

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

**BRIEF OF THE NATIONAL AMERICAN INDIAN COURT JUDGES
ASSOCIATION, THE NAVAJO NATION, AND THE NORTHWEST
INTERTRIBAL COURT SYSTEM AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are the National American Indian Court Judges Association (“NAICJA”), the Navajo Nation, and the Northwest Intertribal Court System (“NICS”).¹

NAICJA is a non-profit membership organization of present and former tribal court judges from approximately 400 tribal courts. Established in 1969, NAICJA is committed to fostering tribal justice systems by providing continuing education and developing resources to enhance the operation of tribal judiciaries. NAICJA also seeks to further public knowledge and understanding of tribal courts.

The Navajo Nation is the largest federally recognized Indian tribe in the United States with approximately 250,000 members. Covering over 27,000 square miles, the Navajo Nation’s land extends into the states of Utah, Arizona and New Mexico. The Navajo Nation’s court system is the most active tribal judicial system in the United States, handling a caseload of more than 30,000

1. The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

cases per year, a significant portion of which involve non-Indians.

NICS is a non-profit organization headquartered in Lynnwood, Washington. It is a consortium of several Western Washington federally-recognized Indian tribes: Confederated Tribes of the Chehalis Reservation, Muckleshoot Indian Tribe, Port Gamble S'Klallam Indian Tribe, Sauk-Suiattle Indian Tribe, Shoalwater Bay Indian Tribe, Skokomish Indian Tribe, and the Tulalip Tribe of Washington. NICS provides court services (including judges) to its member tribes, with the goal of promoting self-sufficient tribal communities. NICS is the oldest continually-existing intertribal court system in the country.

Amici are all directly affected by decisions defining the scope of tribal court jurisdiction over non-Indians. Because the Cheyenne Sioux Tribal Court properly exercised jurisdiction over the Plains Commerce Bank, *amici* respectfully suggest that the judgment below be affirmed.

SUMMARY OF ARGUMENT

Federal policy fully supports Indian autonomy and self-governance and encourages the development of a strong tribal judiciary as a critical component of tribal autonomy. Tribal courts, including, for example, the Navajo Nation's courts and the courts supported by the Northwest Intertribal Court System, are functioning well. These courts serve a vital role in their communities, including the adjudication of disputes that arise in the course of the extensive and ever-growing

commerce between Indians and non-Indians taking place in Indian country. Tribal courts are an essential component in the protection and enforcement of the rights of Indians and non-Indians alike. An examination of tribal courts around the country reveals that the descriptions of tribal courts offered by Petitioner and its *amici* are simply inaccurate. Moreover, any decision further restricting the civil authority of tribal courts would undermine the fundamental principles of tribal sovereignty and self-governance that are at the heart of Congressional and Executive policy respecting the status of Indian nations.

ARGUMENT

I. Federal Legislative And Executive Policy Requires Strong Support Of Tribal Courts As Part Of The Fundamental National Policy Favoring Tribal Self-Governance.

The United States has long been “committed to a policy of supporting tribal self-government and self-determination.” *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *see, e.g.*, 25 U.S.C. § 3601(2) (United States trust responsibility for Indian tribes “includes the protection of the sovereignty of each tribal government”). Central to this commitment is respect for and support of tribal courts, as the power to administer justice and resolve civil disputes is inextricably tied to effective self-governance. As this Court has observed, “[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their

development.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (citations omitted).

The Court has made it clear that it is not the role of the judiciary to “second-guess the political branches’ own determinations” as to the status and role of tribes and tribal governments. *United States v. Lara*, 541 U.S. 193, 205 (2004). Indian law, therefore, “draws principally upon the treaties drawn and executed by the Executive Branch and *legislation passed by Congress*” and are the “instruments [that] form the backdrop for the intricate web of *judicially made* Indian law.” *Id.* at 206 (emphases in original). It follows that questions of tribal court jurisdiction must be decided in a manner that furthers, or at least is consonant with, the relevant Congressional and Executive policy.

Legislation and Executive pronouncements over the past seventy years evidence a federal policy requiring that the United States promote Indian tribes’ sovereignty and self-governance, in part through support of tribal courts and recognition of tribal court civil authority over both Indians and non-Indians in matters arising out of conduct in Indian country.

Federal legislation dating from the early 20th century shows Congressional acknowledgment of the critical role that tribal courts play in furthering the goal of tribal self-determination and self-governance. In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, to encourage tribes to adopt constitutions. 25 U.S.C. § 476(a). Many of those constitutions provided for

the establishment of tribal courts. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 *Tulsa L.J.* 1, 1 (1997).

Congress' passage of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301 *et seq.*, in 1968 further advanced the federal policy of promoting tribal autonomy and tribal court authority. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (one purpose of the ICRA was "to promote the well-established federal 'policy of furthering Indian self-government'"). The ICRA, among other things, extended most of the protections of the Bill of Rights to Indian tribes' exercise of their powers of self-government. 25 U.S.C. § 1302. The Act not only evidenced Congressional support for Indian tribes' exercise of governmental powers – including those powers that are exercised by tribal courts – but also expressly acknowledged that non-Indians as well as Indians could very well be subject, in appropriate circumstances, to tribal court jurisdiction. *See* 25 U.S.C. § 1302(8) (extending Act's guarantees to "any person" within tribal jurisdiction). The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, provided additional impetus for tribes to implement and expand their tribal courts.²

2. Every President since President Nixon has taken steps to implement the strong federal policy supporting tribal self-government and self-determination, so that there would be a "new era in which the Indian future is decided by Indian acts and Indian decisions." President Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970); *see also* President Gerald R. Ford, Statement on Signing the Indian Self-Determination and Education Assistance Act (Jan. 4, 1975); President Jimmy Carter,

In particular, federal policy recognizes that the effective exercise of tribal autonomy and self-governance requires a strong and fully empowered judiciary. Congress made this clear in 1993, when it enacted the Indian Tribal Justice Act (“ITJA”), 25 U.S.C. §§ 3601 *et seq.*, “to assist the development of tribal judicial systems.” S. Rep. No. 103-88, 1993 WL 304728, at *1 (July 15, 1993). Congress found that “tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.” 25 U.S.C. § 3601(5); *see* S. Rep. No. 103-88, 1993 WL 304728, at *3 (“Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments.”). Significantly, the Senate Report accompanying that Act emphasized that “tribal courts are permanent institutions charged with resolving the rights and interests of *both Indian and non-Indian individuals.*” S. Rep. No. 103-88, 1993 WL 304728, at *8 (emphasis added). The ITJA, perhaps more than any other single piece of legislation before it,

Indian Education Programs Statement (July 25, 1978) (recognizing “special relationships between the Government and Indian people”); President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983); President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments (June 14, 1991); President William J. Clinton, Remarks to American Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); President George W. Bush, Memorandum on Government-to-Government Relationship With Tribal Governments (Sept. 23, 2004). These documents are all available at www.presidency.ucsb.edu.

demonstrated Congressional acknowledgement that the policy of supporting tribal self-governance would be severely undermined if tribes lack the power to enforce their own laws over those whose conduct or consent brings them into Indian communities.³ As the Senate Committee on Indian Affairs explained, “strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments.” *Id.* at *3; *see Janet Reno, A Federal Commitment to Tribal Justice Systems*, 79 *Judicature* 113, 113 (1995) (“Tribal authority for self-government includes the power to administer justice. Indeed, tribal justice systems are essential pieces of the mosaic of tribal self-governance.”).⁴

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3. Among other things, the ITJA expressly provides that “[n]othing in this chapter shall be construed to . . . encroach upon or diminish in any way the inherent sovereign authority of each tribal government to . . . enact or enforce tribal laws” 25 U.S.C. § 3631.
 4. Many other legislative enactments reflect Congress’ endorsement of tribal court jurisdiction over Indians *and* non-Indians. *See, e.g.*, 12 U.S.C. § 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against Indians and non-Indian homeowners on reservations in tribal or federal court); 18 U.S.C. § 2265 (states must give full faith and credit to tribal domestic violence protection orders); 25 U.S.C. § 1911(a) (jurisdiction over enforcement of the Indian Child Welfare Act of 1978 is vested exclusively in tribal court for certain children); 25 U.S.C. § 1911(d) (states and United States must give full faith and credit to tribal public acts, records, and judicial proceedings applicable to Indian child custody); 25 U.S.C. § 2207 (Secretary of the Interior must give full faith and credit to tribal determinations made under

In 2000, Congress once again reinforced its support for the development of tribal courts when it enacted the Indian Tribal Justice Technical and Legal Assistance Act (“Assistance Act”), 25 U.S.C. §§ 3651 *et seq.* In the accompanying Senate Report, the Senate Committee on Indian Affairs reiterated: “Along with other factors, stable tribal governments and healthy tribal economic [*sic*] depend on strong and well-ordered tribal courts and judicial systems.” S. Rep. No. 106-219, 1999 WL 1024201, at *4 (Nov. 8, 1999).

To better implement Congressional policy encouraging development of tribal courts, the BIA established the Tribal Justice Support program, which funds about 300 Indian courts.⁵ Likewise, the Department of Justice adopted a program of assisting Indian tribes to enhance tribal justice systems, and has awarded upwards of \$40 million to Indian tribes for this purpose.⁶

tribal probate codes governing descent and distribution of trust lands); 25 U.S.C. § 3106(c) (federal and state courts must give full faith and credit to tribal judgments in forest trespass cases); 25 U.S.C. § 3713(c) (federal and state courts must give full faith and credit to tribal judgments in agricultural trespass cases); 28 U.S.C. § 1738B (states must give full faith and credit to child support orders of tribal courts).

5. See Letter from Chairman Byron L. Dorgan & Vice Chairman Lisa Murkowski, U.S. Sen. Comm. on Indian Affairs 13 (Feb. 22, 2008), *available at* www.indian.senate.gov/public_files/FY2009_viewsandestimatesltr.pdf.
6. See Tribal Judicial Inst. & Nat’l Judicial College, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America 6 (William Brunson ed., 2005), *available at* www.law.und.edu/npilc/judicial/web_assets/pdf/ExecSum9-05.pdf.

These Legislative and Executive actions reflect the strong commitment of the United States to tribal self-governance, and specifically to the development of tribal judicial authority as an essential component of self-governance. Restrictions on tribal court jurisdiction that interfere with the ability of tribal governments to enforce their own laws would be flatly inconsistent with this clear federal policy.

II. Consistent With Federal Policy, Tribal Courts Regularly Administer Civil Justice Fairly and Competently Over A Wide Range Of Cases.

Contrary to the assertions of Petitioner and its *amici*, tribal courts are neither unknown nor unknowable.⁷ In keeping with the clear federal policies promoting tribal courts, tribal court systems are sophisticated partners with the federal and state judicial systems in administering civil justice. As Justice O'Connor aptly put it: "Today, in the United States, we have three types of sovereign entities – the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country." O'Connor, 33 Tulsa L.J. at 1.⁸

7. *See, e.g.*, Petitioner Plains Commerce Bank's Brief at 40-44; Brief For *Amicus Curiae* American Bankers Association And South Dakota Bankers Association In Support Of Petitioner at 3.

8. Of the 562 federally recognized tribes in the United States, approximately 400 currently operate a formal tribal court system. *See generally* National Tribal Justice Resource Center, *Tribal*

A. Tribal Court Systems Nationwide Are Understandable, Accessible, and Fair.

Like their state and federal counterparts, tribal courts adjudicate a wide range of cases, involving Indians and non-Indians alike. The cases run the gamut of civil litigation, including, for example, child welfare, domestic violence, torts, civil regulatory infractions, contract and commercial transactions, and enforcement of foreign judgments. *See American Indian Law Ctr., Inc., Survey of Tribal Justice Systems and Courts of Indian Offenses* 17 (2000). “The structure of tribal trial courts is often similar to state courts.” Cohen’s Handbook of Federal Indian Law § 4.04[3][c][iv][C] (Nell Jessup Newton ed., 2005 ed.). A survey published in 2000, required by the ITJA, 25 U.S.C. § 3612(a), reported that the vast majority of the participating tribes had formal justice systems similar to state or federal court systems, and virtually all provided for appellate review. *See Survey, supra*, at 22-23.

The law applied by tribal courts is written, knowable and publicly available. Written laws and court procedures, always available from the tribal courts themselves, are now available online for an ever-increasing number of tribes.⁹ In addition, the

Court Directory, www.tribalresourcecenter.org/tribalcourts/directory.

9. *See, e.g.*, Chickasaw Nation Code, *available at* www.chickasaw.net/site06/government/256_1578.htm; Colville Tribal Law & Order Code, *available at* codeamend.colvilletribes.com/index.htm;

public can access tribal codes, tribal-state agreements and other Indian law documents through the Native American Rights Fund's National Indian Law Library, which has an online searchable catalog.¹⁰ Likewise, tribal court opinions are publicly available both in print and in increasing numbers on websites in easily searchable formats. In addition to tribal court reporters¹¹ and the monthly *Indian Law Reporter*, there are three comprehensive databases of tribal court opinions available through the National Tribal Justice Resource Center, the Tribal Court Clearinghouse and a commercial site, VersusLaw.¹² A selection of tribal court opinions is also available on LexisNexis and Westlaw.

Tribal court decisions apply principles that are familiar to any litigant in the United States.¹³

Mashantucket Pequot Tribal Laws, *available at* www.mptnlaw.com; *see also* Sections II.B & II.C, *infra*.

10. *Available at* www.narf.org/nill/catalog/catalog.htm. In 2006, the National Indian Law Library was honored with the American Association of Law Library's Public Access to Government Information Award for their ground-breaking work in making tribal law available to the public.
11. *See, e.g.*, The Navajo Reporter; NICS Tribal Appellate Court Opinions; Mashantucket Pequot Tribal Court Reporter; Oklahoma Tribal Court Reports.
12. *See* www.tribalresourcecenter.org/legal/opfolder/default.asp; www.tribal-institute.org/lists/decision.htm; www.versuslaw.com.
13. Tribal court judges, through the National Tribal Court Law Clerk Program, have access to the research and writing services of law

In cases involving the ICRA, for instance, state and federal law is often applied by the tribal court judges in reaching their decisions.¹⁴ Likewise, tribal court procedures are heavily influenced by and often closely mirror state and federal rules. *See* B.J. Jones, *Role of Indian Tribal Courts in the Justice System 1* (Mar. 2000) (noting that, because many tribal courts evolved from courts originally established by the BIA, they “mirror the justice systems that exist in states and the federal system and use very similar procedures and rules.”).¹⁵

Consistent with Justice O’Connor’s observation about the important role that the federal, state, *and* tribal judiciaries play in the administration of justice in this country, federal and state judiciaries have entered into cooperative relationships with tribal courts to develop innovative approaches to judicial administration. For example,

students and recent law graduates in a manner similar to state and federal court judges. *See* Massey Mayo Case & Jill E. Tompkins, *A Guide for Tribal Court Law Clerks and Judges 74* (2007), *available at* www.triballawclerkships.org/files/guide.pdf.

14. In those instances where state and federal law is not applied, it is generally in cases involving only tribal members, such as domestic disputes, or in cases where the tribal court concludes that its interpretation of the ICRA is more protective of individual rights than would otherwise be available in parallel federal or state cases. *See* Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data*, MSU Legal Studies Research Paper No. 06-05, at 6, 20-21 (Mar. 6, 2008), *available at* ssrn.com/abstract=1103474 (concluding that, based on study of cases from various tribal courts, tribal courts applied customary or traditional law exclusively in cases involving only tribal members).

15. *Available at* www.icctc.org/Tribal%20Courts-final.pdf.

the Conference of Chief Justices of the state court systems has worked to improve federal, state, and tribal court cooperation in resolving civil jurisdictional questions and to encourage cross-recognition of judgments among the three groups.¹⁶ In the same vein, tribal judges study alongside state and federal judges, and receive the same high quality professional training as their counterparts, through the National Judicial College.¹⁷

Not surprisingly, therefore, tribal courts have been found to be fair and impartial forums for both Indian and non-Indian litigants. *See, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 *Ariz. St. L.J.* 1047, 1094-97 (2005) (discussing results of several surveys related to fairness of tribal courts). Acknowledging the jurisdiction, fairness and competency of tribal courts, various state legislatures have enacted laws or adopted court rules that allow or require their courts to recognize tribal

16. *See* Tribal-State Relations on the Tribal Court Clearinghouse, www.tribal-institute.org/lists/state_relations.htm; *see also* www.abanet.org/jd/tribalcourts/home.html (Judicial Division of the American Bar Association has established a Tribal Judicial Committee); Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 *Judicature* 154, 155-56 (1995) (Conference of Chief Justices has established a standing committee on federal, state and tribal relations); Teague Protocol, Dec. 7, 2001, *available at* www.walkingoncommonground.org/web-data/Components/resources/Teague%20Protocol.pdf (requires Wisconsin state courts and Four Chippewa Tribes of Wisconsin tribal courts to apply list of factors to determine which court is the more appropriate forum for a particular case).

17. *See* www.judges.org/ntjc.html.

court judgments.¹⁸ Likewise, state courts have recognized the validity of tribal court judgments as a matter of full faith and credit or comity.¹⁹

While there are hundreds of tribal courts that could be used as examples, *amici* offer the Navajo Nation and NICS tribal court systems as just two representative illustrations that the tribal courts in this country are administering justice fairly and competently.

B. The Navajo Nation's Well-Established Court System Is A Modern And Fully-Functioning Judiciary.

The Navajo Nation covers more than 27,000 largely intact and undivided square miles in New

18. See Ariz. R. Proc. for Recognition of Tribal Ct. Civ. J. R. 5; Iowa Code Ann. ch. 626D; Mich. Ct. R. 2.615; Minn. R. Gen. Prac. 10; N.C. Gen. Stat. § 1E-1; Okla. Stat. tit. 12, § 728; Okla. R. for Dist. Cts. 30; S.C. Code Ann. § 27-16-80; S.D. Codified Laws § 1-1-25; Wash. Super. Ct. Civ. R. 82.5; Wis. Stat. Ann. § 806.245; Wyo. Stat. Ann. § 5-1-111; see also Colo. Rev. Stat. § 42-2-127; Ga. Code Ann. § 42-1-12(20)(B); Md. Code Ann. Crim. Pro. § 11-701; Wash. Rev. Code § 26.25.010.

19. See, e.g., *Tracy v. Superior Court*, 810 P.2d 1030 (Ariz. 1991); *Sheppard v. Sheppard*, 655 P.2d 895, 901-02 (Idaho 1982); *Mashantucket Pequot Gaming Enter. v. Malhorta*, 740 A.2d 703, 705-06 (N.J. Super. Ct. Law Div. 1999); *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975); *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1093 (N.M. Ct. App. 1997); *Matter of Marriage of Red Fox*, 542 P.2d 918, 920 (Or. Ct. App. 1975); cf. *In re Lynch's Estate*, 377 P.2d 199 (Ariz. 1962); *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950); *Tempest Recovery Servs., Inc. v. Belone*, 74 P.3d 67 (N.M. 2003).

Mexico, Arizona, and Utah, an area larger than West Virginia and nine other states. Nearly all of the land is tribal or trust land, with a small percentage held in fee by non-Indians. *See* 2003 Navajo Nation Long Range Comprehensive Transportation Plan at II-1.²⁰ The Navajo Nation is traversed by nearly 10,000 miles of public roads, some of which are state and county highways, some BIA-maintained federal roads, and some Navajo-maintained roads. *Id.* at III-1. There are areas within the Navajo lands that are several hours by car from the nearest non-Navajo town. Much of the Navajo Nation (including the state highway system within it) is distant from, and not served in any way by, state law enforcement or civil authorities.

The Navajo tribe has over 250,000 members, a majority of whom live within the Navajo Nation, as do thousands of non-Indians. Many non-Indians work in or near the Navajo Nation for both Indian and non-Indian employers.²¹ Many non-residents travel into the Navajo Nation to reach their places of employment, and millions visit the numerous tourist and recreational areas in Navajo territory. *See* 2005-2006 Comprehensive Economic Development Strategy of the Navajo Nation at 46 (in 2004, over 2.5 million tourists visited sites within the Navajo Nation).²²

20. *Available at* www.navajodot.org/cms/kunde/rtts/navajodotorg/docs/223131733-08-22-2007-08-46-15.pdf.

21. *See* www.navajobusiness.com/fastFacts/majorEmployers.htm.

22. *Available at* www.navajobusiness.com/pdf/CEDS/CEDS%202005%20-%2006%20Final.pdf.

The Navajo Nation governs this vast territory through a legislature (the Navajo Nation Council), an executive branch, and the Navajo court system. The Navajo Nation courts are the most active tribal courts in the United States.²³ Today, these courts handle a caseload of over 30,000 cases a year, including civil, criminal, and family law cases. The Navajo civil docket includes a wide-ranging mix of cases, including tort, contract, and other commercial cases. *See* Judicial Branch of the Navajo Nation, Fiscal Year 2006 Statistical Report, District Court Civil Cases, Oct. 3, 2005 to Sept. 29, 2006. The Navajo Nation's courts, as a result, are experienced in handling the full panoply of cases that any court of general jurisdiction typically handles.

Many of these cases involve non-Indian parties. In fact, non-Indian plaintiffs frequently seek relief in the Navajo courts, but non-Indians are often defendants as well. Indeed, an independent, academic study of Navajo appellate court decisions between January 1969 and December 2004 (the "Navajo Court Study") found that almost 20% of the cases involved non-Indian litigants. Berger, 37 Ariz. St. L.J. at 1068, 1075. The cases involving non-Indians, like the Navajo court docket generally, cover a wide range of issues and claims, including contract, tort and other actions relating to commercial dealings.²⁴ There is no basis to believe

23. *See* www.navajo.org/history.htm; www.navajocourts.org/history.htm.

24. *See, e.g., Curtis v. Amco Ins. Co.*, 8 Navajo Rptr. 838, 842 (Navajo D. Ct. 2005) (dismissing case against non-Indian defendant for lack of personal jurisdiction); *Agricredit Acceptance Co. v.*

that there is any unfairness toward or bias against non-Indians in the Navajo courts. The Navajo Court Study found that non-Navajo parties won in 47.4% of the cases decided between 1969 and December 2004. *Id.* at 1075. More importantly, the Navajo Court Study found that there was no greater chance that the Navajo courts would find in favor of a Navajo litigant in certain categories of cases considered to be “particularly vulnerable to bias,” including decisions involving Navajo common law and cases arising from business relationships. *Id.* at 1094; *see also id.* at 1079-88.

“[T]he Navajo courts are structured very much like those in the state and federal courts.” Tom Tso (former Chief Justice of the Navajo Supreme Court), *The Process of Decision Making in Tribal Courts*, 31 *Ariz. L. Rev.* 225, 227 (1989). Similar to the Anglo-American justice system, the Navajo Nation has a two-tiered court system composed of ten trial-level district courts and the Navajo Supreme Court.²⁵

Henderson, 7 Navajo Rptr. 529, 531 (Navajo D. Ct. 1997) (denying motion to set aside order of repossession and stipulated judgment in favor of non-Indian corporation); *Cummings v. Yazzie*, 7 Navajo Rptr. 479, 484 (Navajo D. Ct. 1994) (finding Navajo defendant liable for damages in negligence action brought by non-Indian for personal injury arising out of accident on U.S. highway on Navajo Reservation); *Boyd & McWilliams Energy Group, Inc. v. Tso*, 7 Navajo Rptr. 458, 464 (Navajo D. Ct. 1994) (granting preliminary injunction to non-Indian company to enjoin interference with drilling on land within Navajo reservation where company had permit and owned mineral rights).

25. *See* Courts of the Navajo Nation in the Navajo Nation Government: A Public Guide to the Courts of the Navajo Nation 2 (Oct. 2006), *available at* www.navajocourts.org/NNCourts.pdf. Each judicial district has a district court, a family court, and a

District court and appellate proceedings in the Navajo courts are governed by extensive written rules of procedure and evidence, which closely resemble the federal rules. *See* Yazzie Statement at 99.²⁶ Court proceedings are conducted in Navajo and English, and Navajo interpreters are provided. *Id.* The Navajo Supreme Court issues written opinions, as do the district courts in cases of first impression. *Id.* These decisions are written in English and are publicly available.²⁷

peacemaking division, which provides optional ADR services based in part on traditional Navajo principles and institutions. *Id.*; *see also Rulings Of The U.S. Supreme Court As They Affect The Powers And Authorities Of Indian Tribal Governments: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 86, 96-98 (2002) (statement of the Honorable Robert Yazzie, Chief Justice of the Navajo Nation) [hereinafter Yazzie Statement]. Non-Indians may choose to resolve disputes in the Peacemaker Court but may not be compelled to do so. Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275, 312 (1991). Justice O'Connor has observed that the Navajo Peacemaker Court is an example of a court that "successfully blends beneficial aspects of both Anglo-American and Indian traditions." O'Connor, 33 Tulsa L.J. at 4. The Peacemaker Court model has been so successful, in fact, there is a movement to incorporate strengths of the tribal systems into the federal and state legal systems. *Id.* at 6. Information on the structure and administration of the Navajo courts is publicly available online at www.navajocourts.org.

26. *See also* www.navajocourts.org/index4.htm (district court rules of procedure and evidence); www.navajocourts.org/index3.htm (appellate rules of procedure).

27. Navajo Nation Supreme Court and selected district court opinions through 1999 can be found in the Navajo Nation Reporter. The decisions of the Supreme Court from 2000 to the present can be found on the Supreme Court website at www.navajocourts.org/suctopinions.htm. A new edition of the Navajo Nation Reporter

Generally, the governing law in the Navajo courts is Navajo law, which can be found in the published Navajo Code²⁸ and the written opinions of the Navajo courts. The Navajo courts look to state and federal law when an issue arises for which no Navajo law exists. *See id.*; *see also* Navajo Nation Code tit. 7, § 204; *Navajo Housing Auth. v. Bluffview Resident Mgmt. Corp.*, 8 Navajo Rptr. 891, 892 (Navajo D. Ct. 2006) (recognizing and applying New Mexico common tort law). Furthermore, Navajo courts look to federal cases to address issues of subject matter and personal jurisdiction. *See, e.g., Sandoval v. Tinian, Inc.*, 5 Navajo Rptr. 215, 220 (Navajo D. Ct. 1986) (determining subject matter jurisdiction based on *Montana* test); *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Navajo Rptr. 282, 288 (Navajo D. Ct. 1978) (looking to *International Shoe* and its line of cases in determining personal jurisdiction).

For litigants in the Navajo courts, the Navajo Nation Bill of Rights²⁹ provides additional protections beyond the due process, equal protection and other rights provided by the Indian Civil Rights

containing decisions from the district court relating to Navajo common law since 1999 will be published shortly. Significant decisions also are available in the Indian Law Reporter and on www.versuslaw.com.

28. An annotated version of the Navajo Code can be found at www.ongd.navajo.org/files/nca.pdf.

29. *Available at* www.navajocourts.org/RuleHarmonization/NavBillRights.htm

Act. In civil cases, the Navajo Rules of Civil Procedure set forth the procedure for making a jury demand, as well as the procedures for jury selection. Navajo R. Civ. P. 38, 41. Both Indians and non-Indians may serve on a jury. *See* Yazzie Statement at 101.

The justices and judges who serve in the Navajo courts are recommended by the Judiciary Committee of the Navajo Nation Council, appointed by the President of the Navajo Nation, and confirmed by the Navajo Nation Council. Navajo Nation Code tit. 7, § 355. Candidates must meet enumerated standards for appointment. *Id.* § 354. The Navajo Nation Code of Judicial Conduct, which is patterned after the ABA Model Code of Judicial Conduct, along with the Personnel Rules for Judges and Justices adopted in 2002, governs judicial conduct.³⁰ There is a formal, transparent system for handling complaints against judges, as well as an elaborate on-going judicial evaluation process.³¹

To practice before the Navajo courts, a lawyer must become a member of the Navajo Nation Bar Association (“NNBA”). Both Indians and non-Indians are eligible for membership in the NNBA, which currently includes attorneys licensed in Arizona, New Mexico, Utah, and Colorado.³²

30. These documents are available online at www.navajocourts.org/index8.htm.

31. Navajo Nation Code tit. 7, §§ 421, 422(A); Personnel R. for Judges and Justices X.A.3.

32. *See* www.navajolaw.org/about_us.htm.

The Navajo court system, organized very much like any other American court system, is a model judiciary with rules and protections similar, and in many cases identical, to those found in the state and federal courts. The fairness and competence of the Navajo courts has been frequently acknowledged. *See, e.g., Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 (D.N.M. 1994) (“The Navajo Nation has developed a sophisticated judicial system with highly competent jurists.”); *see also Williams v. Lee*, 358 U.S. 217, 223 (1959) (recognizing competence of the Navajo Nation’s courts to adjudicate disputes between Navajos and non-Indians). A review of the docket and decisions of the Navajo courts show that they are competent to handle the wide variety of cases before them and that they adjudicate those cases in a fair and unbiased manner regardless of a litigant’s tribal membership.

C. The Northwest Intertribal Court System Provides Sophisticated And Cost-Effective Judicial Services To Tribal Courts.

To be sure, some Indian tribes do not have the resources of large tribes like the Navajo Nation to develop and operate their courts. Tribes often join together to form intertribal court systems. These systems supplement individual tribal courts by, for example, providing *pro tem* trial judges or appellate justices on an as-needed basis. NICS is the oldest continually existing intertribal court system in the country, working with seven member tribes in

Western Washington, as well as other tribes on a contractual basis.

NICS offers full-time and contract trial and appellate judges, prosecutors, code-writers, appellate court staff, technology assistance, and training for court personnel. NICS judges and court staff travel throughout Western Washington State to the Indian reservations of the organization's member tribes. NICS also works closely with other Washington State Indian tribes to provide quality judicial support and court services.

NICS serves as a cost-effective way for tribes to deliver high-quality court services. Last year alone, the seven NICS member tribal courts heard over 2,400 civil and criminal cases, including appeals. In addition, NICS serves as a full-time court for one of its member tribes, the Tulalip Tribe of Washington. In this capacity, NICS provides Tulalip with two law-trained tribal court judges and a prosecutor, thereby enabling the tribal court to meet five days a week. Each of the other six member Indian tribes have an assigned chief judge and receive part-time services from NICS, such as the provision of tribal judges or prosecutors on an as-needed basis. NICS maintains a roster of judges – including lawyers in private practice, law professors, and tribal court judges from non-NICS member Indian tribes – to meet these needs. Appellate opinions issued by NICS-administered courts are

published in a reporter entitled NICS Tribal Appellate Court Opinions.³³

All NICS member tribes have developed tribal codes that provide safeguards for all who appear before their tribal courts. The NICS member tribes' codes are publicly available – in some cases through the offices of the Court Clerk of the tribes and in some cases online and through various law school libraries.³⁴ Furthermore, these tribal codes generally include the rules applicable to litigants in the tribal courts. For example, the Tulalip Tribal Code includes, *inter alia*, the “Civil Rules of Tribal Court,” which establish procedures for: the application of tribal, state, and federal law; service, summons, and pleading requirements; the jurisdiction of the tribal court; and trial application. *See* Tulalip Ordinance 49 (Law & Order Code); *see also* Skokomish Tribal Code Title 3 (Courts); Sauk-

33. Currently, there are six volumes containing written appellate decisions from 1987 through 2004. Each volume provides an index of cases by tribe and subject matter and notations of orders in unreported cases. Volume VII, which will be published shortly, includes written appellate decisions issued during 2005 and 2006. Tribal court appellate opinions are available from NICS and from the law libraries at approximately thirty law schools in the Pacific Northwest and elsewhere in the United States where practitioners are likely to encounter Indian law issues.

34. *See, e.g.*, Tulalip Tribal Codes and Ordinances, *available at* [www.tulaliptribes-nsn.gov/Home/Government/Departments/Legal ReservationAttorney/OrdinancesCodes.aspx](http://www.tulaliptribes-nsn.gov/Home/Government/Departments/Legal%20ReservationAttorney/OrdinancesCodes.aspx); Skokomish Tribal Codes and Ordinances, *available at* www.skokomish.org/Skok Constitution&Codes/Codes/Contents.htm; Sauk-Suiattle Tribal Codes and Ordinances, *available at* www.sauk-suiattle.com/legal.htm.

Suiattle Law & Order Code; Sauk-Suiattle Rules of the Court of Appeals.

* * *

It is evident that Indian tribal courts and the intertribal court systems that support them deliver fair and competent civil justice, and provide the means for member and nonmember litigants to understand the rules of practice and the applicable substantive law. The availability of tribal statutory and decisional law eliminates any perceived uncertainty of litigation in tribal court systems.

III. Tribal Court Jurisdiction Over Non-Indians Arising Out Of Consensual Commercial Relationships In Indian Country Is Consistent With Congressional Policy And This Court's Precedents.

Despite the strong federal policies pointing the Court away from draconian limitations on tribal judicial authority, several *amici* argue that tribal court civil jurisdiction should extend only to cases in which non-Indians expressly consent to tribal court jurisdiction.³⁵ As demonstrated in Section I, *supra*, there is nothing in contemporary Congressional policy that even hints at such a drastic curtailment of the inherent sovereignty of Indian tribes to

35. See, e.g., Brief *Amicus Curiae* Of The States Of Idaho, Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington, And Wisconsin In Support Of Petitioner at 19-23; Brief *Amicus Curiae* Of Association Of American Railroads In Support Of Petitioner at 5-6, 24-27.

adjudicate matters affecting their citizens or their lands, or affecting those who do business with their citizens on their lands. And there is certainly nothing supporting the notion that Congress intended to limit tribal civil jurisdiction to situations in which non-Indians expressly consent to tribal court jurisdiction.

An express consent rule would require Indians to assert civil claims against non-Indians in state or federal court. Such a rule would necessarily signify disrespect for the competence and fairness of tribal courts and would undermine their status and authority in contravention of fundamental federal policy. *See Iowa Mut.*, 480 U.S. at 15 (“A federal court’s exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts.”); *see also* Berger, 37 Ariz. St. L.J. at 1052.

In addition, Petitioner and its *amici* fail to consider the practical implications of the “express consent” rule that they propose. A broad holding requiring express consent will result in unintended and adverse consequences. For instance, already overburdened federal and state courts could be overwhelmed if forced to take on the cases involving non-Indian defendants currently decided by tribal courts. *See, e.g.*, Clifford J. Wallace, *A New Era of Federal Tribal Court Cooperation*, 79 *Judicature* 150, 152 (1995) (noting that federal courts “could not absorb” the thousands of cases decided in the courts of the Navajo Nation given their “current resources”); S. Rep. No. 106-219, 1999 WL 1024201, at *18 (“The tribal courts are doing a huge business,

and we in the federal and state judiciary could not do without them.” (quoting Hon. William C. Canby, Jr., *Tribal Courts, Viewed From A Federal Judge’s Perspective*, The Tribal Court Record 16 (1996)). In addition, an express consent rule would lead, among other things, to inefficiencies and the waste of judicial and party resources. For example, where the dispute involves events that occurred on a reservation, with parties, witnesses, documents, and other evidence located on or near the reservation, and where state and federal courts may be far away, it follows that the tribal court is the most efficient and appropriate forum. *See, e.g., Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 918-19 (Wis. 2003) (Abrahamson, J., concurring) (concluding tribal court was proper forum for employment dispute even though concurrent state court jurisdiction existed where, among other things, nonmember defendant worked in tribe’s casino). Inefficiencies also would result from Petitioner’s proposal in cases involving non-Indian and Indian litigants who have counterclaims or cross-claims against each other. Because an Indian would be unable to bring a suit in tribal court against a non-Indian without express consent, and because the non-Indian would be able to pursue certain claims against Indians only in tribal courts, *see Williams*, 358 U.S. at 222-23, disputes arising out of the same set of facts would, in many instances, need to be litigated in two separate courts. In each of these instances, the limited resources of courts and litigants alike are better allocated if litigation can be pursued in the most suitable court.

Of even greater concern, an express consent rule may give rise to situations where an Indian has no adequate forum in which to seek relief at all. While state courts should generally give full force and effect to tribal laws, there is no guarantee that they will do so. This possibility, coupled with the unavailability of a tribal forum, could lead to nullification of tribal laws under some circumstances or could otherwise leave Indians without the ability to seek legal remedies afforded by those tribal laws. This problem would be exacerbated by the fact that in some cases, the non-Indian courts may be inaccessible as a practical matter. For example, as described in Section II.B, *supra*, portions of the Navajo Nation are quite distant from non-Navajo courts and often are not served by state law enforcement or civil authorities. Accordingly, Indians who transact business with non-Indians in the Navajo Nation may become involved in disputes that involve events and witnesses that are far from the nearest non-Navajo city, much less the nearest non-Navajo court.

The cries of alarm by Petitioner and its *amici* about purported inadequacies of tribal courts³⁶ wholly ignore the stated goals of Congress and have no basis in fact. As demonstrated in Section II, *supra*, tribal courts are not mysterious bodies governed by obscure customs, but are modern courts

36. *See, e.g.*, Petitioner Plains Commerce Bank's Brief at 40-45; Brief For *Amicus Curiae* American Bankers Association And South Dakota Bankers Association In Support Of Petitioner at 3-6; Brief *Amicus Curiae* Of Association of American Railroads In Support Of Petitioner at 19-24.

much like the state and federal courts, and are governed by written rules and accessible statutory and decisional law. These tribal court systems serve a vital purpose not only for Indians, but also for those who engage in commerce with Indians in Indian country. And contrary to the position of Petitioner's *amici*, those who engage in commercial transactions with the Indians should be no more surprised to find themselves in tribal courts than a Floridian engaged in transactions with a New Yorker would be to find himself in a New York court. As this Court established in *Williams v. Lee*:

It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223 (citations omitted); *cf. Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758-60 (1998) (deferring to Congress on issue of tribal immunity). In fact, far from expressing surprise at the possibility of tribal court jurisdiction, most non-Indian businesses routinely address it by including contractual provisions dealing with the manner and

forum of dispute resolution.³⁷ Thus, any purported benefits of the “express consent” rule that Petitioner and its *amici* support is far outweighed by the economic, social, regulatory, and judicial costs that would be exacted by such a rule.

As demonstrated in Section I, *supra*, respect for Indian tribal courts is inextricably tied to this Nation’s policy recognizing tribal self-determination. *Amici* urge the Court, in considering the issue of tribal court civil jurisdiction in this and future cases, to give effect to the clear federal policy favoring the exercise of tribal judicial authority as an essential element of tribal autonomy and self-government.

37. *See, e.g.*, Sisseton-Wahpeton Sioux Tribal Code § 70-02-01 (discussing tribal court jurisdiction in agreement with BNC National Bank) *available at* www.tribalresourcecenter.org/ccfolder/sisseton_wahpeton_codeoflaw70.htm; Steven Paul McSloy, *Lending in Indian Country*, in *Asset Based Financing: A Transactional Guide* § 4A.07 (H. Ruda ed., 2007); *see also* Brief For *Amicus Curiae* The National Congress Of American Indians § III.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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