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 Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER, PLAINS COMMERCE BANK

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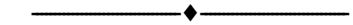
AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER, PLAINS COMMERCE BANK

This *amicus curiae* brief is presented on behalf of Mountain States Legal Foundation, a non-profit, public interest law firm with approximately 36,000 members, in support of the Petitioner, Plains Commerce Bank.[1]



INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has 36,000 members, many of whom live and conduct business on or near Indian reservations. These members are very concerned with the civil and criminal jurisdiction of Indian tribes over them, and the impact that

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

tribal jurisdiction has on their everyday lives and business dealings.

Indeed, those members are generally unfamiliar with the customs, traditions, and social norms that govern tribal justice. Moreover, that system of justice is foreign to them in every way, and dissimilar from Anglo-American notions of justice and due process. Furthermore, the application, by tribal courts, of tribal substantive law, including tribal common law, to MSLF's members is inherently unfair and inconsistent with rights guaranteed by the U.S. Constitution. MSLF members wish to trade and do business with American Indians and American Indian tribes, but they object to the enforcement of tribal laws against them in tribal courts.

MSLF and its members believe that the only proper forum in which to litigate legal disputes between tribal members and non-members is State and federal courts, which apply law to all citizens, tribal members and non-members alike, in accordance with the federal and State constitutions and pursuant to well-established, documented, and verifiable law and procedure.

The decision of the Eighth Circuit Court of Appeals jeopardizes the constitutional rights of MSLF's members, constitutes dangerous precedent, and is contrary to the holdings of this Court.

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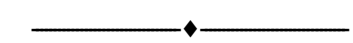
STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case submitted by Petitioner, Plains Commerce Bank, but supplements that Statement by noting that the tribal court sought first to adjudicate federal causes of action based on its misunderstanding of its jurisdiction. Indeed, instructions concerning federal claims of discrimination were submitted to the jury. That tribal customs, traditions, and social norms controlled was argued for the first time in the tribal appellate court by the Tribe in an *amicus* brief. The tribal appellate court, adopting the Tribe's *amicus* argument, held that tribal customs, traditions, and social norms govern the discrimination claim and affirmed the tribal trial court. There was no opportunity to challenge the Tribe's explanation of those customs, traditions, and social norms or whether its view of the unwritten cultural standards of hundreds of years ago, as passed down orally from generation to generation, was accurate.



SUMMARY OF ARGUMENT

Litigation of any legal dispute between a tribal member and a non-member in tribal court is inherently unfair and prejudicial to the non-member. Because

tribal law is unknowable to non-members, non-members may not conform their conduct to that law.

This is so because tribal law is based on the customs, traditions, and social norms of the indigenous peoples who occupied North America before contact with Europeans. It is largely unwritten, handed down orally from generation to generation, depends on memory, and varies from tribe to tribe. Because much of it has been forgotten, tribes endeavor to reacquire their customs, traditions, and social norms, as well as their language. Consequently, the precise nature of their cultural foundations is very subjective and highly debatable. American Indians of the 1860s and 1870s – for whom these traditions, customs, and social norms were a part of daily life before their diminution due to the arrival of Europeans in the American West – left no records. Much of what they knew died with them. Even scholars of legal anthropology are unable to puzzle out this cultural heritage as it relates to tribal justice. It is little wonder that ordinary citizens, including many tribal members, are mystified regarding tribal law.

Additionally, those traditions, customs, and social norms are entirely dissimilar from Anglo-American notions of law, justice, and redress of grievances. They derive from a society, social mores, and notions of morality that differ greatly from those of America's Founding Fathers. Furthermore, tribal forums are extra-constitutional. They were not contemplated by the Constitution. And, the concepts of justice they

employ are foreign to non-Indians and Indian members of different tribes. Indeed, the United States or State Constitutions do not apply to tribal courts.

These differences are particularly critical regarding aspects of the United States Constitution that all Americans take for granted, such as the Separation of Powers Doctrine, the Doctrine of Checks and Balances, the Due Process Clause, and the First Amendment's Establishment Clause. For example, in many tribal courts, the court and its judges are subordinate and answerable to the political branch. Moreover, religion and spirituality are infused into and intertwined with tribal notions of justice.

Congress, under its plenary power, has the authority to establish, reduce, or enlarge the inherent sovereignty of tribes, including the jurisdiction of tribal laws and courts. Therefore, if tribal courts have jurisdiction over non-members, it is only because Congress conferred it, either explicitly or by inaction in allowing tribes to retain it. Consequently, if tribal courts have jurisdiction over non-members, Congress unconstitutionally conferred that power, contrary to the Due Process Clause of the Fifth Amendment.

Tribal members have an appropriate forum to adjudicate legal disputes with non-members. All tribal members and non-members are citizens of the United States and the State in which they reside. All are protected by the written laws and well-established and documented common law of those governments. All are familiar with the particularized and codified

procedures by which constitutional federal and state courts apply law evenly to all before them. Therefore, state and federal courts are the only fair and impartial tribunals in which legal disputes between tribal members and non-members may be litigated.

This Court should reverse the Eighth Circuit Court of Appeals and hold that the Cheyenne River Sioux Tribal Court did not have jurisdiction over Plains Commerce Bank.

ARGUMENT

I. LITIGATION OF ANY DISPUTE BETWEEN A TRIBE OR TRIBAL MEMBER AND A NON-MEMBER IN TRIBAL COURT IS IN DEROGATION OF ALL CONCEPTS OF DUE PROCESS OF LAW.

A. TRIBAL LAW IS BASED ON THE "VALUES, MORES, AND NORMS" OF A PARTICULAR TRIBE, OFTEN HANDED DOWN ORALLY FROM ONE GENERATION TO ANOTHER.

There has been "little writing in law journals concerning the content of tribal codes and constitutions, the procedures of tribal courts, or the distinctively Indian characteristics of criminal, civil, or administrative law on reservations."[2] What little

[2] Robert D. Cooter and Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part*

(Continued on following page)

writing there has been documents the quite different substance, procedure, and character of tribal laws and tribal courts from those of the United States and the several states. "Tribal common law is based on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices."[3] In fact, "in many tribes, information, beliefs, and customs are handed down orally or by example from one generation to another."[4] "[A]ll tribal courts selectively enforce social norms and few tribal courts systematically refine precedent."[5] Accordingly, "Indian common law evolves orally and informally,"[6] and constitutes a "folk common law in most tribes [that] . . . is tribe specific."[7] It often develops orally "through networks among tribal officials and intellectuals."[8]

I, 46 American Journal of Comparative Law 287, 327 (1998) (*Indian Common Law I*). The authors interviewed tribal judges and Indian officials on 37 reservations, in addition to consulting Indian scholars. For this ethnographic field work in tribal laws, the authors received the Max Planck Research Prize in Bonn in 1994. This was the second time a lawyer received the prize and the first time it was awarded for anthropology of law.

[3] Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 130 (1995) (*Indigenous Justice Systems*).

[4] *Id.* at 131.

[5] *Indian Common Law I* at 294.

[6] *Id.* at 327.

[7] *Id.* at 328.

[8] Robert D. Cooter and Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part II*, 46 American Journal of Comparative Law 509, 562 (1998) (*Indian Common Law II*).

This reliance on values, mores, and norms holds true with respect to codified and written law, even when modeled after Anglo-American law. "Tribal law is distinctly more Indian as applied than as written."[9] Thus, "custom is the 'underground' law of the courts in the sense that it affects many decisions without being explicitly recognized or systematized in writing."[10]

"Thus, in essence, Indian customary law develops into Indian common law, which sometimes resembles the Anglo-American common law process, sometimes not," though the "latter is more frequent."[11] And "the existence of customary law is a fact that influences many cases."[12] For example, "social norms influence the way people understand contractual obligations, property rights, and fair punishments."[13] But "most customs – whether Indian or Anglo-American – are not suitable for law enforcement."[14] Nonetheless, "because reservation life involves repeated interactions among people, many of whom are relatives," "sociological tradition predicts that custom will dominate tribal law."[15]

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[9] *Id.* at 563.

[10] *Id.*

[11] *Id.*

[12] *Indian Common Law I* at 329.

[13] *Id*. at 329.

[14] *Id.*

[15] *Indian Common Law II* at 510.

B. TRIBAL LAWS AND COURTS ARE NOT CONSTRAINED BY THE UNITED STATES CONSTITUTION.

Under the United States Constitution, America's federal republic contemplates only two sovereign governments – the United States and the several States. Each of these sovereigns must respect the proper sphere of the other, and citizens of one sovereign are citizens of the other, possessing rights and duties as to both.[16] Therefore, the Bill of Rights and the Fourteenth Amendment protect the citizens of a sovereign state when before another sovereign's tribunal.

But the same is not true for Tribes, because Indian Tribes retain inherent sovereignty to control their own internal relations and to preserve their unique customs and social behavior.[17] That is, tribal legislation and adjudication, pursuant to that inherent sovereign power, are not constrained by the Bill of Rights because the Tribes pre-dated the Constitution and are neither States nor part of the federal government.[18] This distinction applies equally in the civil context as well as in the criminal.

To be sure, the Indian Civil Rights Act ("ICRA") statutorily imposes most of the Bill of Rights on

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[16] *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).

[17] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

[18] *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Indian Tribes.[19] But a statutory right is not the same as a constitutional right. Therefore, the only method to appeal to federal court for conviction of violations of the ICRA is through a writ of *habeas corpus*,[20] which is available only in matters of criminal law to review unlawful detention.[21] Thus, a writ is not available to bring challenges in civil court proceedings that allege a Due Process or Equal Protection violation. Moreover, because the rights set forth in the ICRA are statutory, not constitutional, courts are not bound by the decisions of the Supreme Court with respect to the United States Constitution. Rather, a new body of case law is being developed based on the ICRA.[22] In the process, tribal courts and federal courts are free to interpret these statutes in accordance with "the unique customs, languages, and usages of the tribes [involved],[23] which is particularly problematic because '[t]ribal courts are often subordinated to the political branches of tribal government.'"[24]

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[19] 25 U.S.C. § 1301 *et seq*.

[20] *Martinez*, 436 U.S. at 59-60.

[21] 25 U.S.C. § 1303 ("*habeas corpus* shall be available . . . to test the legality of his detention by order of an Indian Tribe").

[22] *See, e.g., Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082-83 (8th Cir. 1975), and *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (holding generally that the guarantees of due process and equal protection should be applied flexibly and adapted to the tribal context).

[23] *Duro*, 495 U.S. at 693.

[24] *Id*.

C. TRIBAL "VALUES, MORES AND NORMS" DIFFER MARKEDLY FROM THOSE OF THE ANGLO-AMERICAN LEGAL SYSTEM.

1. Tribal law and Anglo-American law are based on entirely different paradigms.

The Anglo-American paradigm of common law is vertical, that is, the structure is upward, with decision-making limited to a few, and is applied through an adversarial system with a winner and a loser decided by a judge or jury:

> In the American paradigm, the law is applied through an adversarial system that places two differing parties in the courtroom to determine a defendant's guilt or innocence, or to declare the winner or loser in a civil case. It focuses on one aspect of a problem, the act involved, which is discussed through adversarial fact-finding. The Court provides the forum for testing the evidence presented from the differing perspectives and objectives of the parties. Interaction between parties is minimized and remains hostile throughout.[25]

In contrast is the Indian paradigm of justice, which relies more on a holistic policy by indigenous cultures of small, closely-knit bands, focuses on repairing relations, and strives for consensus:

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[25] *Indigenous Justice Systems* at 126.

> The indigenous justice paradigm is based on a holistic philosophy and the worldview of the aboriginal inhabitants of North America. These systems are guided by the unwritten customary laws, traditions, and practices that are learned primarily by example and through oral teachings of tribal elders. . . . The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony. . . . Restorative principles refer to the mending process for renewal of damaged personal and communal relationships, [with] the victim as the focal point, to heal and renew the victim's physical emotional, mental and spiritual well-being. It also involves deliberate acts by the offender to regain dignity and trust. . . . These are necessary for the offender and victim to save face and to restore the personal and community harmony.[26]

Thus, in the American Indian system, "dispute resolution in tribes aims at repairing relationships,"[27] which "requires going deeper into the dispute than the immediate cause of the disagreements," such as "the character and feelings of the parties."[28] On the other hand, in the Anglo-American system, "rules of procedure in federal and state courts narrow the

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[26] *Id.* at 125-27.

[27] *Indian Common Law I* at 324.

[28] *Id.*

dispute to the specific wrongdoing alleged by the plaintiff."[29]

Moreover, the Anglo-American system considers separation of the judicial, executive, and legislative branches essential to fairness and justice, as is the separation of church and state. The opposite is true of the American Indian systems of justice:

> In the American justice paradigm, separation of powers and separation of church and state are essential doctrines to ensure that justice occurs uncontaminated by politics and religion. For many tribes, law and justice are a part of a whole that prescribes a way of life. . . . Restoring spirituality and cleansing one's soul are essential to the healing process for everyone involved in a conflict.[30]

As a result, "the separation of powers doctrines," so critical to Anglo-American jurisprudence, "are difficult for tribes to embrace."[31] In fact, "many [tribal courts] find it impossible to make such distinctions."[32] For example, many "tribal council[s] act[ ] as appeals courts"[33] and "[o]n most reservations, the council can

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[29] *Id.*

[30] *Indigenous Justice Systems* at 127.

[31] *Id.*

[32] *Id.*

[33] *Indian Common Law I* at 317.

impeach or dismiss judges, and politicians sometimes use this power to force judges to resign."[34]

The two systems even differ in how law itself is developed and promulgated. "[D]ispute resolution in the tribes" is the "application of inchoate social norms," which are "not fully explicit."[35] In contrast to this "social law," "Anglo-American common law stresses the reasoned elaboration of rules by judges,"[36] which "aspires to an explicit statement of rules, which exist in the decisions of judges, not just the practices of people."[37] Therefore, because "predictability and boundedness," are the hallmarks of the Anglo-American system of law, "common law rules are promulgated authoritatively" to create "institutional memory."[38] "Consequently, changing common law rules requires an official revision."[39]

In contrast, under the American Indian system, "social norms are not promulgated, so they can change without an official revision."[40] Therefore, "[m]ost tribal judges cannot consult records and rules and principles articulated in past decisions in their

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[34] *Id.* at 318.

[35] *Id*. at 326-27.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

own courts."[41] Accordingly, "[c]ourts without adequate records must rely upon individual memory about past decisions," so that "Indian common law evolves orally and informally."[42] As a result, there is little that is predictable about the development, coherency, or consistency of the law applied by tribal courts. Indeed, there is "little evidence of a formal common law process similar to American state courts in any tribal court, except the Navajo."[43] In fact, "many tribal judges . . . want to stop far short of the Anglo-American common law process."[44]

2. Tribal courts apply substantive law in very different ways than do Anglo-American courts.

The fundamental differences in the approach to justice between the Anglo-American system and the American Indian system result in particular differences in substantive law. For example, while contracts in Anglo-American law require offer, acceptance, and consideration, contracts in Indian law "are valid by mutual consent," without either "writing, consideration, or witnesses . . . required."[45] Thus, "trust and reliance are the foundations of

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[41] *Id*. at 327.

[42] *Id.*

[43] *Id*.

[44] *Id.* at 328.

[45] *Indian Common Law II* at 548.

contract exchange."[46] Because Anglo-American law goes to great lengths to ensure that innocent statements are not mistakenly taken to be contracts, and requires a bargained for exchange, not merely a promise, formality in contracts and the bargained for consideration is critical in Anglo-American contract jurisprudence. Indeed, at one time all enforceable contracts had to be written and under seal to assure that mere negotiations or casual statements did not bind parties. On the other hand, "customary laws among tribes afford few defenses or excuses for nonperformance of a promise."[47] Furthermore, "specific performance is the preferred remedy" because the Indian tradition "is not money oriented" but "aims at repairing the relationship between the parterns [sic] as the primary legal goal."[48]

"Many contract disputes that end up in tribal courts are brought by off-reservation creditors who lent money to Indians for the purchase of goods."[49] It is not surprising, given the differences in law and approach between tribal courts and State and Federal courts, that such "creditors sometimes fare badly in these disputes."[50] Under Indian tribal custom, what a non-member might have meant as an exploration of

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 548-49.

[49] *Id.* at 549.

[50] *Id.*

the possibility of terms, or simple discussions or negotiation of terms, becomes binding under some tribal custom and tribal common law totally unknown to a non-member.

In the area of injury to person or property, that is, tort and criminal law, there is a very different focus in tribal courts than that in courts of the States and United States. In fact, in the indigenous systems, "criminal and civil sanctions were not sharply distinguished. . . ."[51] Indeed, "perusing Navajo court records does not suggest that tort compensation occupies a central place in legal disputes."[52] Moreover, to the degree that tort law exists, "tribal courts place more emphasis . . . on reconciliation and repairing relationships."[53]

Additionally, "tribal tort law focuses upon causation more than intent."[54] "There's much less psychology in Indian law," thus the maxim "he did it[,] that's enough" prevails.[55] As a result, "tribal tort law looks more like strict liability than negligence."[56] Furthermore, Indian tort law, like all other Indian law, focuses on custom and tradition. For example, people of the White Mountain Apache Tribe "have their own

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[51] *Id.* at 552.

[52] *Id.*

[53] *Id.* at 563.

[54] *Id.* at 552.

[55] *Id.*

[56] *Id.*

ideas about what constitutes negligence."[57] "To illustrate, stray animals are considered a threat and a nuisance, . . . but owners of horses and cows that stray onto roads and collide with vehicles are not held liable. . . ."[58] In a similar example, Navajo jurors "award damages in light of the specifics of Navajo culture, such as marital practices and family structure."[59] Likewise, judges on the Blackfeet tribal court "take specific cultural considerations into account when awarding damages."[60]

Utilizing cultural resources as part of their jurisprudence is particularly problematic for many tribal judges, because, though "some of the judges were deeply rooted in the culture where they presided in court, . . . others were outsiders."[61] Therefore, many tribal judges "actively seek counsel on custom, . . . by assembling elders to discuss custom or tradition."[62] Of course, these elders are, in effect, testifying to facts that are not subject to cross-examination or impeachment. Therefore, tribal "values, mores, and norms" are not easily ascertained even by the judges who must apply them.

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[57] *Id.*

[58] *Id.*

[59] *Indian Common Law I* at 329.

[60] *Id.*

[61] *Id.* at 323.

[62] *Id.* at 323-24.

D. TRIBAL CULTURE IS UNKNOWABLE TO NON-MEMBERS TO WHOM TRIBAL COURTS SEEK TO APPLY IT.

Tribal customs, traditions, and social norms are unwritten and known only to those steeped in the culture of a particular tribe. There is, therefore, no mechanism by which laws based on these customs, traditions, and social norms may be known to non-members or their lawyers. Thus, there is no notice of the law and standards to which a non-member, who enters into a consensual, on-reservation agreement, will by held accountable by a tribal court. Indeed, even many tribal court judges have no independent knowledge of these customs, traditions, and social norms. Instead, they must consult the elders of the tribe.

In fact, much of the culture of pre-contact indigenous peoples has been lost as a result of expansionist policies of the United States and federal Indian policies over the years, particularly allotment and assimilation.[63] It is well known that many Indian tribes have lost many aspects of their culture, religion, and

[63] "In the 1940s and 1950s the last Indians died who could recall life before confinement to reservations, so retrospectives like Llewellyn and Hoebel's became impossible." *Indian Common Law I*, at 291. The reference is to K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, University of Oklahoma Press (1941, 1983). The authors used historical records and recollections of elderly Indians to reconstruct Cheyenne law as it existed during the 1860s and 1870s.

language. It is also true that many tribes are trying to rediscover and preserve what has been lost. "Indian tribes now take every measure conceivable to preserve indigenous cultures and restore lost cultural knowledge and practices."[64] "But this development of applying customary law in tribal courts is new and under-theorized."[65] Consequently, "in a practical sense . . . many tribes have not yet recovered . . . customs and traditions that [are] useful in this regard."[66]

Thus, it is likely that most tribal members do not know the customs, traditions, and social norms that will govern them in tribal court, that is, until the tribal court issues a judgment. As a result, tribal courts utilize a process that is essentially unfair to them, and much more so to non-members. Tribal law is vague and uncertain so that it fails to articulate comprehensible standards to which the conduct of a person, including tribal members, must conform.

To make matters worse, there are 562 federally recognized Indian Tribes, all with their own customs, traditions, and social norms.[67] Some tribes occupy

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[64] Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, Indigenous Law and Policy Center Working Paper, Indigenous Law and Policy Center, Michigan State University College of Law (2006-04), at 6.

[65] *Id.*

[66] Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 728 (2006).

[67] 67 Fed. Reg. 46328 (2002).

reservations with other tribes, such as the Northern Arapaho and the Eastern Shoshone on the Wind River Reservation, the Assiniboine and Gros Ventre on the Fort Belknap Reservation, the Assiniboine and the Sioux on the Fort Peck reservation. These tribes, though sharing some customs, traditions, and social norms, do not share all aspects of their respective cultures.

For example, the Northern Arapaho and Eastern Shoshone were traditional enemies, one from the Algonquian language group, the other from the Uzo-Aztecan. They had different allies and lived in different areas. The permanent presence of the Northern Arapaho on the Eastern Shoshone's reservation was bitterly resented, resulting in a lawsuit by the Eastern Shoshone against the United States, which located the Northern Arapaho there.[68] Yet they share a reservation and one tribal court that answers to a Joint Business Council, consisting of the combined councils of the two tribes. It is difficult to imagine how that tribal court applies custom, tradition, and social norms to govern conduct between litigants from opposing tribes.

Moreover, there are approximately 250 tribal courts in the country.[69] Often, there are many in one

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[68] *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937).

[69] Bureau of Justice Assistance, U.S. Dep't of Justice, *Executive Summary, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America*, 5-6 (2005).

State. For example, there are eleven Indian Tribes living on seven reservations in Montana.[70] It is impossible for a non-member to have even a clue as to the standards of conduct to which he may be held in any of those tribal courts.

E. IF TRIBAL COURTS HAVE JURISDICTION OVER NON-MEMBERS, EXERCISE OF THAT JURISDICTION VIOLATES NON-MEMBERS' RIGHTS TO DUE PROCESS OF LAW.

1. Tribal law is so vague that a non-member cannot know what it is or when it applies.

"A statute [or other law] which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[71] Therefore, as demonstrated above, American Indian law as applied by tribal courts is contrary to the Anglo-American concept of Due Process of Law, as set forth in the Fifth and Fourteenth Amendments to the

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[70] http://leg.mt.gov/css/publications/research/past_interim/handbook.asp#montanas. The tribes are the Salish-Kootenai, Flathead, Crow, Blackfeet, Assiniboine, Sioux, Gros Ventre, Northern Cheyenne, and Cree-Chippewa.

[71] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

United States Constitution, and as adopted by every State constitution.

2. If tribal courts have jurisdiction over non-members, it is only because Congress has authorized that jurisdiction.

Congress' plenary power over Indian tribes enables Congress to "enact legislation that both restricts, and in turn, relaxes those restrictions on tribal sovereign authority."[72] Therefore, if a tribe retains the inherent sovereignty to try a non-member, it is only because Congress permits it to do so. Thus, it is not the Tribe, but Congress that subjects non-members to tribal jurisdiction.

3. This Court should not construe tribal sovereignty in a manner that renders its application unconstitutional.

This Court must construe the inherent sovereignty of tribes in a manner that precludes exercise of jurisdiction by tribal courts over non-members. Any other construction would result in a finding that Congress had acted unconstitutionally to confer such jurisdiction on tribal courts. Wherever possible, this

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[72] *United States v. Lara*, 541 U.S. 193, 202 (2004).

Court must avoid constructions of congressional action that render that action unconstitutional.[73]

F. MEMBERS OF THIS COURT HAVE AGREED THAT NON-MEMBERS SHOULD NOT BE SUBJECT TO LITIGATION IN TRIBAL COURT.

Justice Rehnquist, writing for the Court in *Oliphant*,[74] made clear that it would not be fair to allow Tribes to try non-members criminally because to do so would be to impose tribal law "over aliens and strangers, over members of a community separated by race [and] tradition."[75] Indeed, tribal jurisdiction would "seek to impose [on non-members] an external and unknown code . . . which judges them by a standard made by others and not for them."[76] He concluded that a tribal court "tries [non-members] not by their peers, nor by the customs of their people, nor

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[73] *Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory*, 325 U.S. 450, 470 (1945).

[74] *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978).

[75] *Id.* at 210. Though Justice Rehnquist was quoting from *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which considered the justice of trying Indians in federal court for crimes against Indians in Indian country, before the enactment of the Major Crimes Act, he also stated that these words "apply equally strongly against the validity of respondents' contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure." *Id.* at 211.

[76] *Id.*

the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect understanding."[77]

Justice Kennedy, writing for the Court in *Duro*, reiterated this concern: "[W]e hesitate to adopt a view of tribal sovereignty that would single out another group of citizens – non-member Indians – for trial by political bodies that do not include them."[78] His concern was the unfairness of subjecting non-members to unfamiliar tribal customs and traditions:

> 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." It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.[79]

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[77] *Id.* at 211.

[78] *Duro*, 495 U.S. at 693.

[79] *Id.* (internal cites omitted).

Justice Souter, writing for himself and Justices Thomas and Kennedy, reiterated this theme with respect to civil jurisdiction in *Hicks*:[80] "The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given the special nature of Indian tribunals."[81] For example, "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."[82] And "there is a definite trend by tribal courts toward the view that they have the leeway in interpreting the Indian Civil Rights Act's due process and equal protection clauses and need not follow the U.S. Supreme Court precedents 'jot for jot.'"[83] In addition, "[t]ribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges."[84] Also, "[t]ribal 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 . . . [that] would be unusually difficult for an outsider to sort

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[80] *Nevada v. Hicks*, 533 U.S. 353 (2001).

[81] *Id.* at 383 (Souter, J., concurring) (joined by Justices Thomas and Kennedy).

[82] *Id.*

[83] *Id.* at 384.

[84] *Id.*

out."[85] Finally, "[t]ribal courts are often subordinated to the political branches of tribal government."[86]

II. TRIBAL SUBSTANTIVE LAW IS NOT A REGULATION CONTEMPLATED BY THE FIRST *MONTANA* EXCEPTION.

The consensual relations exception in *Montana* recognizes that tribes have jurisdiction to regulate consensual relations "through taxation, licensing, or other means."[87] The question here is whether "other means" includes tribal substantive law, statutory and common. The answer must be no, given the vast differences between Anglo-American and American Indian law and the due process and equal protection implications of those differences. And *Montana* itself *also* demonstrates that the answer must be no.

The types of regulations the court gave as examples were "taxation and licensing."[88] When this Court construes language, it generally follows the interpretative maxim *eiusdem generis*, which instructs, "[w]here general words, [such as 'other means'] follow specific words [such as 'taxation and licensing'] . . . the general words are construed to embrace only objects similar in nature to those objects enumerated

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[85] *Id.*

[86] *Id.*

[87] *Montana v. U.S.*, 450 U.S. 544, 565 (1980).

[88] *Id.*

by the preceding specific words."[89] Therefore, only forms of regulation similar in nature to "taxation and licensing" would come within the catch-all phrase "other means."

Thus, this Court used the phrase "taxation, licensing or other means" to describe methods by which tribes could regulate "commercial dealing, contracts, leases, or other arrangements."[90] Obviously, this is not adjudication at all, but only regulation. Furthermore, the phrase refers to very limited authority over a transaction, which might include the power to determine who may do business on a reservation and the qualifications and cost of, and locations for, doing business. Licensing and taxation cannot be read to include regulating conduct through the application of substantive law related to such transactions, such as contract law and tort law, which are totally unrelated to the terms this Court used.

Moreover, licensing, taxation, permitting, and so on is only legislative. Adjudication by application of either unwritten law or customary law is not included. In fact, *Hicks* used the very term "legislative jurisdiction," to describe this licensing and permitting.[91]

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[89] *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

[90] *Montana*, 450 U.S. at 565.

[91] *Hicks,* 533 U.S. at 367-68.

III. TRIBAL MEMBERS ARE NOT WITHOUT A FAIR REMEDY FOR GRIEVANCES AGAINST NON-MEMBERS.

A non-member, particularly a non-Indian, cannot be a member of a tribe. He cannot know the customs and traditions of that tribe. The converse is not true, however. Like non-members, all tribal members are citizens of the United States and the County and State wherein they reside. Thus, there is a forum where all parties stand on an equal footing and where readily ascertainable law and procedure is well known to both, and in which a fair trial, subject to the constraints of the United States and State Constitutions exists: State courts and federal courts. These constitutional courts are the proper forum in which to address substantive legal disputes between tribal members and non-tribal members. Indeed, these are the forums to which all United States citizens, Indians, non-Indians, non-tribal members and tribal members may look to obtain fair and impartial justice.

CONCLUSION

The Judgment of the Eighth Circuit Court of Appeals should be reversed by holding that tribal courts have no jurisdiction over non-members of that tribe for any purpose whatsoever.

Respectfully submitted,

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