

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PLAINS COMMERCE BANK, :

4 Petitioner :

5 v. : No. 07-411

6 LONG FAMILY LAND AND :

7 CATTLE COMPANY, INC., :

8 ET AL. :

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10 Washington, D.C.

11 Monday, April 14, 2008

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:07 a.m.

16 APPEARANCES:

17 PAUL A. BANKER, ESQ., Minneapolis, Minn.; on behalf
18 of the Petitioner.

19 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf
20 of the Respondents.

21 CURTIS E. GANNON, ESQ., Assistant to the Solicitor
22 General, Department of Justice, Washington, D.C.;
23 on behalf of the United States, as amicus curiae,
24 supporting the Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 07-411, Plains Commerce Bank versus Long Family Land and Cattle Company. Mr. Banker.

ORAL ARGUMENT OF PAUL A. BANKER
ON BEHALF OF THE PETITIONER

MR. BANKER: Mr. Chief Justice, and may it please the Court:

Tribes lack inherent sovereign power over nonmembers. This court in the Montana decision recognized two narrow exceptions based on the underlying principles of protecting tribal self-government and controlling internal relations. Neither of those exceptions applies here.

The question today is whether the tribal court possessed adjudicatory jurisdiction to hear the Longs' discrimination claim against the nonmember bank. It did not. There was no qualifying consensual relationship here of the qualifying kind. There was -- adjudication is not another means of regulating nonmember defendant conduct.

JUSTICE SCALIA: We've said that regulation does include regulation by adjudication for purposes of

1 -- of Federal pre-emption laws. Why would it -- why
2 would it be different for -- for Indian law.

3 MR. BANKER: Well, I think the reason that
4 it would be different for Indian law is the way that it
5 bears on the nonmember defendants' rights. The -- if
6 you look at what Montana was based on and the underlying
7 principles, I think it is important to recognize that
8 nonmember defendants in tribal court, finding themselves
9 there to adjudicate, that is something that I think was
10 contemplated by the second exception, but not the first
11 exception.

12 The reason that I think that is that in
13 carving out two exceptions --

14 JUSTICE SCALIA: Yes, I understand, but I'm
15 just talking about the first one now. You say it is not
16 -- it is not regulation, right, under the first? And
17 that's -- that's the only point I'm addressing. Why
18 should regulation through a process of adjudication not
19 be considered regulation for purposes of our Indian law
20 where -- whereas, we have made clear in several cases
21 that it does constitute regulation for purposes of
22 Federal pre-emption under statutes that pre-empt state
23 regulation?

24 MR. BANKER: I think that it is different in
25 the tribal-law context because in articulating the --

1 the first exception when the Court said: Regulate
2 nonmember conduct through other means, if the Court had
3 meant to say "adjudication," I think the court could
4 have articulated that there. And I think it's --

5 JUSTICE SCALIA: We could have said the same
6 thing about the Congress. Congress just said -- just
7 said "regulation," and we interpreted that term to
8 include common-law adjudication.

9 MR. BANKER: When I look at the -- you know,
10 at the -- and compare the language in the first Montana
11 exception of regulation to the language in the
12 Constitution under the Indian Commerce Clause, I see a
13 parallel there between saying that, you know, there are
14 certain types of legislative authority that tribes may
15 exercise over nonmembers versus exercising the power of
16 the courts.

17 JUSTICE SOUTER: Well, are you saying that
18 the -- that the regulatory authority could be broader
19 than the adjudicatory authority?

20 MR. BANKER: I think that has been well
21 established: That the regulatory --

22 JUSTICE GINSBURG: Can you give any example
23 of that? I mean, I found that rather surprising your
24 brief. The Montana -- a clear case that Montana talks
25 about is tax, the imposition of a tax. Well, if a

1 jurisdiction has authority to tax, then surely it has
2 authority to sue to collect that tax. So I am not aware
3 of a case where a State or tribe or nation has authority
4 to regulate, to legislate, but lacks authority to
5 enforce that regulation. And if you have an example of
6 that, I would appreciate being enlightened.

7 MR. BANKER: Well, I think that there's a
8 tension between what the Court said in the Strate case,
9 where it said, presumptively, if there is the power to
10 regulate, then there is presumptively the power to
11 adjudicate. That, I believe, was called into question
12 by the second footnote in the Nevada versus Hicks
13 decision, which questioned, in my mind, whether or not
14 there was any adjudicatory power at all. And I think
15 that is the question that the Court has to determine, is
16 whether --

17 JUSTICE GINSBURG: What was the regulation
18 that was authorized but unenforceable in the courts? I
19 don't recall -- Montana -- Hicks having said anything on
20 that subject.

21 MR. BANKER: Well, there was a -- the footnote
22 number 2 in Hicks at least called into question about
23 whether or not -- you know, I think it's been made clear
24 by the Court's opinions that -- that adjudicatory
25 authority is certainly no broader than legislative

1 authority. The question raised by the second footnote
2 in the Hicks opinion, in my mind, is whether or not
3 adjudicatory authority exists at all in the first
4 exception.

5 CHIEF JUSTICE ROBERTS: Well, what is a tribe
6 supposed to do? Let's say there is a gas station on the
7 reservation. The tribe has a tax. Anybody doing
8 business -- it's, you know, 1 percent of gross proceeds.
9 And at the end of the year the gas station owner says,
10 well, I'm just not going to pay it. What do they do
11 then?

12 MR. BANKER: Well, I think that there is a
13 difference between situations where there is a clear
14 ability to regulate and where you would move to enforce
15 that regulation and a situation where you are
16 adjudicating, you know, separate claims under the common
17 law of the tribe.

18 CHIEF JUSTICE ROBERTS: So you think there
19 would be -- there would be tribal-court jurisdiction in
20 the case I hypothesized?

21 MR. BANKER: I don't think so. I think the
22 nature of the first exception is a consensual
23 relationship. And I think if there is going to be an
24 ability to regulate in the first instance, then the
25 regulation needs to be clearly consented to.

1 CHIEF JUSTICE ROBERTS: So your case, your
2 entire case, is based on whether or not there's consent
3 to dealing with the tribe by the nonmember?

4 MR. BANKER: Well, I think it goes further
5 than that. If I could -- you know, in your example of
6 the taxation, if there was clear consent to be taxed --

7 JUSTICE GINSBURG: Who would consent to be
8 taxed? I mean the tax is --

9 (Laughter.)

10 JUSTICE GINSBURG: It's being imposed. But,
11 say, at the gas station, they don't ask you when you
12 drive up: Now do you consent to the tax?

13 MR. BANKER: Well, but by engaging in commerce
14 on the reservation and by, you know -- and this Court
15 has addressed it in a number of taxation decisions
16 regarding Indian law, the -- there is a quid pro quo for
17 --

18 JUSTICE GINSBURG: But that's different from
19 consent. You can say I don't consent as loudly as you
20 like and as often as you like, and you still have to pay
21 the tax.

22 MR. BANKER: But that -- you know, in the
23 taxation context, I think that is the price of doing
24 business.

25 JUSTICE SOUTER: No, but if that kind of

1 implicit consent applies in the tax context, I don't see
2 why in theory it doesn't apply in the situation we've
3 got here.

4 MR. BANKER: Well --

5 JUSTICE SOUTER: If somebody is going to do
6 business with the tribe, with tribal members, in a way
7 that affects the tribe on the reservation, it makes just
8 as much sense to say, well, they implicitly consent not
9 to discriminate against tribal members because of their
10 Indian status.

11 MR. BANKER: I think it is, you know, that
12 consent under the first Montana exception can't be
13 implicit. I think it needs to be explicit.

14 JUSTICE SOUTER: Well, I thought it was
15 implicit in the tax situation, as you responded to
16 Justice Ginsburg's question.

17 MR. BANKER: Well, I think we need to be
18 specific about the taxation context. You know, I don't
19 think that any taxation context would carry with it
20 implicit consent.

21 JUSTICE SOUTER: All right. Let me take
22 another example, the other explicit example from
23 Montana, which mentioned taxing and licensing. Are you
24 saying that if a -- in any particular activity, say,
25 running a filling station or advertising oneself as a

1 certified mechanic in the -- at the filling station on
2 the reservation, and the tribe says, well, we are going
3 to license mechanics to make sure they are competent.
4 Are you saying that there has got to be an explicit
5 agreement to the licensing in order for the tribe to
6 enforce its licensing restriction against somebody who
7 goes to work for that gas station?

8 MR. BANKER: I mean in that situation, if the
9 tribe said, here is the licensing that we are going to
10 impose on you for being a mechanic, and the mechanic
11 then went to work at that gas station, knowing about
12 that licensing requirement, I mean, that is -- that is
13 the sort of actual --

14 JUSTICE SOUTER: Okay. Then, that's --
15 that's implicit consent then, isn't it?

16 MR. BANKER: I think it comes --

17 JUSTICE SOUTER: He doesn't sign a document
18 saying "I consent"; he just goes to work. And your
19 answer says, okay, that's enough to catch him on
20 licensing. In Justice Ginsburg's example, if they
21 started doing business, that's enough to catch them on
22 taxation. And if that is so, why isn't tribal dealing
23 sufficient in effect to supply an implicit consent not
24 to discriminate?

25 MR. BANKER: Well, I don't know that I would

1 -- I would disagree that -- I would say that those
2 examples of consent of the licensing of the taxation are
3 much closer to being actual consent. I'm not saying by
4 "actual consent" that there needs to be a written
5 document that says --

6 JUSTICE SCALIA: You don't really mean "actual
7 consent" by "actual consent," right?

8 (Laughter.)

9 MR. BANKER: Well, yes.

10 JUSTICE SCALIA: Maybe you should use a
11 different term, like "implicit consent," maybe.

12 (Laughter.)

13 MR. BANKER: The -- I think that there has to
14 be a line drawn.

15 JUSTICE SOUTER: All right. Why draw the line
16 where you want to draw it? We've got a line in which
17 the -- I'll put a blank, the "X" consent -- what did we
18 want -- whatever adjective we want suffices for taxation
19 and it suffices for licensing. Why doesn't it suffice
20 for nondiscrimination? Why do we draw the line where
21 you want it drawn?

22 MR. BANKER: The reason where we would draw
23 the line where I want to draw it is that, you know, the
24 discrimination claim that was made here ultimately
25 turned out to be based on tribal common law. It arose

1 out of this -- the dealings, the contractual dealings,
2 between the bank and a nonmember corporation. It is
3 important for a nonmember to know where tribal
4 jurisdiction attaches or doesn't attach. And it is not
5 possible to predict when a common law, tribal -- for an
6 outsider to determine when a tribal common-law
7 discrimination claim is going to attach as a form of
8 regulation --

9 JUSTICE SCALIA: Oh, so one of your answers to
10 an earlier question suggests the same point that you now
11 seem to be making, although I don't -- I don't recall it
12 from your brief. Apparently you think that it would be
13 different if this antidiscrimination law of the tribe
14 had been set forth in a tribal ordinance. Is that
15 right? Would you say your client could have been held
16 to it if it had been written, rather than simply a -- a
17 portion of tribal common law?

18 MR. BANKER: If it had been a tribal
19 antidiscrimination statute, there would have at least
20 been the possibility of notice and the possibility of --

21 JUSTICE SCALIA: That's not what I asked.
22 That's not what I asked. I asked whether you would
23 acknowledge that your client could be bound if it had
24 been written.

25 MR. BANKER: I think what is required to bind

1 a nonmember to tribal law is clear consent, and merely
2 knowing about the tribal antidiscrimination --

3 JUSTICE SCALIA: Well, that doesn't make any
4 difference. We shouldn't place any weight on the fact
5 that this was a common-law regulation, rather than
6 regulation by a statute or ordinance. You can't have it
7 both ways. It either makes a difference or it doesn't
8 make a difference.

9 MR. BANKER: I -- I think that it does make a
10 difference.

11 JUSTICE SCALIA: But you just told me it
12 didn't.

13 MR. BANKER: I think --

14 JUSTICE SCALIA: You just told me that even
15 if it were written down, you would still need what you
16 think is express consent.

17 MR. BANKER: I think that that provides the
18 clearest guidance for when tribal jurisdiction attaches
19 or doesn't.

20 JUSTICE GINSBURG: Well, do you recognize
21 that the bank was on notice, at least that it was a Federal
22 requirement that when you deal with individual Indians
23 or what this loan company was, it was an organization of
24 Indians -- that's what the Federal law calls it -- there
25 is a duty of fair dealing? The Federal law requires

1 that. Isn't that so?

2 MR. BANKER: That is so, but, you know,
3 we're not here to, you know -- the Federal courts don't
4 provide a substantive review on the merits. Another
5 side to the story about the merits of the
6 discrimination.

7 JUSTICE GINSBURG: But it's not -- it's not
8 uncommon that a State would adopt a Federal standard as
9 its -- as its own on a question of civil rights. A
10 State might stay, well, we choose to construe our human
11 rights law in accord with the Federal -- Federal law?

12 MR. BANKER: No. That's, that's not
13 uncommon. But I think it's important to focus on the
14 background about, out of which this discrimination claim
15 arose. And, you, know it began in the first instance
16 with the bank, a nonmember, entering into a contract
17 with a South Dakota corporation. And the South Dakota
18 corporation, the Long Family Land and Cattle Company, is
19 not a tribal member, cannot be --

20 JUSTICE GINSBURG: But it is an organization
21 of Indians?

22 MR. BANKER: It is closely held by tribal
23 members. And it is organized for the purpose of
24 facilitating Bureau of Indian Affairs loan --

25 JUSTICE SCALIA: Can a State distinguish

1 when it grants a corporation status between non- Indian
2 and Indian corporations.

3 MR. BANKER: I don't believe so.

4 JUSTICE KENNEDY: Can you incorporate under
5 tribal law.

6 MR. BANKER: You cannot incorporate under
7 tribal law.

8 JUSTICE SCALIA: Wasn't part of the
9 transaction the obtaining of back-up liability on the
10 part of the individual Indians who, who owned the
11 corporation? Didn't they guarantee the loan?

12 MR. BANKER: You have to be specific about
13 the loan guarantees and the contracts that we are
14 talking about. Before 1996, before the loan contracts
15 that are at issue here, there were lending relationships
16 and loan guarantees that were made. And after 1996,
17 when additional loans were made, there were personal
18 guarantees that were made. There was no attempt ever to
19 enforce those personal guarantees, but they were part of
20 the record.

21 JUSTICE SCALIA: No, but it does give the
22 whole thing a decided flavor of dealing with, with
23 Indians on the reservation. You're dealing with a
24 corporation that, that's majority owned or entirely
25 owned. Is it majority or entirely?

1 MR. BANKER: I believe it is certainly 51
2 percent.

3 JUSTICE SCALIA: Yes.

4 MR. BANKER: There is a question about
5 whether it's more.

6 JUSTICE SCALIA: And then you get guarantees
7 from, on reservation Indians. It smells like dealing
8 with Indians on the reservation to me. Of course, this
9 certainty that you're -- that you're asking, your client
10 could have obtained that certainly by inserting a choice
11 of law provision providing that any disputes would be
12 resolved somewhere else, couldn't it?

13 MR. BANKER: There is no question that this
14 whole question would have been avoided had there been a
15 choice of forum selection that placed the dispute
16 resolution squarely in South Dakota courts. In the
17 absence of that, in the silence of that --

18 JUSTICE SCALIA: In the absence of that, why
19 should we bend over backwards to give something that has
20 the smell of dealing with the Indians any other name?
21 Your clients can fully protect themselves by a choice of
22 forum provision.

23 MR. BANKER: I think that in the face of
24 silence in the contract, the general rule controls
25 rather than its exceptions.

1 CHIEF JUSTICE ROBERTS: Well, your clients
2 could they fully protect themselves. What if the tribe
3 sought to enforce tribal law against them, can they
4 bring that claim in State court?

5 MR. BANKER: If the tribe or if the tribal
6 members sought to enforce that?

7 CHIEF JUSTICE ROBERTS: Right. Well, just
8 like this and there was a choice of forum provision,
9 says, well, you've got to bring this in State court. I
10 thought there were restrictions on whether or not tribal
11 law can be enforced in State courts.

12 MR. BANKER: Well, I think it's the question
13 of who the plaintiff is if the Long Family Land and
14 Cattle Company, the South Dakota corporation, had had a
15 contract with the bank that said your forum for dispute
16 resolution is South Dakota courts, and the Long Family
17 Land and Cattle Company had commenced an action in South
18 Dakota courts, I think the dispute could have been
19 resolved there.

20 CHIEF JUSTICE ROBERTS: Even if it -- well,
21 that's if it's a contract claim. What if it's a
22 discrimination or Indian common law claim arising out of
23 the contractual relationship?

24 MR. BANKER: That's a more difficult
25 question. You know, there was -- it isn't part of the

1 question presented, but there was a dispute in the
2 underlying tribal court about the nature of the
3 discrimination claim, whether it rose under Federal law
4 or what was its underlying basis. That was resolved in
5 favor of it being a tribal law claim.

6 As I understand the tribal court of appeals'
7 explanation of that on an underlying basis that there is
8 little difference between the tribal law claim and the
9 underlying Federal discrimination law.

10 JUSTICE SCALIA: Is it a contract claim?

11 MR. BANKER: Is it a --

12 JUSTICE SCALIA: Is it a contract claim?
13 Was -- was -- was the claim a claim for discrimination
14 in contracting so that it was part of the contract
15 claim.

16 MR. BANKER: No. I believe that the
17 discrimination --

18 JUSTICE SCALIA: It's a freestanding tort
19 action, is that what it was?

20 MR. BANKER: It is a freestanding tort
21 action.

22 JUSTICE STEVENS: Would the -- would the
23 jurisdiction issue be any different if it were a
24 contract claim? Supposing your client -- they had
25 brought suit against your client claiming a breach of

1 contract, would there have been tribal court
2 jurisdiction?

3 MR. BANKER: Well, we have to look at, you
4 know, who were the contracting parties. The contracting
5 parties were the bank on the one hand and the Long
6 Family Land and Cattle Company on the other. So the
7 individual tribal members I don't believe would have had
8 a breach of contract.

9 JUSTICE STEVENS: Well, we would assume that
10 the corporation had a breach of contract claim, could
11 they have sued in tribal court?

12 MR. BANKER: I don't think that the Long
13 Family and Cattle Company appropriately was a plaintiff
14 in tribal court to sue on breach of contract.

15 JUSTICE GINSBURG: Did they --

16 JUSTICE STEVENS: The question isn't whether
17 that was an appropriate plaintiff. Do you think the
18 tribal court would have had jurisdiction of such a
19 contract claim?

20 MR. BANKER: I don't think so without some
21 sort of consent to hearing that.

22 JUSTICE GINSBURG: I thought that the
23 bank -- I thought that the Long Company was a plaintiff
24 in the tribal court?

25 MR. BANKER: The Long Company was a

1 plaintiff in the tribal court.

2 JUSTICE GINSBURG: And as I understand it,
3 the Long Company asserted, along with the individuals,
4 contract claims?

5 MR. BANKER: That's correct.

6 JUSTICE GINSBURG: But the Long Company did
7 not make a tort claim?

8 MR. BANKER: That's correct.

9 JUSTICE GINSBURG: So why isn't this
10 judgment, even if you're right about the individuals in
11 the tort claim, why isn't this judgment good at least as
12 to the contract claim, which are not challenging and
13 which runs to the benefit of the Long Company which has
14 nothing to do with the tort claim that you are
15 challenging?

16 MR. BANKER: Because of the way that the
17 case was tried. If you look at the general verdict form
18 at page 192 -- 191 and 192 in the joint appendix, you'll
19 see that the jury -- the tribal court jury was asked
20 interrogatories about liability: Liability for
21 contract, liability for discrimination.

22 When they got to question 6 on page 192, the
23 question was asked of the jury if you answered "yes" to
24 question four for the other liability questions, four
25 being the discrimination claim, then award damages. And

1 so the jury awarded \$750,000 of undifferentiated
2 damages. Whether it was for contract, whether it was
3 for tort is not for us to now second-guess. There was a
4 general award of damages. And the jury was instructed
5 that they could award damages for breach -- for
6 discrimination.

7 So, you know, that is a feature of how the
8 case was tried. It is a feature of the way that the
9 jury returned its verdict. And at this point it's
10 impossible to know -- the \$750,000 that was ultimately
11 awarded was far less than what the Longs were asking for
12 for breach of contract, and they didn't say they were
13 not asking for damages for discrimination in the
14 tribal -- in the tribal court.

15 So for this Court to say now that there was
16 no jurisdiction over the discrimination claim would
17 basically invalidate that underlying judgment.

18 JUSTICE SOUTER: Mr. Banker, you several
19 times have raised a point which seems to me to go to the
20 nature of the first exception in Montana on an issue we
21 haven't discussed yet, and I want to get clear on it.
22 You have emphasized consistently through your argument
23 the need for consent whether we call it actual,
24 explicit, some kind of consent to at least the
25 regulatory jurisdiction upon which a judicial

1 jurisdiction is premised. And my understanding is that
2 that's not what -- I don't have Montana in front of me,
3 but my understanding is that that is not what Montana,
4 in effect said with respect to the -- to the first
5 exception. As I recall what the court said in Montana
6 it was that there may be situations in which a nonmember
7 enters into a consensual relationship with the tribe or
8 tribal members, and as a result of that consensual
9 relationship, it then would be appropriate to recognize
10 jurisdiction, for example, to tax regulatory
11 jurisdiction.

12 My understanding is that the consent that
13 Montana was talking about was not a consent to the
14 specific jurisdiction whether it be regulatory or
15 adjudicatory, but rather consent to some kind of, or a
16 consent forming some kind of a relationship that would
17 make it appropriate for the tribe to assert regulatory
18 jurisdiction. So that the consent does not have to
19 relate to jurisdiction as such. Am I -- if that is
20 correct, then your argument for consent seems to me to
21 miss the point. But maybe I'm missing the point of --
22 of Montana. What is your response to that?

23 MR. BANKER: Well, what Montana said, the
24 actual language of Montana said a tribe may regulate
25 through taxation, licensing or other means the

1 activities of nonmembers who enter consensual
2 relationships with the tribe or its members, through
3 commercial dealings, contracts, leases or other
4 arrangements.

5 JUSTICE GINSBURG: So the consensual
6 relationship is what you just said, contracts, leases or
7 other commercial. So the consent is to the commercial
8 relationship.

9 MR. BANKER: Well, I mean, my interpretation
10 of that is -- I mean, Montana in its first exception
11 meant that the consent was in the consensual
12 relationship, then any business dealings with the tribe
13 or its members would result in tribal ability to
14 regulate, and that hasn't been the case, as this Court
15 has, you know, decided --

16 JUSTICE SOUTER: But the point of my
17 question was do you agree that there -- within the --
18 the description of the exception in Montana, that there
19 need not be a consent, either to the regulation or to an
20 adjudicatory jurisdiction to enforce the regulation?

21 MR. BANKER: Not in the actual language of
22 Montana, but in reading Strate and in reading Hicks and
23 in reading Atkinson Trading Company, that is my
24 interpretation of the --

25 JUSTICE SOUTER: So you're saying the

1 Montana exception has been modified by later cases.

2 MR. BANKER: That is correct.

3 JUSTICE SOUTER: Okay.

4 JUSTICE GINSBURG: Certainly not in *Strate*,
5 which you quoted before as saying if you have
6 jurisdiction to regulate, then have you jurisdiction to
7 enforce the regulation.

8 MR. BANKER: True, but I think *Strate* is an
9 important part of that history.

10 JUSTICE ALITO: Well, I thought that your
11 argument was that the general principle that was adopted
12 in Montana is the tribal jurisdiction extends only to
13 those things that are necessary to protect tribal
14 self-government or to control internal relations, and
15 that merely entering into consensual commercial
16 transactions doesn't fall within that, but if one were
17 to consent to the jurisdiction of the tribal courts,
18 then that would be an additional basis for jurisdiction.
19 I thought that was what your argument was.

20 MR. BANKER: I believe that's correct.

21 JUSTICE SOUTER: But if that's your argument
22 what's left of the first exception?

23 MR. BANKER: Well, what's left of the first
24 exception is certainly a tribal ability to regulate, and
25 perhaps that's all.

1 JUSTICE SOUTER: So the first -- but as I
2 understand it the first exception would have no
3 independent application unless the second exception were
4 met -- were satisfied, i.e., there was a tribal need
5 based on self-government, economic self-protection and
6 so on which, which would in effect validate the tribe's
7 attempt to regulate, which seems in effect to say that
8 everything turns on the second exception, not the first.

9 MR. BANKER: Well, I think the first
10 exception could still have meaning, in the sense that it
11 grants the tribe the ability to regulate. The question
12 really is how far does that ability go and how far does
13 it stretch. I don't think that it stretches to
14 adjudication, and I further don't think it stretches to
15 adjudication of nonconsensual tort claims.

16 If there are no further questions I'd like
17 to reserve the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
19 Mr. Frederick.

20 ORAL ARGUMENT OF DAVID C. FREDERICK

21 ON BEHALF OF THE RESPONDENTS

22 MR. FREDERICK: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 I'd like to address both standing and the
25 merits, but because there are some additional wrinkles

1 on the standing question in light of how it was briefed
2 in the reply brief, I'd like to make three brief points
3 on the merits before addressing standing.

4 First, the bank engaged in a seven-year
5 business relationship with the Longs, knowing that they
6 were Indians and deriving substantial commercial
7 benefits from the Longs' tribal status through the BIA
8 loan guarantees. Second, the bank has not challenged
9 tribal court jurisdiction over the breach of contract
10 claim or the bad faith claim, which are the core claims
11 in the case.

12 JUSTICE GINSBURG: Well, they said they
13 don't need to because they said if they win on their
14 claim, then their whole case --

15 MR. FREDERICK: And I'll address that,
16 Justice Ginsburg, on the general verdict point, which is
17 there is actually some law of this which I would like to
18 describe for the Court my understanding of. My third
19 point, though, is that both the district court and the
20 Eighth Circuit below found significant that the bank had
21 conceded tribal court jurisdiction in its motion for
22 summary judgment on its counterclaim, and they found
23 that concession to be important to note, and both courts
24 below found the Indian character of the Long family
25 company to be notable as well. Under this Court's two

1 court rule, those fact findings are entitled to
2 significant respect.

3 Now, as to the standing question Justice
4 Ginsburg, let me get to your point on the general
5 verdict. This is ultimately a question of tribal
6 procedural law, how the tribal court would treat
7 vacature of a claim deemed to be an invalid claim.

8 CHIEF JUSTICE ROBERTS: Where do I look that
9 up in tribal law?

10 MR. FREDERICK: Mr. Chief Justice, under
11 tribal law number 1, the Cheyenne River Sioux Tribe has
12 adopted the Federal Rules of Civil Procedure for
13 procedure in the tribal courts, and under Federal Rules
14 of Civil Procedure 49, there are provisions for special
15 verdicts and general verdicts, and Rule 49(a)(3)
16 provides that if no specific objection is made to a fact
17 or finding requested by the jury, it is waived. The
18 bank here did not make a specific objection to the
19 general interrogatory number 6, therefore, they may be
20 deemed to have waived their objection to having the
21 damages collected.

22 CHIEF JUSTICE ROBERTS: I'm sorry; I don't
23 understand. I'm looking at joint appendix 191 to 192.
24 You have special interrogatories, including number 6 but
25 also number 4 and then they have damages. And it's not

1 clear whether those damages are based on the finding of
2 liability under 4 or 6.

3 MR. FREDERICK: That's my point, Mr. Chief
4 Justice. In the trial transcript which is contained at
5 roughly pages 555 through 562 of the tribal court
6 record, there was colloquy on how these special
7 interrogatories were to be framed. The bank objected to
8 number 4, the discrimination count on the ground that a
9 company cannot be discriminated against, only
10 individuals can be discriminated against. That
11 objection was sustained, and so special interrogatory 4
12 was written as you see it in the joint appendix. The
13 bank did not object to the general verdict question on
14 damages, so the law on Rule 49(a)(3) would be that
15 special verdict is deemed to be waived, and now there is
16 some --

17 JUSTICE GINSBURG: There is no objection --

18 JUSTICE SCALIA: Wait. They are, they are
19 not objecting to a -- to a general verdict. They are
20 objecting to the fact that in their view, one of the
21 elements of that -- of that general verdict is based
22 upon what they assert is an invalid claim in the -- in
23 the Indian court.

24 MR. FREDERICK: Precisely so, Justice
25 Scalia.

1 JUSTICE SCALIA: I don't know that they
2 waive that when they when -- when they allow a general
3 verdict to go.

4 MR. FREDERICK: The way cases say general
5 verdicts should be deemed, if there is an invalid claim,
6 there are competing views about what to do with that
7 when the damages awarded is treated as a general
8 verdict. There is a circuit split on the question of
9 what you do when there has not been a specific objection
10 preserved and there is a general verdict and one invalid
11 claim and evidence that supports a valid claim.

12 Now recall, they don't challenge the breach
13 of contract claim. Our brief points out how the
14 evidence supports damages for breach of contract. Now
15 Judge Kozinski in the Ninth Circuit in a case called
16 McCord v. Maguire 83 F 2d 1271 says that this waiver
17 rule means that their ability to challenge the general
18 verdict would be waived and they would be forced to live
19 with the verdict if evidence supports it. Under that
20 rule --

21 JUSTICE SCALIA: If evidence supports any
22 one of the claims contained in the general rule.

23 MR. FREDERICK: That's correct. That's
24 correct. The First Circuit in a case called Gillespie
25 versus Sears Roebuck, 386 F3d 21 takes the position that

1 if you have not filed your objection you have not waived
2 it.

3 CHIEF JUSTICE ROBERTS: Who wrote that? You
4 gave us the benefit of the author of the Ninth Circuit,
5 but not the First.

6 MR. FREDERICK: Chief Judge -- I was about
7 to say that. They are both very fine opinions; they --

8 JUSTICE GINSBURG: You're not asking us to
9 resolve that circuit split in this case.

10 MR. FREDERICK: No. What I'm saying is that
11 the tribal court, which would be looking to Federal law
12 to resolve the effect of a supposed tainted claim -- if
13 you were to conclude that a discrimination complaint is
14 a tainted claim -- would have to evaluate what effect
15 that has on the final judgment. And because there is a
16 circuit conflict on that question, unfortunately, I
17 cannot give you a definitive answer as to how the tribal
18 court would resolve that.

19 My point, though, is that if this Court
20 concludes that there is a redressibility problem in this
21 case, which we would submit, respectfully, there is, the
22 appropriate course would be to vacate and remand for the
23 lower courts to certify the question to the tribal court
24 of appeals or to make some further inquiry into the law
25 to determine how --

1 JUSTICE SCALIA: The tribal court of appeals
2 would have to be finding Federal law. It wouldn't be
3 Indian law; it would be Federal law.

4 MR. FREDERICK: It is --

5 JUSTICE SCALIA: You say they have adopted
6 the Federal rules. So whatever the Federal law -- in
7 other words, we would ask them to answer the question
8 that you don't want us to answer.

9 MR. FREDERICK: No. I've asked you to go
10 with the Ninth Circuit Court because that is what I
11 think is the court rule. But, Justice Scalia, any time
12 a different jurisdiction incorporates some law into its
13 own system, it is opining as a matter of Cheyenne River
14 Sioux Tribe law. And, as Cohen's Indian law treatise
15 points out, tribal courts would not look not only to
16 Federal sources but also to State courts, too. The rule
17 in South Dakota follows the general verdict rule in
18 which --

19 CHIEF JUSTICE ROBERTS: And, presumably,
20 tribal -- whatever tribal precedent there may be, as
21 well.

22 MR. FREDERICK: That's correct although we
23 have not been able to find precedent --

24 CHIEF JUSTICE ROBERTS: Well, neither could
25 -- and neither could anybody, right? I mean if anybody

1 could find it, you could. It's because it's not
2 published anywhere, right?

3 MR. FREDERICK: Well, there are published
4 decisions. This Court -- this is a question of first
5 impression.

6 JUSTICE SCALIA: Certainly, your reliance
7 upon the Federal rules doesn't impress me as much as it
8 did when you first told me about it, because apparently
9 the Federal rules mean whatever the tribal courts say
10 they mean; is that right?

11 MR. FREDERICK: No. I think, Justice
12 Scalia, the Court would look at the various sources of
13 law --

14 JUSTICE SCALIA: And come to its own
15 decision as to what they mean.

16 MR. FREDERICK: Yes.

17 CHIEF JUSTICE ROBERTS: One of the points
18 you mentioned earlier is that this is an Indian
19 corporation, and that's a concept I don't understand.
20 If Justices Scalia and Alito form a corporation, is that
21 an Italian corporation?

22 (Laughter.)

23 MR. FREDERICK: I would like to beg the
24 indulgence of the Court in not answering that question
25 specifically.

1 (Laughter.)

2 MR. FREDERICK: My point --

3 JUSTICE SCALIA: And do we get special loan
4 guarantees?

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: I understand the
7 concept of a minority-owned or an Indian-owned
8 corporation, but the point here is you are trying to say
9 that the corporation is a member of the tribe. And I
10 just don't know. And I certainly don't think the State,
11 when it incorporated this entity, said: You're a
12 different type of corporation than every other; you're
13 an Indian corporation.

14 MR. FREDERICK: Well, to the contrary,
15 Mr. Chief Justice. There is a State supreme court case
16 on point called Pourier, which we cited in our brief,
17 which says that a majority-owned corporation under South
18 Dakota State law shall be treated as a member of that
19 tribe for the tax purposes that were at issue in that
20 case. So --

21 CHIEF JUSTICE ROBERTS: How would a normal
22 -- I guess a non-Indian or non-Italian or non-Irish --
23 corporation dealing with the Long Family Land and Cattle
24 Company know that it was an Indian corporation --

25 MR. FREDERICK: Well, I --

1 CHIEF JUSTICE ROBERTS: -- putting apart the
2 particulars in this case?

3 MR. FREDERICK: Mr. Chief Justice, let me
4 step back and say I'm not here to advocate that there
5 can be different racial characteristics of corporations.
6 What is anomalous about this case and the way the BIA
7 has set up this program is that the BIA establishes
8 principles of Indian identity so that it can determine
9 whether it satisfies congressional mandates for Indian
10 financing.

11 CHIEF JUSTICE ROBERTS: Well, I know the BIA
12 says that. But if you're a bank and somebody comes in
13 and says: I'm a corporation; I would like a loan, is
14 the bank supposed to start asking questions about
15 whether there are Indian shareholders, and how many, and
16 all of that?

17 MR. FREDERICK: Banks typically do require
18 lots of documentation, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: So they should have
20 a check box on their loan application that says: Are
21 you an Indian?

22 MR. FREDERICK: The difference here,
23 Mr. Chief Justice, is that the bank required BIA loan
24 guarantees as a condition of making the loans.

25 CHIEF JUSTICE ROBERTS: I'm asking you

1 about: In a general case, let's say they don't require
2 BIA loan guarantees. They require, just as in this
3 case, collateral.

4 MR. FREDERICK: They did not. They required
5 more, and that's the important point. The facts
6 actually matter.

7 CHIEF JUSTICE ROBERTS: Well, I am sure the
8 facts here matter. I have a hypothetical question. A
9 bank dealing with an Indian-owned corporation, how are
10 they supposed to find out, or may they find out, whether
11 it's an Indian-owned corporation, particularly when
12 under your approach, when they do form that contract,
13 they are subjecting themselves to tribal-court
14 jurisdiction?

15 MR. FREDERICK: I would acknowledge that
16 when there are no BIA loan guarantees required, a bank
17 may or may not know of the identity of the owners of the
18 corporation.

19 CHIEF JUSTICE ROBERTS: And do they subject
20 themselves to tribal-court jurisdiction because they are
21 dealing with, as you call it, an Indian corporation?

22 MR. FREDERICK: Without further facts, no.
23 Here, though, the bank required the BIA loan. It went
24 on to the reservation to scrutinize the collateral. It
25 required personal guarantees from the tribal members.

1 It got collateral in guarantees on the personal effects
2 and chattels.

3 It knew that the corporation was doing all
4 of its business on tribal trust lands. It went into the
5 tribal headquarters to determine that the tribe was
6 comfortable with the various loan arrangements. It
7 enlisted the assistance of tribal financial officers to
8 ensure that the cash flow would be a sufficient --

9 CHIEF JUSTICE ROBERTS: So that if the bank
10 had two -- two different types of loans, in one
11 situation the corporation comes to the bank. It is an
12 Indian corporation, if there is such a thing; and the
13 bank deals with it, although it doesn't know that. In
14 the other situation are the facts, as you suggest here;
15 and the -- dealing through the normal, collateral
16 consequences and operations of a contract with a bank,
17 they want to know the collateral, and all of that, that
18 constitutes consent, but a commercial relationship with
19 a member does not.

20 MR. FREDERICK: I think, in general,
21 Mr. Chief Justice, I would agree with that hypothetical.
22 But here, if you took away the BIA loan piece, I think
23 the facts very strongly point to the bank knowing it was
24 engaging in a consensual relationship with Indians
25 because it went on tribal trust lands. It involves the

1 officers of the tribe for effectuating the loan.

2 JUSTICE ALITO: Well, there are many facts
3 here that are favorable to your position, but I would
4 appreciate it if you could articulate the rule of law
5 that you would like us to adopt in this case, the
6 general principle that you would like -- the general
7 rule that you would like us to adopt.

8 MR. FREDERICK: Justice Alito I don't think
9 I can improve on the language that's in Montana in its
10 first exception, itself, which is that there are
11 consensual relations that are licensing of commercial --

12 JUSTICE ALITO: Can that be the case: Any
13 consensual relationship between a member of the tribe
14 and a nonmember is subject to the jurisdiction of the
15 tribal courts?

16 MR. FREDERICK: No. I think that the Strate
17 case imposed a nexus requirement. I think the liability
18 has to arise out of that consensual relationship, which
19 it clearly does here.

20 JUSTICE ALITO: So an Indian goes to a bank
21 off the reservation and asks for a loan and gets the
22 loan. That contract is subject to the jurisdiction of
23 the tribal courts?

24 MR. FREDERICK: No. I don't think
25 necessarily any loan. I think I answered Mr. Chief

1 Justice's question to the effect that any kind of
2 general loan of that nature would not necessarily give
3 rise to --

4 JUSTICE SCALIA: Well, it has to be a known
5 -- a known consensual relationship, for one thing.
6 Wouldn't you add that requirement.

7 MR. FREDERICK: Yes.

8 JUSTICE ALITO: All right. So the Indian
9 goes to the bank and says: I'm an Indian. Give me a
10 loan. The bank gives him a loan. That's subject to the
11 jurisdiction of the tribal courts?

12 MR. FREDERICK: No. I think, Justice Alito,
13 that there are very fine gradations in the facts. And
14 we are not asking for an articulation of a general rule
15 of the kind of sweeping effect that the Petitioners are
16 asking for.

17 We are asking for a straightforward
18 application of Montana 1 on facts here that developed
19 over a substantial number of years.

20 JUSTICE ALITO: Well, isn't it necessary for
21 there to be some kind of clear notice? Somebody puts an
22 ad in the newspaper to sell a used car. Someone shows
23 up to purchase the used car. He purchases the used car
24 and says: And, by the way, I'm an Indian. That is
25 subject to the jurisdiction of the tribal courts?

1 MR. FREDERICK: I don't think that
2 necessarily would give rise to the kind of consensual
3 relationship that Montana was speaking about.

4 JUSTICE ALITO: Well, why not? What's
5 missing there?

6 MR. FREDERICK: I think what's missing is
7 the longevity of a relationship, the degree to which the
8 cause of action arose out of the answering of that ad.
9 I mean one of the features of --

10 CHIEF JUSTICE ROBERTS: It's an odd sort of
11 basis on which to predicate jurisdiction. We usually --
12 when you're dealing with jurisdiction, we usually look
13 for a bright-line rule.

14 MR. FREDERICK: Well, I think that the
15 necessary concomitant of having tribes with their
16 elements of sovereignty residing within States and
17 within the United States is to have somewhat less
18 bright-line features to some of these jurisdictional
19 principles. Our submission here is that the facts --

20 CHIEF JUSTICE ROBERTS: You said earlier --
21 I am sorry. You said earlier that this was a
22 straightforward application of Montana?

23 MR. FREDERICK: Given the facts that are
24 present in this case.

25 CHIEF JUSTICE ROBERTS: Yes, given the

1 facts. But isn't it true that this would be the first
2 case in which we have asserted or allowed Indian tribal
3 jurisdiction to be asserted over a nonmember?

4 MR. FREDERICK: Yes, it would although the
5 court in National Farmers and in Iowa Mutual could have
6 disposed of the case simply on a bright-line-rule basis
7 but rejected that very notion.

8 JUSTICE KENNEDY: Do you think it's inherent
9 in Montana exception number 1, that an Indian tribal
10 court in the course of adjudicating commercial dealings
11 has the capacity to elaborate common law?

12 MR. FREDERICK: Yes. And -- and I don't
13 think --

14 JUSTICE GINSBURG: To elaborate tribal
15 common law.

16 MR. FREDERICK: That's how I understood your
17 --

18 JUSTICE KENNEDY: Tribal common law?

19 MR. FREDERICK: Yes, that's how I understood
20 Justice Kennedy's question. You know, and it is the
21 same --

22 JUSTICE KENNEDY: And you think that's
23 necessary for regulating consensual relationships?

24 MR. FREDERICK: I think that, yes, it can
25 be. I mean the -- I thought I heard the Petitioner

1 acknowledge today that if the discrimination rule had
2 been written down, that that would be perfectly fine to
3 put everybody on notice. These principles of
4 discrimination here are --

5 JUSTICE SCALIA: He backed off on that. I
6 pressed the point and --

7 (Laughter.)

8 MR. FREDERICK: Well, my -- my mission here
9 is that the bank did not avail itself of any of the
10 procedures in Rule 12 to clarify the source of the law,
11 to move to dismiss the discrimination claim, to move for
12 summary judgment on the discrimination claim.

13 CHIEF JUSTICE ROBERTS: What about -- what
14 about their point that, under our system, governing is
15 based on the consent of the governed, and in this case
16 the bank has no role to play in the nature or
17 establishment of the court to which they are being
18 subjected?

19 MR. FREDERICK: Well, in this particular
20 case, Your Honor, this bank has availed itself
21 purposefully of tribal courts on at least 14 occasions.
22 This would be the 15th case. These are set out in the
23 tribe's brief, the amicus brief, footnotes 27, 28, and
24 29.

25 JUSTICE KENNEDY: Well, and I suppose --

1 MR. FREDERICK: This is not a stranger to
2 the tribal court, Mr. Chief Justice.

3 JUSTICE KENNEDY: Well, suppose it were the
4 first occasion? I mean, what's the rule? That doesn't
5 help me.

6 MR. FREDERICK: My point is --

7 JUSTICE KENNEDY: In other words, if you go
8 -- if you make a mistake 14 times, you're bound to 15?
9 That's kind of an estoppel.

10 MR. FREDERICK: No, I'm saying that the
11 availment of the tribal court is what creates the
12 jurisdiction. I'm saying it responds to the point that
13 the bank can hardly claim surprise. They know how to
14 deal with tribal law and tribal procedures. They could
15 have asked the nonmember judge who presided over this
16 trial to clarify how the discrimination would be done.
17 In the tribal transcript, the colloquy on discrimination
18 was rather straightforward as to treating members in a
19 fair way as compared to treating nonmembers. These are
20 not difficult concepts in the law.

21 JUSTICE GINSBURG: Mr. Frederick, before you
22 finish, I would like for to you give your best answer to
23 a lurking, underlying concern, and that is the the Chief
24 Justice brought up the outsider subjected to courts
25 where the outsider has no vote. That happens when you

1 sued in a State that's not your own, but there is the
2 right to remove and also at the end of the line is this
3 Court. And I think in the case of the tribal courts,
4 neither of those exist. There's no -- you can't remove
5 to a State or Federal court, and this Court has no
6 review authority over a tribal court's judgment.

7 MR. FREDERICK: I have two suggested
8 responses to that, Justice Ginsburg. One is that, when
9 a tribal court judgment needs to be enforced, it can be
10 brought in State court, and South Dakota follows the
11 comity rule, which means that it has to satisfy certain
12 requirements of fairness, adherence to basic principles,
13 and the law before a State -- the State court will
14 enforce the tribal court judgment. Under national --

15 JUSTICE GINSBURG: Not the same faith and
16 credit that it would give to a sister State judgment?

17 MR. FREDERICK: That's correct. It's not
18 full faith and credit; it's comity. And that comity
19 provides for a substantive review while enforcing the
20 judgment.

21 CHIEF JUSTICE ROBERTS: Well, what if the
22 tribal law has certain cultural principles such as
23 fairness and equity of a sort that aren't recognized
24 under Federal or State law in this type of contractual
25 relationship? Does that preclude the State court from

1 giving comity or not?

2 MR. FREDERICK: The way the South Dakota
3 statute is worded, Mr. Chief Justice, unfortunately, I
4 can't give you a direct answer to that because it
5 involves a panoply of issues whether State law deems the
6 final judgment ultimately to be a fair one and -- and,
7 importantly, when this Court recognized the
8 jurisdictional point as giving rise to Federal
9 jurisdiction in National Farmers, I would submit it also
10 perhaps created the avenue for the enforcement of
11 judgments to be brought in Federal court as well. I
12 don't understand why a jurisdictional challenge and a
13 challenge to the enforcement of a judgment could not
14 give rise to the same Federal question jurisdiction
15 recognized in National Farmers.

16 So I think there are two avenues to be in
17 State or Federal court when enforcing a judgment in
18 tribal court that heretofore for have not fully been
19 explored, certainly not by any decisions of this Court.

20 If the Court has no further questions.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Frederick.

23 Mr. Gannon.

24 ORAL ARGUMENT OF CURTIS E. GANNON

25 ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE,
2 SUPPORTING THE RESPONDENTS

3 MR. GANNON: Mr. Chief Justice, and may it
4 please the court:

5 This court's Montana framework confirms that
6 Indian tribes can, in some circumstances, exercise
7 legitimate authority over nonmembers and nonmember land
8 on their reservations. Unlike what has happened in the
9 criminal context, the political branches have not acted
10 to divest tribes generally of civil jurisdiction over
11 nonmembers. Both before and after Montana was decided,
12 Congress and this Court have repeatedly articulated the
13 firm Federal policy of encouraging tribal
14 self-government and have recognized that tribal justice
15 systems are an essential part of tribal governments.

16 JUSTICE SCALIA: Well, that may be; it
17 depends on what you mean by "tribal." I mean, it
18 certainly would be rational to say that all disputes
19 between members of the tribe can be resolved
20 authoritatively by the tribal court, but it's quite a
21 different thing to say that a dispute between a
22 nonmember of the tribe and a member of the tribe can go
23 to the tribal court. It's sort of the analogue to being
24 home fried in a foreign State. It's -- is pretty close.

25 MR. GANNON: Well, Justice Scalia, that's of

1 course true, that there is a difference, but the Montana
2 framework recognizes that the political branches have
3 not completely divested tribes of their jurisdiction
4 over nonmembers in circumstances like this. And --

5 CHIEF JUSTICE ROBERTS: Well, you agree with
6 your friend Mr. Frederick that Montana did not address
7 jurisdiction over a nonmember and that this would be the
8 first case in which we'd recognize such jurisdiction?

9 MR. GANNON: Well, it did not specifically
10 address any previous cases involving jurisdiction over a
11 nonmember defendant who is hailed into Federal court.

12 JUSTICE SCALIA: Defendant, yes.

13 MR. GANNON: But I think it is -- it is the
14 case that it clearly recognized a consensual
15 relationship that is established before the lawsuit
16 begins is what provides for regulatory jurisdiction in
17 some of the cases and adjudicatory jurisdiction, as is
18 now clear from Strate and the Court's subsequent
19 decisions.

20 JUSTICE KENNEDY: In your view, does
21 jurisdiction follow all regulatory authority? If it's
22 within regulatory authority, then is it your position
23 that there is necessarily jurisdiction to enforce in a
24 tribal court --

25 MR. GANNON: Well --

1 JUSTICE KENNEDY: -- in civil cases?

2 MR. GANNON: Well, in Iowa Mutual, this
3 Court did state that tribal courts are best qualified to
4 interpret and apply tribal law. And so --

5 JUSTICE KENNEDY: In your position, is
6 regulatory jurisdiction concomitant with civil judicial
7 jurisdiction in the tribal court?

8 MR. GANNON: Generally, yes.

9 CHIEF JUSTICE ROBERTS: What happens if the
10 bank deals with a corporation that is not an Indian
11 corporation, and then that -- the shareholders of that
12 corporation sell their shares to Indians?

13 MR. GANNON: Well --

14 CHIEF JUSTICE ROBERTS: Does the bank now
15 have a consensual relationship with an Indian
16 corporation?

17 MR. GANNON: Well, I think, Mr. Chief
18 Justice, to expand upon the discussion that you were
19 having with Mr. Frederick, that the consensual
20 relationship that's necessary to establish jurisdiction
21 in the sense of Montana's first exception requires not
22 only that there be a consensual relationship with a
23 member, and which we do think that implicit in that is
24 some knowledge at least objective knowledge that you
25 knew you were dealing with a tribal member. And so if

1 the conceptual relationship were established and with
2 somebody who was not a nonmember who subsequently ended
3 up through sales of shares to become a member, we don't
4 think that that ex post facto development would effect
5 the establishment of the original relationship.

6 JUSTICE SCALIA: You would add on the
7 reservation? I mean --

8 MR. GANNON: Yes, absolutely, Justice
9 Scalia. That is something --

10 JUSTICE SCALIA: If he walks into some town
11 in South Dakota, the mere fact that you know he's an
12 Indian -- it has to be on the reservation.

13 MR. GANNON: Absolutely, Justice Scalia, and
14 that follows directly from the terms in Montana itself
15 because Montana says that the exceptions are are about
16 instances of, quote, "civil jurisdiction over
17 non-Indians on the reservation." And that's an
18 important factor.

19 CHIEF JUSTICE ROBERTS: Well, but the only
20 reason -- the only reason the bank is on the reservation
21 is because the land was collateral, right?

22 MR. GANNON: The only reason --

23 CHIEF JUSTICE ROBERTS: They didn't want to
24 buy land on a reservation; they wanted to make a loan
25 and get the interest or whatever, and it just turned out

1 that the Indians defaulted, and therefore they were left
2 with a land on a reservation. Is that consensual?

3 MR. GANNON: Well, everything about this
4 transaction is related to the reservation. To be sure,
5 part of it dealt with the land on the reservation, but
6 the rest of the ranch's operations, including places
7 where the bank possessed collateral and security
8 interest in personal property, were on tribal grazing
9 land.

10 CHIEF JUSTICE ROBERTS: So if it's a
11 different -- the Indian -- the corporation is owned by
12 members on the reservation, the collateral they put up
13 is off the reservation, is there consensual dealings
14 with the corporation then?

15 MR. GANNON: Well, the thing that's key
16 here, I believe, is that the subject of the contract was
17 intimately connected with the reservation itself, and
18 that's why it comes within Montana's discussion of civil
19 jurisdiction.

20 CHIEF JUSTICE ROBERTS: Yes, but the subject
21 of the contract is loan to a corporation owned by
22 Indians on the reservation. The collateral put up is
23 other land that the corporation owns or the individuals
24 own off the reservation. Jurisdiction or not.

25 MR. GANNON: Without any further facts, no,

1 I don't think that would be enough to establish
2 jurisdiction. What's important here is that the subject
3 of the contract was actually on the reservation, and
4 that's why it comes in --

5 CHIEF JUSTICE ROBERTS: I guess, what I
6 meant, what do you mean by the subject of the contract?

7 MR. GANNON: Well, the loan here was for
8 specific purposes. It was for -- I mean, there were a
9 lot of specific terms in which the bank dictated lots of
10 practices on the ranch, and it knew everything about the
11 way the operation was being conducted or required
12 express approval for individual purchases and things
13 like that. And so, this is not an instance where a
14 member is engaging in business off the reservation.

15 And indeed in Blaze Construction the court
16 addressed a case in which there was a member-owned
17 corporation that was doing business on a different
18 reservation, and the parties conceded there that that
19 would not be considered to be a member for purposes of
20 Montana -- that was actually a taxation case, but it
21 would not be considered a member for purposes of these
22 exceptions.

23 JUSTICE SCALIA: Am I correct that the
24 collateral here, the land, the land that was collateral
25 was within the reservation but it was not Indian land.

1 MR. GANNON: Well, that's generally correct,
2 Justice Scalia. There is a little bit of a dispute in
3 the probate proceedings about exactly the status of the
4 land. But, yes, this transaction did involve transfer
5 of the deed to the bank, and therefore, at that point it
6 would have been -- to the extent that that transfer was
7 effective, it would have been a nonmember only on the
8 reservation.

9 JUSTICE SCALIA: And you think that that's
10 enough. It doesn't have to -- when you say "on the
11 reservation," you include as on the reservation land
12 that is no longer owned by Indians but -- but is within
13 the reservation boundaries.

14 MR. GANNON: The thing that triggers the
15 regulation here or the jurisdictional authority of the
16 tribe is the consensual relationship with the tribal
17 member. And so it's -- it's -- it's not -- this
18 isn't -- this isn't like a tort that occurred on a
19 particular piece of land while we are asking --

20 JUSTICE SCALIA: No, no, wait. You say that
21 consensual relationship is not enough. If you enter
22 into relationship with Indian in South Dakota on, you
23 know -- in the State capital, that isn't enough. It has
24 to be on the reservation. You acknowledge that. And
25 for purposes of on the reservation, it's enough that

1 you're dealing with land that is within the reservation
2 even -- even if it is no longer Indian land?

3 MR. GANNON: Yes, Justice Scalia. And the
4 Montana exception to deal with jurisdiction --

5 JUSTICE ALITO: Does "on the land" mean --
6 "on the reservation" mean land on the reservation or
7 does it extend any further than that?

8 MR. GANNON: I -- I -- I can't say --

9 JUSTICE ALITO: Let's say an Indian gets an
10 auto loan for a vehicle to be used in a business on the
11 reservation. Is that on the reservation?

12 MR. GANNON: In general, the sale of goods
13 off the reservation, unless there is some particularly
14 intimate connection with the reservation that -- that
15 the parties anticipate at the time, probably isn't going
16 to be enough to trigger jurisdiction. And so --

17 CHIEF JUSTICE ROBERTS: What about a home
18 equity loan for home on the reservation.

19 MR. GANNON: For a home that's on the
20 reservation?

21 CHIEF JUSTICE ROBERTS: Yes.

22 MR. GANNON: And it's for remodeling the
23 home --

24 CHIEF JUSTICE ROBERTS: Whatever home equity
25 loans are for.

1 MR. GANNON: Yes. I think that that's -- if
2 it were going to be used for something completely off
3 the reservation, then maybe an argument could be made
4 that it doesn't have enough to do with regulating
5 activities that are occurring on the reservation.

6 CHIEF JUSTICE ROBERTS: Well, they are going
7 to add -- add a new wing onto the -- new room on to
8 their home.

9 MR. GANNON: And that's an example where I
10 do think that --

11 CHIEF JUSTICE ROBERTS: So if Chase
12 Manhattan gets a home equity loan application from
13 somebody and they grant the home equity loan, they are
14 now subject to being sued in tribal court?

15 MR. GANNON: If they know that they are
16 dealing with a member and they have not included any
17 form selection or choice of law provisions that say that
18 they want to be sued and resolve disputes in some other
19 forum, then it may well be the case that they will be
20 sued in tribal court.

21 CHIEF JUSTICE ROBERTS: What if the tribal
22 court has a rule that forum selection provisions are not
23 enforceable?

24 MR. GANNON: Well, I think it's probably
25 unlikely that the tribal courts would -- or that the

1 tribe would adopt a rule like that, because as a
2 pragmatic matter it would make it more difficult for
3 their citizens to engage in business relationships if
4 they had a categorical ban like that. And so --

5 JUSTICE GINSBURG: But then could you go
6 into Federal court under what was in farmers and say we
7 had no jurisdiction because we had a forum selection
8 clause?

9 MR. GANNON: I -- if -- if there was a forum
10 that would be a question about the nature of the
11 underlying consent. And I do think that, in general,
12 forum selection clauses here ought to be enforced. And
13 so, it would be relevant to the scope of the consensual
14 relationship there.

15 CHIEF JUSTICE ROBERTS: Does the judgment
16 here that the bank discriminated against the Indian
17 corporation because they didn't give them as favorable
18 terms as they gave someone who hadn't defaulted on a
19 loan impede dealings with Indian corporations by outside
20 members -- outside nonmembers?

21 MR. GANNON: Well, as was pointed out
22 earlier, Mr. Chief Justice, the -- the -- the only
23 duties that the bank was exposed to here were a duty not
24 to breach contracts and not to discriminate. And the
25 only question is the source of those duties.

1 CHIEF JUSTICE ROBERTS: What was the basis
2 for the finding of discrimination?

3 MR. GANNON: It was the -- under --
4 according to the jury instruction it was a person or
5 entity denied a privilege to a person based solely upon
6 that person's race or tribal identity.

7 CHIEF JUSTICE ROBERTS: It had nothing to
8 do -- the bank's justification had nothing to do with
9 the fact that the entity had defaulted earlier?

10 MR. GANNON: No, I don't believe so, Your
11 Honor. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Banker, you have two minutes remaining.

14 REBUTTAL ARGUMENT OF PAUL A. BANKER
15 ON BEHALF OF THE PETITIONER

16 MR. BANKER: I think when you step back in
17 listening to the arguments of opposing counsel, you
18 know, what is the other way that tribal courts get --
19 that the tribes get jurisdiction over nonmembers? Well,
20 Congress can provide it. And if we look at this Bureau
21 of Indian Affairs loan guaranty program, which Congress
22 authorized, Congress didn't provide jurisdiction over
23 nonmembers in implementation of that program.

24 So you've got an elaborate loan program and
25 it's designed to provide capital to tribes and tribal

1 members, and Congress is silent on that.

2 Now, in other instances Congress has
3 provided authorization for tribal courts and tribes to
4 have jurisdiction over nonmembers. Congress is aware of
5 this Court's opinion in Montana presumably and the cases
6 that follow from it, but in the Bureau of Indian Affairs
7 loan guaranty program Congress remained silent. What do
8 we infer from that?

9 I think it is crucial when you think about
10 nonmember defendants in tribal court and whether they
11 can have their rights adjudicated there to think about
12 the structural problems, the lack of a right to remove,
13 the lack of a right to have this Court provide a
14 substantive review. There is no --

15 JUSTICE KENNEDY: What general principle
16 underscores the validity of your point that it's -- is
17 it a republican form of government law, Due Process
18 Clause? What is the general principle you rely on to
19 say we have to look to the structure of these courts?
20 If the structure is insufficient, then it violates what
21 prohibition in the Constitution?

22 MR. BANKER: I think that the -- you know,
23 the tribal courts stand outside of the Federal -- of the
24 Federal-State relationship. I think it is a question of
25 due process. I think it is a question of equal

1 protection.

2 JUSTICE KENNEDY: Due process for whom? The
3 tribal courts aren't governed -- aren't creatures that
4 are subject to the Due Process Clause.

5 MR. BANKER: Well, that's exactly the point.
6 I mean it is the due process right of the nonmember.

7 JUSTICE KENNEDY: What is -- what is the
8 constitutional prohibition that is a restriction on
9 assigning cases to a court that does not follow the Due
10 Process Clause if it's an Indian court? It's not the
11 same as if we assign this to the American Arbitration
12 Association. What's the difference?

13 MR. BANKER: I think the difference is the
14 constitutional protections of nonmembers do not apply
15 down to tribal courts.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.

18 (Whereupon, at 11:08 a.m., the case in the
19 above-entitled matter was submitted.)

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