIMS AGAINST NONMEMBERS ABSENT CLEAR AND UNEQUIVOCAL CONSENT.

The Court should clarify that the outer limits of tribal court jurisdiction do not encompass the power to exercise jurisdiction over nonmembers without their consent—and that the nonmembers' consent to tribal court jurisdiction must be clear and unequivocal. While such a standard is implied in the Court's decisions from *Worcester*[13] to *Duro*,[14] and from *Montana*[15] to *Atkinson*,[16] clear delineation of such a standard will provide the lower federal courts, and state and tribal courts, needed guidance. Such a standard will ensure that litigation against nonmembers, which sometimes threatens the financial solvency of business and may guide its conduct, will be addressed by a forum that the nonmember has agreed affords acceptable law, procedure, and fundamental safeguards of process and fairness, including access to a federal review of

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[13] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
[14] *Duro v. Reina*, 495 U.S. 676 (1990).
[15] *Montana v. United States*, 450 U.S. 544 (1981).
[16] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

all federal issues.[17] This standard would ensure that agreements between tribes, tribal members, and nonmembers waiving tribal sovereign immunity or consenting to tribal court jurisdiction receive the same level of scrutiny. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S 411, 418-419 (2001).

Holding that tribes lack adjudicatory jurisdiction over claims against nonmembers absent clear and unequivocal consent in no way infringes upon retained, inherent tribal rights or denies the tribe its ability to vindicate its rights. Already, the Court has recognized that the inherent limitations on tribal jurisdiction over nonmembers may prohibit tribes from independently enforcing regulations against nonmembers in tribal courts of law. *See, e.g., Montana*, 450 U.S. at 566 n.14 ("By denying the Suquamish Indian Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen."). But tribal self-government does not require an expansion of tribal court jurisdiction over nonmembers to redress this perceived problem.

Other remedies are available to tribes and their members, such as the state and federal courts in which tribes, tribal members, and nonmembers are

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[17] Moreover, requiring clear and unequivocal consent may encourage tribes and business communities to work together to develop defined procedures and laws that will enable tribes and tribal courts to both protect tribal interests and attract economic development to reservations.

afforded the full panoply of federal protections. Federal and state courts provide adequate forums for addressing tribal and nonmember rights. *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001) ("the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights"); *Strate v. A-1 Contractors,* 520 U.S. 438, 459 (1997) (noting state courts were available for the petitioner's "optional use").

Tribal court jurisdiction exists primarily for the purpose of enabling tribes to make and enforce their own law in internal matters. *See Duro*, 495 U.S. at 694; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). As the Cheyenne River Sioux Court of Appeals demonstrated in the case below, tribal courts find and apply tribal laws including unwritten customary law. *See Plains Commerce Bank v. Long Family Land & Cattle Co.,* No. 03-022-A, slip op. at 8 (Sioux Tribal Ct. App. Nov. 22, 2004), App. to Petition at A-54. That power would remain unhindered by the standard *amicus* advances. However, where nonmembers and tribes interface, a tribal court—whose laws are often unknown, difficult, or impossible for nonmembers to ascertain, and may even directly contradict the pronouncements of this Court[18]—is not the forum in which nonmembers

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[18] *See Hoover v. Colville Confederated Tribes*, 3 CTCR 43, 6 CCAR 16 (Colville Confederated Ct. App. Mar. 18, 2002) ("The United States Supreme Court has clearly stated that, aside from the *Montana* exceptions, Indian tribes may regulate non-member activities on reservations only when Congress has

should be compelled to defend litigation. Other forums exist for those purposes, established by governments with a political process in which tribes, their members, and nonmembers may participate. The Court should provide needed clarification, and rule that *Montana*'s first exception cannot be read to afford tribal court jurisdiction over private tort claims against a nonmember without clear and unequivocal consent to tribal court jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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explicitly granted the tribes explicit authority to do so. We believe this approach unduly restrictive because it ignores the clear reality of circumstantial evidence."). *Available at:* http://www.tribalresourcecenter.org/legal/opfolder/default.asp.