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 Writ of Certiorari to the
United States Court of Appeal for the Eight Circuit

BRIEF FOR IDAHO COUNTY AND LEWIS COUNTY, IDAHO; CASS COUNTY AND MAHNOMEN COUNTY, MINNESOTA; *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* COUNTIES

Amici are counties in two states, representative of counties throughout the United States, that provide a wide variety of services to their residents and lands within their boundaries under *especially* difficult circumstances. These counties include lands that were at one time within the boundaries of Indian reservations and lands that were at one time held in trust by the United States (and therefore not taxed). Congress later provided that much of this land be conveyed to individual Indians and to others, with most ultimately passing into fee ownership. The core of this policy was the General Allotment Act of 1887, 24 Stat. 388, but

other acts of Congress implemented that policy in specific areas of the Country or to particular tribes and bands.

One group of these counties is within the State of Minnesota, with the Nelson Act of 1889, 25 Stat. 642, implementing the General Allotment Act. Mahnomen County, Minnesota, and Cass County, Minnesota, are representative of these counties in the State of Minnesota and counties similarly situated throughout the United States.

Other *Amici* counties, Idaho County, Idaho, and Lewis County, Idaho, are representative of counties in the State of Idaho and counties similarly situated throughout the United States, that face unresolved claims with reference to reservation status.

As this Court has often noted, trust lands and fee lands are scattered throughout the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as Federal Indian Policy, with one exception. All of these counties have routinely taxed fee lands to provide services to the area and the residents in the area. And all of the counties have less tax base upon which to rely because trust land, of course, is not taxable.

The level and cost of services provided by the counties has increased, as has been true of government services more generally. Landowners as taxpayers have often and understandably resisted increases in property taxes to provide such services.

In all of the *Amici* counties, the services required by the areas occupied by Indian tribes have increased to a greatly disproportionate degree. This is true for two main reasons. First, as noted above, many lands are trust lands and are not subject to property taxes, which is the primary, traditional source of funding for counties. Second, more and more tribes are engaged in activities such as casino gambling, which has a higher than proportionate impact on services by bringing large numbers of nonresidents to temporarily visit or stay in the counties. Road cost is one example of an area in which these impacts are greater than those associated with the more usual activities of residents on their lands. The problem is cumulative; bringing higher costs to counties, with a taxable land base which already includes trust lands, which do not bear the costs ratably (while complicating further the administrative process of assessing and collecting taxes). For example, a few years ago, in Mahnomen County, Minnesota, the total taxes collected by the county per year increased by a significant percentage due to casino-related expenditures. And these facts constitute only part of the difficult circumstances in which these counties find themselves.

The other part of the equation is the part directly related to this case: namely, the *uncertainty* regarding the scope of tribal jurisdiction over nonmembers that continues to undermine the quality of life and the economic development in all of these areas, despite the best efforts of this Court. The fact of the matter is that some, unfortunately, continue to ignore and abuse the general rules of this Court

limiting the jurisdiction of Indian tribes over nonmembers, as this case attests.

In this regard, the concern of *Amici* can be simply stated. Unless this Court establishes a bright-line rule, the precise limits of tribal adjudicatory jurisdiction over nonmembers, especially within the context of the consent exception, will continue to be ignored, circumvented or otherwise made meaningless. Economic development, upon which counties rely to continue to meet the demanding costs of service to all county residents, will remain dormant as it has in the past four decades. Hundreds of millions of dollars will continue to be expended testing the limits of the consent exception and the scope of tribal civil adjudicatory jurisdiction, as they have been expended in the decades since the 1960s testing the limits of tribal jurisdiction over non-Indians.

Amici Curiae submit that the solution to this dilemma can be found in the Opinions of this Court in *Nevada v. Hicks*, 533 U.S. 353 (2001).

SUMMARY OF ARGUMENT

The residents and businesses need a bright-line rule regarding when they are subject to the jurisdiction of a tribal court. With a clear rule, residents and business can manage their affairs accordingly. Thus, this Court should use this case to reaffirm that tribal courts do not have adjudicatory jurisdiction over non-members.

ARGUMENT

I. THIS COURT SHOULD ESTABLISH A BRIGHT-LINE RULE THAT PRECLUDES TRIBAL ADJUDICATORY JURISDICTION

A bright-line rule that precludes tribal adjudicatory jurisdiction will benefit all of the residents of *Amici* counties, those counties similarly situated throughout the United States providing services under especially difficult circumstances, and all others that do business there. First, background for the especially difficult circumstances and second, support for a solution to resolve at least this dilemma.

A. Mahnomen County, Minnesota and Cass County, Minnesota

Mahnomen County is located in northwestern Minnesota. The county lies wholly within the boundaries of the original White Earth Reservation, which was created by treaty in 1867. *See* Treaty of March 19, 1867 with the Chippewa of the Mississippi, 16 Stat. 719. Two other Minnesota counties, Becker County and Clearwater County also partially lie within those boundaries.

Originally comprising 825,000 acres, the White Earth Reservation was divided up and parceled out to individual tribal members in 1889, when Congress enacted legislation known as the Nelson Act, 25 Stat. 642, to implement the General Allotment Act of 1887, 24 Stat. 388. The federal government, in implementing the Nelson Act initially issued only trust patents. In 1906, however, Congress passed the Clapp Amendment to the General Allotment Act, 34

Stat. 325, 353, *as amended by* Act of March 1, 1907, 34 Stat. 1015, 1034, to provide that adult allottees received their White Earth Reservation allotments in fee rather than trust. Within three years, title to much of the allotted land had been sold or mortgaged.

Current census data reflects the opening of the reservation to non-Indian ownership. In 1990, only one fourth of Mahnomen County residents claimed American Indian heritage. Land ownership is likewise overwhelmingly owned today by non-tribe members—approximately eighty-five percent of land within Mahnomen County is owned by non-tribe members.

The especially difficult circumstances of providing services under these conditions in Mahnomen County, Minnesota, is compounded by the fact that the county is currently enmeshed with the local tribal council over the tax status of the tribe's casino. The tribe stopped paying property taxes due on the casino in 2005, even though the tribe holds title in fee. The parties have been litigating in state and federal court over this issue. If the tribe's fee-to-trust application is ultimately granted, a tax exemption will extend to the county's largest employer and what is otherwise by far the most valuable commercial property in the county.

Cass County, Minnesota, shares a history similar to that of Mahnomen County with reference to the 1889 Nelson Act, including land and population figures. Approximately twelve percent of the population claims American Indian heritage and 15,500 acres of land is held in trust for the Leech Lake Tribe. In addition, the reservation status of

this area is also unresolved, adding to the uncertainty.

B. Idaho County, Idaho and Lewis County, Idaho

Idaho County and Lewis County are two counties in the State of Idaho with jurisdiction that conflicts and overlaps with the 1863 Nez Perce Reservation. These counties belong to the North Central Idaho Jurisdictional Alliance. The North Central Idaho Jurisdictional Alliance is an unincorporated association; its members have included 3 counties, 8 cities, 3 school districts and 7 highway districts in north central Idaho whose geographical boundaries include land which was within the Nez Perce Indian Reservation as it existed prior to 1894. The purpose of the North Central Idaho Jurisdictional Alliance is to provide an organization to foster cooperation between its members and to focus their efforts directed toward obtaining an adjudication of their jurisdictional authority in relationship to the jurisdictional authority of the United States and the Nez Perce Tribe.

In 1894, the Nez Perce Tribe ceded approximately 550,000 acres of land to the United States government. Today, approximately 90 percent of the ceded land is owned by non-members and 90 percent of the population is not enrolled in the Nez Perce Tribe. The Nez Perce Tribe claims sovereign governmental authority over all ceded land, some of which is within the geographic boundaries of the members of the *Amici* counties. The general interests of the counties concern conflicting and

overlapping jurisdictional issues between the State, counties, the United States and the Nez Perce Tribe. The specific concerns have been identified above.

The issue of the reservation status of the original 1863 Nez Perce Reservation is important to the Counties, the State of Idaho, the Nez Perce Tribe and the United States. The counties support the rationale and holding of the opinion of the Idaho district court in *In re Snake River Basin Adjudication (SRBA)*. In two orders in that case, Presiding Judge Barry Wood made it clear that the original 1863 Nez Perce Reservation was disestablished by a subsequent act of Congress. *In re SRBA*, No. 39576 (5th Jud. Dist. County of Twin Falls Nov. 10, 1999) (Order on Motion to Strike, Motion to Supplement the Record and Motions for Summary Judgment); *In re SRBA*, No. 39576 (5th Jud. Dist. County of Twin Falls Jan. 21, 2000) (Order on United States' Motion to Alter or Amend Judgment or Alternatively for an Evidentiary Hearing). Judge Wood squarely rejected the arguments of the United States that the 1863 Nez Perce Reservation continued to exist, as it had prior to the 1894 cession.

As in the past, however, the United States persisted in its quest to resurrect the reservation boundaries of the original Nez Perce Reservation in a series of criminal cases in which the participation of the State of Idaho and the counties was limited. *United States v. Scott*, No. CR98-001-N-EJL (D. Idaho May 27, 1998); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001); *Lewis Co., Idaho v. Allen*, 169 F.3d 509 (9th Cir. 1998). The Ninth Circuit at least arguably

resurrected the 1863 Nez Perce Reservation boundaries, without even addressing the opinion of Judge Wood or the position of the State of Idaho and the *Amici* counties (no effective voice in the process). To date, this conflict between the Ninth Circuit Court of Appeals and the state courts in Idaho has not been resolved.[1]

C. The Opinions in *Nevada v. Hicks* Support a Bright-Line Rule That Precludes Tribal Adjudicatory Jurisdiction.

1. Early on in this dispute regarding the scope of tribal jurisdiction over nonmembers, *Oliphant v. Schlie*, 544 F.2d 1007, 1015 (9th Cir. 1976) (Kennedy, J., dissenting), *rev'd sub nom. Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), recognized the importance of a proper historical perspective. "As the Supreme Court recognized almost a century ago, only two truly sovereign entities exist at any place within the geographical limits of the United States: the federal government and the states of the union. *United States v. Kagama*, 118 U.S. 375, 379 (1886)." Other cases support a similar proposition regarding the importance of the distinction between tribal members and nonmembers in the process. *See Hicks*, 533 U.S. at 379 (Souter, J., concurring and citing *Oliphant*,

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[1] *Amici* counties will be pleasantly surprised if the United States, as *Amicus Curiae*, does not make an appearance in this case arguing that Petitioner has consented to tribal adjudicatory jurisdiction and that consent solves the problem. In any event, that argument should be rejected.

544 F.2d at 1015) (Kennedy, J., dissenting); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S. at 564 and is therefore not inherent").

2. Building on that historical perspective, the pivotal observation of the Court in *Hicks* adds special emphasis to the fact that this Court has never held that a tribal court has jurisdiction over a nonmember defendant:

> We avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that tribal court had jurisdiction over a nonmember defendant.

533 U.S. at 358 n.2 (Scalia, J.). This fact, in the proper historical perspective, forms the basis for a bright line to resolve the issue in this case. In this respect, Justice Scalia's observation points the way.

If this bright line needs additional support, that support can be found throughout the concurring Opinion of Justice Souter in *Hicks*. The reference to the "membership status" of the unconsenting party as the "primary jurisdictional fact," 533 U.S. at 382, is directly on point. Similarly, the discussion regarding the "real, practical consequence" and the ability of nonmembers to *know* where tribal jurisdiction begins and ends, *Id.* at 383-85, completes the equation. In this respect, Justice Souter's opinion lights the path.

Moreover, the Court in *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997), pointed out that there are forums available as competent alternatives to tribal court with reference to criminal proceedings. Those same forums, state or federal courts, are also available with reference to tribal adjudicatory jurisdiction in cases like this.

At the end of the day, there are no principled reasons in *Hicks* or in any other Opinion of this Court to depart from the "never held" observation of this Court set forth in *Hicks*, 533 U.S. at 358 n.2. A principled conclusion like that fashioned by the Court in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005) or *Strate*, 520 U.S. at 459, is also called for in this case. Clearly, that conclusion is sorely needed and justifiable under the circumstances.

CONCLUSION

The court of appeals' judgment should be reversed and this matter remanded for further proceedings.

Respectfully submitted,

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