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 AND LILA LONG

Respondents.

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

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Confederated Tribes of the Warm Spring Indian Reservation of Oregon

Duckwater Shoshone Tribe of the Duckwater Reservation of Nevada

Flandreau Santee Sioux Tribe

Fond du Lac Band of Chippewa

Hopi Indian Tribe

Minnesota Chippewa Tribe

Oglala Sioux Tribe

Omaha Tribe of Nebraska

Pueblo of Laguna

Rosebud Sioux Tribe

Saginaw Chippewa Indian Tribe of Michigan

Salt River Pima-Maricopa Indian Community

St. Croix Chippewa Indians of Wisconsin

Standing Rock Sioux Tribe

Winnebago Tribe of Nebraska

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and the *amici* tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes.

The decision in this case may have critically important implications for tribal self-government. This Court has long recognized that the tribes' inherent sovereign powers include tribal-court authority to exercise civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," and over the "conduct of non-Indians on fee lands within [a] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565-66 (1981). The rule of law urged by the Plains Commerce Bank ("the Bank") would effectively nullify this longstanding recognition of tribal-court jurisdiction.

NCAI tribes have a strong interest in participating in this case because they are responsible for the administration of civil justice in Indian country,

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

which they have long viewed as a critical attribute of tribal self-government and sovereignty. They oppose the abandonment of time-honored principles of Indian law and seek to prevent the further deterioration of tribal sovereignty that the Bank urges this Court to effect in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Bank seeks to void a judgment of the Cheyenne River Sioux Tribal Court of Appeals. That judgment upheld a jury verdict for Ronnie and Lila Long and the Long Family Land and Cattle Company (jointly, "the Longs"), on a number of claims against the Bank. The Bank, which has utilized the Cheyenne River courts with favorable results for many years, see generally *Amicus* Brief of Cheyenne River Sioux Tribe ("Tribe"), did not originally object to the tribal courts' jurisdiction, and continues to acknowledge the courts' jurisdiction over the Longs' breach-of-contract and bad-faith claims. The Bank now contends that the tribal courts lacked jurisdiction only over the Longs' claim that the Bank discriminated in contracting with them for the sale of their land in exchange for certain loans, and the right to repurchase that land, and in selling their land to nonmembers "'on terms more favorable'" than the Bank offered to the Longs. App. A-4.

NCAI agrees with the Longs that the Bank lacks standing to challenge the judgment on the Longs' discrimination claim and that, even if the Bank had standing, the judgment should be affirmed on other grounds. This brief, however, addresses the merits of the Bank's arguments in the event the Court decides to consider them. Specifically, the Bank claims that

the tribal courts lacked jurisdiction over the Longs' discrimination claim for three reasons:

(i) the cause of action involved reservation land owned by a nonmember, the Bank;

(ii) although tribes may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," *Montana*, 450 U.S. at 565, adjudication is not regulation; and, thus, tribes may not *adjudicate* causes of action that involve such relationships, and

(iii) the cause of action did not involve "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 566.

In fact, however, this case involves a straightforward application of *Montana*'s delineation of tribal jurisdiction over nonmembers. As the record makes clear, the Longs and the Bank had a longstanding consensual, commercial relationship involving the Longs' ranch and its cattle operations on the reservation – a relationship made possible and directly affected by the Bureau of Indian Affairs' ("BIA's") regulations concerning loans to tribes and tribal members. The Bank's action against the Longs, and the Longs' discrimination counter-claim against the Bank, arose directly from these commercial dealings. Specifically, the Longs charged that the Bank offered them terms less favorable than those offered to nonmembers in connection with the transactions at issue. This relationship falls squarely within *Montana*'s terms. See Longs' Br. 39-44.

The Bank's first response – that the tribal courts lacked jurisdiction because the land at issue belongs to a nonmember – is based on mischaracterizations of

fact and a faulty analysis of the jurisdictional issue. The Bank's factual premise – that the Longs' ranch is nonmember land for purposes of this case – is wrong. And, in any event, the question presented is not whether the Tribe has jurisdiction over the Longs' ranch, but whether the Tribe has jurisdiction over a consensual, commercial relationship between the Longs (tribal members), their Company (a tribal entity, see *infra* at 22-23) and the Bank – a consensual relationship within which the Longs deeded their land located within the reservation to the Bank in exchange for additional loans and a lease with an option to purchase. App. A-10.

The Bank argues in the alternative that tribal courts lack jurisdiction under both tests set forth in *Montana*. The Bank asserts that the first test is not satisfied because it never entered into a consensual, commercial relationship with a tribe or tribal members. This argument is demonstrably wrong and was correctly decided against the Bank by both lower courts.

The Bank's principal argument is that the "consensual relationship" test does not apply to tribal courts' exercise of civil jurisdiction. The Bank contends that although tribes can enact laws and regulations governing such relationships, tribal courts cannot *adjudicate* claims arising from such relationships. This argument parses the language in *Montana* as if it were a statute, narrowly interpreting the word "regulate" to exclude adjudication. But that opinion is not a statute, see *Nevada* v. *Hicks*, 533 U.S. 353, 371-72 (2001); and there is no logic to the argument. Indeed, this Court has held, both generally and in the *Montana* context, that civil litigation regulates parties in the sense intended by *Montana*. And, in *Williams* v. *Lee*, 358 U.S. 217

(1959), a seminal case relied on by *Montana*, this Court made clear that tribal courts have exclusive jurisdiction over non-Indians' claims against tribal members based on consensual, commercial transactions in Indian country.

The Bank's reading of *Montana* would effectively eliminate tribal-court jurisdiction over nonmembers engaged in substantial commercial and domestic relationships with tribes and tribal members, contrary to this Court's precedent and in derogation of the tribes' ability to operate effective governments. The Bank, in other words, would have this Court undo both of the *Montana* tests in one fell swoop, despite the fact that neither this Court nor the political branches have suggested in the quarter century since *Montana* that its tests should be dismantled.

None of the Bank's policy arguments vitiates *Montana*'s application here. Based on this Court's 1959 decision in *Williams* and on *Montana*, non-Indians entering into consensual, commercial transactions and relationships have been on notice for almost half a century that tribal courts have jurisdiction over disputes arising out of such transactions and relationships. The traditional tools of negotiation of choice of law and choice of forum provisions provide nonmembers with flexibility in doing business with tribes and tribal members in Indian country, while preserving inherent tribal sovereignty. The Bank's attacks on tribal courts (made despite its use of the Tribe's courts) are grounded in innuendo, not fact, and run counter to both the strong congressional policy supporting tribal courts and the demonstrable efficacy and fairness of those courts in practice.

ARGUMENT

I. THE ORIGINS AND EVOLUTION OF INDIAN TRIBES' CIVIL JURISDICTION DEMONSTRATE THAT THE TRIBAL COURTS HAD JURISDICTION HERE.

A. The Constitution does not clearly delineate the relationship among Indian tribes, the federal government, and the States. It has thus fallen to Congress and this Court to define what powers inhere in the tribes' sovereign authority and what powers are lost or limited in view of the tribes' status as domestic, dependent nations within the United States. To understand the scope of tribal civil jurisdiction today, it is critical to understand the evolution of the tribes' historical and legal status.

Prior to conquest, the tribes possessed the powers of any sovereign state. See generally Felix S. Cohen, *Handbook of Federal Indian Law* ch. 1 (2005). And, during the colonial period, the tribes were recognized as sovereigns, retaining and exercising plenary police power over their own territories and members. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 544-45 (1832). However, under the so-called "discovery doctrine," as European powers spread across the continent, they were deemed to have gained the right to exclude other European powers from discovered lands and the exclusive right to purchase Indian lands. *Id.* at 543-44.

When the United States declared independence, the British Crown's discovery rights passed to the colonies and, ultimately, to the United States. After a period of great confusion and conflict between the colonies and the federal government over who possessed the authority to deal with the Indian nations under the Articles of Confederation, the

Constitution "grant[ed] Congress broad general powers to legislate in respect to Indian tribes, powers that [this Court] has consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 541 U.S. 193, 200 (2004).

Critically, the tribes retained sovereignty in their territory except to the extent specifically and expressly limited by Congress. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In the Constitution's text, the Indian Commerce Clause parallels the interstate and foreign Commerce Clauses in a grammatical sense. This parallel phrasing evinces the Framers' intention that the national government would have bilateral relations with the Indian tribes as distinct sovereign entities, as it would with foreign nations and the States. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982).

In addition, this Court's early jurisprudence made clear that treaty provisions and federal statutes limiting tribal powers and interests were to be construed narrowly to protect the tribes. See generally Cohen, *supra*, § 2.02. These rules of construction were adopted in light of the trust relationship between the tribes and the United States – a trust resulting from the tribes' simultaneous dependency and sovereignty. *Id.* § 2.02[2]. They retain their vitality today. See, *e.g.*, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so"). The canons effect appropriate federal judicial deference to tribal authority and to Congress's ultimate responsibility over federal Indian policy. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978) (in interpreting a federal statute that arguably displaces inherent tribal sovereignty, "a proper respect both for

tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

In sum, this Court has long understood Congress to have plenary authority over Indian affairs, including the scope of tribal jurisdiction over nonmembers, see *Lara*, 541 U.S. at 205-07. But, the tribes' police powers are not "federal powers created by and springing from the [C]onstitution"; they are instead inherent sovereign powers that "existed prior to the [C]onstitution." *Talton* v. *Mayes*, 163 U.S. 376, 382, 384 (1896). Absent a clear treaty cession or contrary federal law, the tribes remain "distinct political communities" and retain sovereignty over their people and territory. See *Worcester*, 31 U.S. (6 Pet.) at 556-57, 561.

B. Under these principles, the tribes originally retained significant authority over non-Indians found in Indian country or engaged in relationships with tribal members. Since the Republic's early days, however, Congress has exercised its power to regulate Indian affairs. In some instances, its actions have altered the content of federal Indian policy with consequences that have dramatically affected the scope of tribal sovereignty over both land and nonmembers. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1, 14-15 (1999).

The historical development that perhaps played the largest role in the evolution of tribal authority over nonmembers occurred in the late 19th century, when Congress "retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive

homes for Indian tribes." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). The General Allotment Act of 1887 (or "the Dawes Act") and related statutes allotted portions of reservation land over which the tribes had exercised dominion to individual Indians, with "surplus" land opened to non-Indian homesteading. *Id.* at 335-36. Before allotment, few non-Indians were present in "Indian country,"[2] and the question of tribal authority to regulate non-Indians and other nonmembers on reservations rarely arose.

In 1934, Congress "formally repudiated" the allotment policy by passing the Indian Reorganization Act, see *id.* at 339. That Act halted the vast losses of tribal land that occurred during the allotment era.

The profound damage to tribal interests caused by allotment was never undone. Massive lands within "Indian country," are now owned by non-Indians and other nonmembers. See L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev. 53, 122-46 (1994). This fact has resulted in a substantial increase in tribal interaction with non-Indians and other nonmembers, raising significant questions about the scope of tribal jurisdiction over tribal and member relationships with nonmembers and nonmembers' conduct within the reservation.

C. In the modern post-allotment era, tribal civil jurisdiction over nonmembers may be based on express federal authorization or the tribes' inherent

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[2] "Indian country" is, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States government" and "dependent Indian communities" and "allotments." 18 U.S.C. § 1151 (1994).

authority. This Court has routinely approved tribal civil jurisdiction resulting from Congressional delegation. In *United States* v. *Mazurie*, 419 U.S. 544 (1975), this Court unanimously held that a federal criminal statute requiring all persons selling alcohol in Indian country to abide by state and tribal law was a lawful delegation of regulatory authority to the Tribe. Justice Rehnquist, speaking for the Court, explained that tribes are not "'private, voluntary organizations,'" but "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* at 557. And because tribes are government entities with their own "independent authority of the subject matter," Congress lawfully vested in the tribes "this portion of its own authority" to regulate Indian affairs. *Id.*

The scope of inherent tribal sovereignty over nonmembers has been the subject of evolution and sharper debate. The foundational precedent in this area is *Williams* v. *Lee*, 358 U.S. 217 (1959). There, the Court announced that Arizona's courts lacked jurisdiction over a non-Indian's claim against a Navajo seeking to collect for goods sold on the reservation. The Court held that permitting state-court jurisdiction over the non-Indian's claim "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. As Justice Black explained:

> 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. [*Id.* (citation omitted).]

The Court thus ensured that suits by non-Indians against Indians concerning commercial relations in Indian country would fall within the exclusive jurisdiction of the tribal court, *i.e.*, that the dispute in *Williams* would be decided by tribal courts under tribal law. See *id.* at 222 (Navajo tribal courts are available to resolve "suits by outsiders against Indian defendants"). The Court's undergirding assumption was that tribal courts are a significant component of inherent tribal sovereignty – that "self-government includes having one's own courts apply one's own rules of decision to disputes arising within one's own territory." Frickey, *supra*, at 30. After *Williams*, well over a decade passed before the Court again addressed inherent tribal jurisdiction over nonmembers.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Tribe prosecuted in tribal court a non-Indian living on its reservation for assaulting a police officer. The federal government clearly had jurisdiction to prosecute this claim but declined to do so. The question presented was whether federal jurisdiction was exclusive or whether the Tribe had concurrent jurisdiction. This Court announced that evolving federal common-law rules determine whether and when tribal jurisdiction over nonmembers is "[]consistent with their status" as domestic, dependent nations. *Id.* at 208. Applying this standard, the Court held that tribal courts no longer had criminal jurisdiction over non-Indians, but acknowledged that Congress had authority to restore such jurisdiction to the tribes. *Id.* at 208-12.

In so holding, the Court relied in part on a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians" for crimes. *Id.* at 206. Another critical factor was the United States' interest in protecting its citizens from "unwarranted intrusions on their personal liberty." *Id.* at 210. The Court posited that "[b]y submitting to the overriding sovereignty of the United States, Indian Tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* The Court was particularly concerned that the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302, does not accord all of the Bill of Rights' guarantees to criminal defendants in tribal courts. See 435 U.S. at 194 n.4 & 211.

That same concern caused this Court to reject tribal-court criminal jurisdiction over Indians who were not tribal members in *Duro* v. *Reina*, 495 U.S. 676 (1990). Expressly distinguishing *Williams* because it involved civil rather than criminal jurisdiction, *Duro* – like *Oliphant* – focused on the need for protection of citizens' personal liberty in a forum where the Constitution does not apply. See 495 U.S. at 687; *id.* at 705 (Brennan, J., dissenting). See *id.* at 688 ("[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties"). The Court thus concluded that the tribes' inherent sovereignty no longer included the right to exercise criminal jurisdiction over

nonmembers, including Indians, who committed crimes on the reservation. *Id.* at 693-94.[3]

Critically, this Court has not extended the *Oliphant* rule to tribal *civil* jurisdiction over nonmembers. In *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court rejected Washington's contention that federal law displaces the tribes' inherent authority to tax the activities or property of non-Indians. The Court explained that "[t]ribal powers are *not* implicitly divested by virtue of the tribes' dependent status." *Id*. at 153 (emphasis supplied). Instead, "[t]his Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Id.* at 153-54. With respect to taxation of non-Indians, the Court said:

> [A]uthority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934. [*Id.* at 153.]

See also *Morris* v. *Hitchcock*, 194 U.S. 384 (1904) (upholding tribal taxes on nonmembers grazing cattle on land they owned within tribal territory).

D. *Williams*, *Colville* and *Oliphant* formed the backdrop for the decision in *Montana* that governs this case. In *Montana*, the Tribe had outlawed

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[3] Congress subsequently overrode in part the common-law rule announced in *Duro*, restoring the tribes' inherent sovereign power to exercise criminal jurisdiction over nonmember Indians who commit certain crimes on reservations. In *Lara*, 541 U.S. at 205-07, this Court confirmed Congress's authority to do so.

hunting and fishing by nonmembers including on the lands within the reservation owned in fee by nonmembers. The Court ultimately upheld the Tribe's civil jurisdiction over nonmembers hunting and fishing on tribal lands, but concluded that the Tribe lacked such authority over nonmembers on "lands no longer owned by the tribe." 450 U.S. at 564-65.

In doing so, this Court did not transport *Oliphant*'s ban on tribal-court jurisdiction over nonmembers wholesale into the civil context. Rather, it recognized two significant circumstances – critical to the effective functioning of tribal governments and their courts – in which the exercise of such jurisdiction is appropriate:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [*Id.* at 565-66 (citations omitted).]

This Court cited four cases to illustrate the scope of *Montana*'s first test. All involved nonmembers who engaged in voluntary commercial transactions with the tribes or tribal members, thereby submitting themselves to tribal jurisdiction. See *Hicks*, 533 U.S. at 371-72. *Confederated Tribes*, 447 U.S. at 152-53,

involved nonmembers' purchases of cigarettes from a tribal outlet. *Morris*, 194 U.S. at 384, authorized tribal regulation of ranchers grazing animals on Indian lands "under contracts with individual members of said tribe." *Williams*, as set forth *supra*, declared that tribal courts had "exclusive" jurisdiction over a "lawsuit arising out of on-reservation sales transaction[s] between [a] nonmember plaintiff and member defendants." *Strate* v. *A-1 Contractors, Inc.*, 520 U.S. 438, 457 (1997) (citing *Williams*, 358 U.S. at 223). Finally, *Buster* v. *Wright*, 135 F. 947, 949 (8th Cir. 1905), rejected a jurisdictional challenge to a tribe's "permit tax" imposed upon nonmembers for "the privilege . . . of trading within [reservation] borders."

These cases provide significant "guidance . . . as to the type of consensual relationship contemplated by the first exception of *Montana*." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 n.4 (2001); see also *Strate*, 520 U.S. at 457. They demonstrate that *Montana*'s first test (i) covers "private commercial actors" who "voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they . . . enter[] into," *Hicks*, 533 U.S. at 372; (ii) treats as "'inherent'" the tribes' "'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders,'" *Strate*, 520 U.S. at 457 (omission in original) (quoting *Buster*, 135 F. at 950); (iii) addresses the scope of tribal-court jurisdiction, *id.* (describing *Williams*' declaration of exclusive tribal-adjudicatory jurisdiction over nonmember merchant's suit against tribal members); and (iv) does not require the express consent of non-Indians before tribes may exercise civil jurisdiction over them. These principles require affirmance in this case.

E. Since *Montana* was decided, this Court has addressed the application of its first test in various circumstances. Three themes have emerged.

First, as already made clear, this Court has consistently reaffirmed that under *Montana*'s first test, tribes have civil jurisdiction over nonmembers who are "private commercial actors" and who "voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Hicks*, 533 U.S. at 372. See also *Atkinson*, 532 U.S. at 653 (same); *Strate*, 520 U.S. at 457 (same). In each of these decisions, the Court has cited and relied on *Williams* as an exemplar of the first *Montana* test, describing it as "declaring tribal jurisdiction exclusive over [a] lawsuit" by a nonmember bringing a civil claim arising out of a commercial transaction against a tribal member. See, *e.g.*, *Strate*, 520 U.S. at 457. In this context, the Bank's arguments – that its consensual dealings with the Longs did not give rise to tribal-court jurisdiction and that the first *Montana* test does not reach adjudication – are plainly wrong.

Indeed, since *Montana*, this Court has upheld various exercises of the tribes' inherent authority over the conduct of nonmember defendants on the reservation and in consensual, voluntary relationships with tribes and tribal members. See, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (upholding tribal regulation of nonmembers hunting and fishing on reservation); *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200-01 (1985) (upholding tribal severance tax on minerals extracted from reservation by non-Indian); cf. *Merrion*, 455 U.S. at 142 ("a tribe has no authority over a nonmember *until the nonmember enters tribal*

lands or conducts business with the tribe") (emphasis supplied).

Second, this Court has *refused* to bar tribal courts from hearing civil cases against non-Indians, as it did with criminal cases against non-Indians in *Oliphant*. In fact, the Court's holding that a nonmember contesting tribal-court civil jurisdiction must first exhaust that claim in tribal court, see *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 855-56 (1985), would make no sense if tribal courts *always* lack jurisdiction over civil cases involving nonmembers.

As this Court expressly said in *National Farmers*, "the reasoning of *Oliphant* does not apply to this case." *Id.* at 854. See *id.* at 855 ("the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed"). The Court explained that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. [*Id.* at 855-56 (footnote omitted).]

The Court mandated that tribal courts resolve the question of their own jurisdiction "in the first instance," in part because "Congress is committed to a policy of supporting tribal self-government and self-determination." *Id.* at 856. This reasoning makes clear both that tribal courts possess civil jurisdiction in cases involving nonmembers, and that this type of

civil jurisdiction is an important aspect of tribal sovereignty. See also *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987) ("[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty") (citing *Montana*; *Colville Indian Reservation*, *inter alia*).

Finally, this Court has made clear that in applying the first *Montana* test, the nexus between the nonmember and the tribe, tribal members or tribal lands is significant. As the Court explained in *Hicks*, when nonmembers enter into "'private consensual' relationships" "'with the tribe or its members, through commercial dealing, contracts, leases or other arrangements,'" that arrangement provides a sufficient nexus for tribal civil jurisdiction. See 533 U.S. at 371. See also *Strate*, 520 U.S. at 457 (elaborating on the nexus required by "*Montana*'s list of cases fitting within the first exception"). In addition, tribal power to tax and otherwise regulate "non-Indians entering the reservation to engage in economic activity" has routinely been upheld. See *Confederated Tribes*, 447 U.S. at 153 (citing *Buster* v. *Wright*, *inter alia*). See *id.* at 152 ("[t]he power to tax transactions occurring on trust lands and *significantly involving a tribe or its members* is a fundamental attribute of sovereignty").[4] As explained

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[4] The nexus between tribal-land regulation and reservation-land ownership has played a significant, but not dispositive role in this Court's analysis of tribal jurisdiction over nonmembers using that land. *See Hicks*, 533 U.S. at 360 ("[t]he ownership status of land, in other words, is only one factor to consider in determining" tribal civil jurisdiction, albeit it is sometimes "dispositive"). *See Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-44 (1989) (Stevens, J., joined by O'Connor, J., announcing the judgment) (the tribe had authority to zone nonmember land in the area of

below, these recent iterations of *Montana* and the jurisdictional nexus it contemplates among tribes, their members and nonmembers plainly embrace the relationship between the Longs, their ranch, and the Bank.

This Court's post-*Montana* decisions, in sum, contain no hint that *Montana*'s tests should be narrowed as the Bank argues here. Nor has Congress taken action suggesting that those tests should be truncated or eliminated altogether. To the contrary, as elaborated upon in the *Amicus* Brief of the National American Indian Court Judges Association et al., Congress and the executive branch have expressed strong support in the years following *Montana* for tribal self-government and the tribal courts in particular. If *Montana* was grounded in the common presumptions of the political branches and this Court, then the developments since *Montana* strongly counsel against eviscerating the *Montana* tests. And, as the next section demonstrates, any fair application of those tests supports the exercise of jurisdiction by the Tribe's courts in this case.

Deference to Congress, recognition of tribal self-government and the balancing of tribal and federal interests are the doctrinal underpinnings of *Montana*. The Bank's proposal – that tribes lack civil jurisdiction over nonmembers absent express consent – is divorced from the history and precedent that led to *Montana*, inconsistent with the context-specific analysis mandated by the array of relevant considerations, and disrespectful of the tribes' governmental status.

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the reservation that was largely Indian trust land, but lacked authority to do so in areas largely owned by nonmembers).

II. NONE OF THE BANK'S ARGUMENTS CASTS DOUBT ON THE EXERCISE OF TRIBAL-COURT JURISDICTION HERE UNDER *MONTANA*.

A. This Civil Dispute Is Not About And Does Not Arise On Non-Indian Land.

The Bank first argues that the *Montana* tests have no application here because this case involves reservation land that was owned by a nonmember, the Bank. As the Longs have demonstrated, this argument misapprehends the issue presented – whether the tribal courts had civil jurisdiction to decide the claim that the Bank engaged in discrimination in the course of its consensual, commercial dealings with the Longs.

Thus, this case is not, as the Bank would have it, akin to a claim arising out of a tort physically occurring on land held or controlled by a non-Indian or by the federal or state government (*e.g.*, *Strate*) or to a tribal assertion of civil jurisdiction over transactions among nonmembers occurring on such land (*e.g.*, *Atkinson*). Instead, this is a dispute between tribal members (the Longs) and a nonmember (the Bank) concerning a transaction that was an integral part of a longstanding commercial relationship between these parties in which the BIA was involved. This claim thus falls squarely within the ambit of tribal civil jurisdiction over nonmembers described in *Montana*, 450 U.S. at 565-66.

NCAI will not repeat the detailed demonstration of this point by the Longs. Instead, NCAI will focus on how the nature of the transaction here *heightens* the tribal interest in civil jurisdiction.

First, the transaction underlying the discrimination claim involves the loss of tribal members' ownership

of land within Indian country. Both as a historical matter and as a factor relevant to tribal sovereignty, this circumstance makes plain the nexus between the transaction and tribal interests and self-government. It is no exaggeration to say that the post-settlement history of the tribes is a history centered on the loss of sovereignty and land. Conquest (resulting in treaties of cession) and allotment, described *supra*, caused the most substantial losses. Indeed, "[l]and speculators and frontier settlers saw allotment as a sure-fire scheme to open up Indian lands for more productive use and ultimate transfer to non-Indian owners." Cohen, *supra*, § 1.04, at 77. In 1887, when the Dawes Act was passed, the tribes held 138 million acres; less than fifty years later, when allotment ended, only 48 million acres remained. *Id.* at 77-78.

Since the end of the allotment and assimilation eras, the federal government's policy has been to protect and foster tribal sovereignty and lands, with substantial federal statutory and regulatory schemes addressing these subjects. See, *e.g.*, *Amicus* Brief of the National American Indian Court Judges Association, et al. But, the critical point here is that the transaction that is the basis of the Longs' discrimination claim is one in which Indian history and tribal sovereignty are uniquely implicated because it involves the loss of tribal members' land within Indian country.

Second, the role of the federal government, acting in furtherance of its trust obligation to the tribes in connection with this transaction, supports the tribal courts' civil jurisdiction over this dispute. The Indian Financing Act, 25 U.S.C. § 1451 *et seq*., authorizes a number of BIA programs to promote development in Indian country, including the Indian Guaranteed Loan Program, which provides a guaranty or

insurance coverage up to and including 90 percent of a loan to a tribe, tribal business or business entities with at least 51% Indian ownership for projects that will contribute to the tribal economy. See 25 C.F.R. § 103.6. The loans must be those that would not be made without the program. *Id.* § 103.4(d). The Banks' loans to the Longs, accordingly, would not have been made – and thus the transaction that is the subject of the tribal courts' civil jurisdiction would not have occurred – but for the Longs' tribal status and their ranch's contribution to the tribal economy. This nexus between the transaction and tribal interests militates strongly in favor of tribal-court jurisdiction.

B. Tribal Courts Had Jurisdiction Under *Montana*.

1. This Case Involves A Straightforward Application of *Montana*'s First Test.

For two reasons, the Bank contends that this case does not fall within the first *Montana* test for tribal jurisdiction over nonmembers.

First, the Bank wrongly contends that the Long Company is not a tribal entity. The discrimination claim at issue was brought by the Longs, who are indisputably tribal members; and they, as well as the Company, formed a commercial relationship with the Bank, even guaranteeing the Company's debt. App. A-10 to A-12.[5] Two federal courts have concluded that the Long Company is a tribal entity for purposes of this case (*id.* at A-5, A-7), a factual finding entitled

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[5] The Bank's statement that the Longs used the Company to "shield [themselves] from personal liability," Bank Br. 34, is thus highly ironic.

to deference under this Court's two-court rule. See *Berenyi* v. *District Dir.*, 385 U.S. 630, 635-36 (1967) (the Court generally will not "'undertake to review concurrent findings of fact by two courts below'").

If more were needed, the transaction was based on and occurred as a result of BIA loan guarantees and insurance that were available because tribal members own more than 50% of the Company. See *supra*, at 21-22. The Bank's suggestion that it has not "availed itself of the advantages of doing business with a member," Bank Br. 33, is belied by these facts.

Second, the Bank seeks to avoid the application of the first *Montana* test by arguing that it describes only the scope of tribal "regulatory" jurisdiction over nonmembers, *id*. at 31, which is broader than tribal adjudicatory jurisdiction over nonmembers. This argument cannot withstand scrutiny.

Initially, as noted *supra*, this Court cited examples of circumstances in which tribal courts satisfied this test for tribal jurisdiction in *Montana*. See 450 U.S. at 565-66. Among these examples was *Williams*, 358 U.S. at 223, a case involving not regulatory but adjudicatory jurisdiction. And, in *National Farmers Union*, a case involving adjudicatory jurisdiction, the Court noted that if it were to extend *Oliphant* to the civil setting, it would have to forbid tribal courts from ever exercising civil jurisdiction over nonmembers, and this it declined to do. See 471 U.S. at 855-56. Finally, in *Strate*, this Court characterized *Williams* as "*declaring tribal jurisdiction exclusive over* [*a*] *lawsuit arising out of on-reservation sales transaction between* [*a*] *nonmember plaintiff and member defendants*." 520 U.S. at 457. None of this is consistent with the Bank's assertion that tribal courts lack jurisdiction over nonmembers under *Montana*'s first test.

Second, this Court has said that "[a]s to nonmembers, . . . a tribe's adjudicative jurisdiction does not *exceed* its legislative jurisdiction," *id.* at 453 (emphasis supplied); but, surely, it does not fall short of that subject matter either. See Cohen, *supra*, § 7.01, at 598 n.12 ("[W]ith respect to a tribal court's subject matter jurisdiction . . . it makes sense to view that power as reaching as far as the tribe's legislative jurisdiction. *Both legislative jurisdiction and subject matter jurisdiction are concerned with whether the subject involved is properly within the authority of the government in question.*") (emphasis supplied).

The argument that the tribe has civil-regulatory but not civil-adjudicative jurisdiction makes neither logical nor practical sense. As a matter of practice, if a tribe has civil-regulatory jurisdiction over the Bank, as the Bank concedes, that jurisdiction could be exercised either by an executive officer, with judicial review available, or through litigation in court brought by the executive officer. Neither the federal nor the state courts, however, have jurisdiction to enforce or review tribal law. The only logical forum for litigation concerning tribal regulation is a tribal court. If a sufficient nexus exists to warrant tribal jurisdiction in the first instance, then tribal-adjudicative jurisdiction must follow.

Thus, for example, if a nonmember is caught hunting on tribal land in violation of tribal civil law, the tribal game warden may seize the rifle as a civil forfeiture. Absent diversity jurisdiction (which is not available when a tribe is a party), the nonmember could not litigate this forfeiture in federal or state court (*Williams*, 358 U.S. at 222-23). (If a federal court were to have diversity jurisdiction, the matter would have to be stayed for exhaustion of tribal remedies, see *LaPlante*, 480 U.S. at 16.) The only

place he could seek judicial relief to get his rifle back would be the tribal court (or some administrative appeals process within the tribal executive branch, presumably subject to judicial review). In the same vein, where a tribe issues a comprehensive regulatory regime governing consensual, commercial dealings between nonmembers and the tribe (or its members), the enforcement of that regime would be a toothless affair without the availability of the tribal court system. As a practical matter, without adjudicative jurisdiction, regulatory jurisdiction is largely meaningless.

Nor is there any basis in logic for the Bank's view that the first *Montana* test applies exclusively to "regulatory" jurisdiction, and that regulatory jurisdiction somehow excludes adjudicatory jurisdiction. "[C]ommon law rules administered by judges, like statutes and regulations, create and define legal obligations." *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1012 (2008) (Stevens, J., concurring). Indeed, "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 522, 504 (1992) (emphasis omitted) (plurality opinion). In other words, far from being "world[s] apart," Bank Br. 36, statutes and regulations, and the judicial enforcement of statutes, regulations and common law, all regulate. See also App. A-14 ("[t]ort law is [simply another] means of regulating conduct") (citing W. Page Keeton et al., *Prosser and Keeton on Torts* 25 (5th ed. 1984)).

This Court has clearly held that a state court's entry of judgment on a state statutory or common-law cause of action imposes state-law requirements on the litigants. See, *e.g.*, *Riegel*, 128 S. Ct. at 1008 (common-law causes of action impose requirements

on entities and thus are preempted when inconsistent with federal statutes). That adjudicatory jurisdiction regulates litigants is clearest when the adjudication enforces a statute or regulation. But, common-law liability is also "'premised on the existence of a legal duty,' and a tort judgment therefore establishes that the defendant has violated a state-law obligation." *Id.* (quoting *Cipollone*, 505 U.S. at 522). "And, while the common law remedy is limited to damages, a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* (internal quotation marks omitted) (quoting *Cipollone*, 505 U.S. at 521).

In essence, the Bank's argument is that *Montana* should be treated like a statute subject to a strict construction, and that the word "regulate" should be given its narrowest conceivable interpretation and exclude adjudications that regulate. But this Court does not "parse the text" of its opinions as though they are "governing statute[s]." *Commissioner* v. *Bollinger*, 485 U.S. 340, 349 (1988). See *Hicks*, 533 U.S. at 371-72 (declining to treat *Montana* as a statute). The word "regulate" should be given its natural meaning – and the meaning clearly intended by *Montana* – as embracing all forms in which the government undertakes to establish and enforce the legal rules governing behavior.[6]

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[6] The Bank's attempt to use the Indian Commerce Clause to support its argument that "regulate" means only to enact laws and regulations is far off the mark. Bank Br. 38. The Constitution refers solely to Congress, while *Montana* addresses tribal government as a whole. Moreover, in exercising its authority over the tribes, Congress can establish tribal courts or designate courts to adjudicate claims. Thus, Congress's regulatory power includes the power to provide for adjudication.

2. *Montana*'s Second Test Also Supports Tribal Court Jurisdiction.

The Bank also urges this Court to reach a question not addressed by the courts below and to hold that *Montana*'s second test does not apply. NCAI endorses the Longs' showing that the Bank's conduct threatens tribal integrity, economic security and welfare. Longs' Br. 53-57. *Amici* will not repeat that analysis, but urges the Court to focus on one important aspect of this test.

In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court declared that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Id.* at 163. Our government warrants this "high appellation" in substantial part due to its federal and state court systems. Although many tribal courts were initially established as part of the federal assimilation of tribes into the American mainstream, see generally William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (1966), tribal judicial systems are now an important component of tribal "government[s] of laws" for many tribes; and those systems generally receive the political and financial support of the United States. The *Amicus* Brief of the National American Indian Court Judges Association, et al., makes this showing in detail.

Tribal legal systems with civil jurisdiction over nonmembers engaged in substantial, consensual, transactions and relationships with tribes and tribal members are crucial to tribal self-government. Tribal legal systems have limited practical utility if they cannot resolve such disputes. Tribes cannot foster tribal economic and social policies, and they cannot act as true governments if they lack civil jurisdiction

to implement and enforce their laws in the context of such relationships. See generally Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Non-members in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1105-06 (2005). It is no exaggeration to say that without tribal-court civil jurisdiction over non-Indians engaged in relationships or transactions that give them a nexus to the tribe and tribal lands, there will be little respect either for tribal courts or tribal self-government. *Id.* at 1109-10. See also *Hearing on Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America Before the S. Comm. on Indian Affairs*, 107th Cong. 29 n.4 (2002) ("[restriction of tribal court jurisdiction over non-Indians] creates resentment and projects an image that non-Indians are above the law in the area where they chose to reside or enter into.") (testimony of John St. Clair, Chief Judge of the Shoshone and Arapahoe Tribal Court of the Wind River Reservation), *quoted in* Berger, *supra*, at 1114. *Montana* certainly recognizes this point by citing *Williams* as an illustration of test two, as well as test one.

III. NOTHING IN THE REALITY OF TRIBAL COURTS OR TRANSACTIONS AMONG TRIBES, TRIBAL MEMBERS AND NON-INDIANS REQUIRES THIS COURT TO FORBID TRIBAL-COURT JURISDICTION.

Montana authorizes but does not make exclusive tribal-court jurisdiction over consensual relations between tribes, tribal members and nonmembers with a sufficient nexus to Indian country. After *Williams* and *Montana*, the general assumption of non-Indians doing business with tribes and tribal members in Indian country has been that tribal courts enjoy jurisdiction over civil disputes arising

out of those relationships and transactions. That assumption arises from *Williams* and was confirmed by *Montana*. The Bank clearly shared that assumption, litigating in tribal court on many previous occasions and objecting to tribal-court jurisdiction only when it lost below. See generally *Amicus* Brief of Cheyenne River Sioux Tribe.

Under the *Montana* regime, parties have successfully negotiated hundreds of thousands of agreements and contracts that are essential to economic development in Indian country, but also allow tribal governments to protect important tribal interests. The Bank nonetheless argues that allowing the tribal courts to exercise jurisdiction over the claims at issue is bad public policy because tribal courts are underfunded; because the Constitution does not apply and non-Indians lack notice of the substance of Indian law; and because transactions among tribes, tribal members and non-Indians do not implicate tribal self-government.

First, as discussed above, there is no reason to believe that the political branches view the *Montana* tests as bad policy such that this Court, acting in its common-lawmaking capacity, should narrow or eliminate those tests. To the contrary, as the *Amicus* Brief of the National American Indian Court Judges Association et al. demonstrates, Congress has shown considerable support for tribal courts in *Montana*'s wake, affirming *Montana*'s delineation of civil jurisdiction in a variety of realms.

Second, the impact that affirmation of the tribal courts' jurisdiction would have on the Bank and similarly-situated businesses is vastly exaggerated. In any loan agreement or contract involving tribes, tribal members and nonmembers, the parties may enter into agreements determining both the choice of

forum and the choice of law governing that dispute. Such clauses are common in almost every form contract and certainly in contracts negotiated between commercial parties at arm's-length.

In any event, thousands of contract relationships and other transactions take place in Indian country based on the premise that tribal courts will have jurisdiction unless the parties agree otherwise. Often, these contracts and loan agreements address choice of law and forum issues. The *Montana* framework allows parties engaged in consensual, commercial transactions the freedom to negotiate the choice of law and forum issues that best suit their individual requirements. Tribes and tribal members can decide when and the extent to which important tribal interests are implicated by a transaction, while businesses can decide whether questions of choice of law and forum must be resolved in a particular way as a condition of entering into the transaction. In this setting, and in light of the consensual nature of the transactions at issue, there is no justification for working the deep infringement of tribal sovereignty and self-government urged by the Bank.

These kinds of negotiating options were certainly open to the Bank, which had been dealing with the Longs specifically and within Indian country generally for many years under the *Williams/ Montana* regime. Indeed, the Bank clearly believed that its interests were best served by the tribal-court forum in this case and in numerous others until it failed to prevail here.

The Bank's further arguments and assumptions about the inadequacy of tribal courts as compared with state and federal courts are demonstrably incorrect and designed to engender prejudice against the former. The Bank would be hard pressed to

explain in any serious way why it did not receive thorough and fair process below. As the Tribe's *amicus* brief carefully details, the Tribe operates a modern, serious court system that administers justice in an even-handed fashion. See generally *Amicus* Brief of Cheyenne Sioux River Tribe. This is also true of the Tribe's sister courts around the Nation. See generally *Amicus* Brief of the National American Indian Court Judges Association, et al. The fairness and efficacy of the Tribe's courts no doubt explain the Bank's repeated utilization of those courts over the course of many years, as well as the fact that the Bank has never objected to their jurisdiction until now. The Bank's efforts to undo the *Montana* tests by casting unfounded aspersions on the Tribe's courts find no support in Congressional policy and should not be sanctioned by this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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