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 FOR RESPONDENTS

JAMES P. HURLEY
BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.
333 West Boulevard
Suite 400
P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040

MICHAEL F. STURLEY
LYNN E. BLAIS
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1350

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

RICHARD A. GUEST
MELODY L. MCCOY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

March 12, 2008

QUESTIONS PRESENTED

1. Whether petitioner has satisfied its burden to establish standing to challenge in federal court a claim in a tribal-court proceeding on which it prevailed.

2. Whether a tribal court may exercise subject-matter jurisdiction over a non-member that engages in a multi-year regular and continuous course of dealings with the tribe and members of the tribe on the reservation and engages in discriminatory conduct arising directly out of those commercial relations.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Long Family Land and Cattle Company, Inc. states that it was at all times at least 51% Indian-owned, that it is not a publicly held company, that it does not have any parent corporations, and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, TREATIES, STATUTES, REGULATIONS, AND RULES

LEGISLATIVE MATERIALS

OTHER MATERIALS

This case involves predatory lending by a bank on the Cheyenne River Sioux Reservation ("Reservation") in South Dakota. For more than seven years, petitioner engaged in commercial dealings with respondents Ronnie and Lila Long, members of the Cheyenne River Sioux Tribe ("Tribe" or "CRST"), controlling virtually every aspect of the financial management of their on-reservation business, respondent Long Family Land and Cattle Company, Inc. ("Long Company"). Two particular predatory practices underlie the claims in this lawsuit. First, petitioner switched a traditional bank-financed 20-year contract-for-deed with respondents for a lease-with-option-to-purchase that required the entire principal to be paid in two years — terms far more onerous than petitioner offered for the same land to non-members of the Tribe. Second, to ensure that respondents could not make the necessary balloon payment within two years, petitioner breached a contract to pay an operating loan for necessary winter cattle feed, even though the Bureau of Indian Affairs ("BIA") and the personal collateral demanded by petitioner guaranteed the loan.

Petitioner mischaracterizes the facts, this Court's cases, and what is truly at stake in this litigation — all to deny tribal members access to tribal courts to adjudicate and resolve similar wrongs committed by lending institutions that voluntarily and knowingly do business in Indian Country.

Before reaching the merits, this Court must first determine whether petitioner has standing to press its challenge. A close review of the record reveals that petitioner prevailed on the discrimination claim — the only claim it continues to challenge. Notwithstanding the jury's finding that petitioner discrimi-

nated against respondents, in its post-trial supplemental judgment, the Cheyenne River Sioux Tribal Court ("Tribal Court" or "CRSTC") reconciled that jury finding with another jury finding *favoring* petitioner by denying respondents the relief requested on their discrimination claim. Because no relief was awarded for discrimination, petitioner cannot meet its burden of establishing injury sufficient for a case or controversy under Article III. Alternatively, because the Tribal Court's judgment rests on an independent breach-of-contract ground that petitioner does not challenge here, the case should be affirmed on that basis or dismissed as improvidently granted.

On the merits, this case represents a straightforward application of *Montana v. United States*, 450 U.S. 544 (1981), on a record petitioner assiduously ignores. This Court has consistently stated that a tribal court may exercise subject-matter jurisdiction over a non-member's conduct on its reservation: (1) when a non-member engages in consensual business dealings with the tribe or tribal members; and (2) when the non-member's conduct threatens the political integrity or economic security of the tribe. The discrimination tort here arises out of long-standing, consensual financial dealings, thus readily satisfying *Montana*. Moreover, petitioner's specific litigation actions evidence its consent to tribal-court jurisdiction, as both federal courts below correctly found. Petitioner initiated this proceeding in Tribal Court, conceded there that the Tribal Court had jurisdiction over the case, and elected not to prosecute its simultaneously pending state-court eviction action against respondents. This case is far afield from an unwilling and unwitting non-member haled into tribal court.

STATEMENT

1. This Court is familiar with the history between the United States and the Sioux Nation. *See*, *e.g.*, *United States v. Sioux Nation*, 448 U.S. 371, 374 (1980). As with many other Indian tribes, federal Indian policy sought to transform the Sioux from itinerant hunters into reservation-confined farmers and ranchers.[1] As relevant here, the 1889 Agreement took 9 million acres of the Great Sioux Reservation out of Indian ownership as "surplus lands" and established the Pine Ridge, Rosebud, Standing Rock, Lower Brule, Crow Creek, and Cheyenne River Sioux Reservations. To encourage the Sioux to become farmers and ranchers, the 1889 Agreement provided for the allotment of tribal land "advantageous for agricultural or grazing purposes" to individual Indians and authorized the distribution of "such and so many American breeding cows of good quality . . . as in his judgment can be . . . cared for and preserved, with their increase, by said Indians." §§ 8, 17, 25 Stat. 890, 894-95.

In 1908, Congress authorized the Secretary to open 1.6 million acres of the Reservation for homesteading. *See* Act of May 29, 1908, ch. 218, 35 Stat. 460 ("1908 Allotment Act"); *see South Dakota v. Bourland*, 508 U.S. 679, 682 (1993). This is where respondents Ronnie and Lila Long reside today.

2. This case involves predatory lending activities relating to both fee simple lands whose title derives from the 1908 Allotment Act and Indian trust lands. Beginning in the mid-1970s, the Long Company

---

[1] *See* Act of July 20, 1867, ch. 32, 15 Stat. 17; *see also* Treaty of Fort Laramie (1851) (11 Stat. 749); Treaty of Fort Laramie (1868) (15 Stat. 635); Act of Mar. 2, 1889, ch. 405, §§ 1-6, 25 Stat. 888, 888-90 ("1889 Agreement").

grazed approximately 500 head of cattle year-round on 6,400 acres of Indian trust land (also known as a "Tribal Grazing Unit"). On a different parcel of approximately 2,230 acres owned in fee simple wholly within the Reservation, the Long family lived and farmed, raising crops and livestock. That fee land was purchased in 1958 by Kenneth Long, a non-member, and his wife Maxine, a Tribe member.[2] Together, they owned that land as joint tenants with right of survivorship until Maxine's death. *See* Affidavit of Ronnie and Lila Long ¶ 7 (D.S.D. filed Dec. 9, 2005) ("1st Aff.").

In 1987, the Long Company incorporated under South Dakota law as a family farm corporation to qualify for loans guaranteed by the BIA under 25 C.F.R. Part 103. Under BIA regulations, a corporation must be majority-owned by members of an Indian tribe. *See id.* § 103.25. From its inception and under its Articles of Incorporation requiring Indian majority ownership, *see* JA17, the Long Company was owned and controlled by tribal members Maxine Long and Ronnie and Lila Long. *See* 1st Aff. ¶ 6. (Ronnie is Kenneth and Maxine's son; Lila is Ronnie's wife. *See id.* ¶ 5.) When Kenneth died, he bequeathed his 49% share interest to Ronnie and three siblings, who then assigned their interests to Ronnie. *See id.* ¶ 9. Since Kenneth's death, in 1995, Ronnie and Lila Long have owned 100% of the Long Company's shares. *See id.*

---

[2] According to property records examined by counsel in the Dewey County, South Dakota courthouse, all of the fee lands owned by non-member Kenneth Long and member Maxine Long were parcels first made available for sale under the 1908 Allotment Act.

In 1988, petitioner purchased the Longs' loans from another bank. *See* Third Affidavit of Ronnie and Lila Long ¶ 8 (D.S.D. filed Jan. 12, 2006) ("3d Aff."). From 1989 to 1996, petitioner provided additional loans to the Long Company and the Longs personally. *See* 1st Aff. ¶ 10; 3d Aff. ¶¶ 1-3. Those loans provided working capital for the Long Company. The BIA provided loan guarantees and interest-subsidy payments, both of which substantially reduced petitioner's risk. Notwithstanding those benefits, petitioner required the Long Company itself and the Longs personally to provide additional guarantees as conditions for obtaining the loans. *See* 3d Aff. ¶ 4.

From 1989 to 1996, petitioner annually made operating loans to the Longs to pay ranch expenses, to buy additional cattle for the Longs' cattle ranching operations, and to finance the moving of hay for winter cattle feed on the Tribal Grazing Unit where the cattle were located year-round. The Longs would repay the operating loan after that season's calves were sold. Petitioner's loans also enabled Ronnie Long to make annual lease payments of approximately $17,000 to the Tribe and Indian allottees for grazing privileges on the Tribal Grazing Unit; petitioner often made that lease payment directly to the CRST and the BIA for the Longs. *See* 3d Aff. ¶ 15. To secure these loans, petitioner required Kenneth and Maxine Long to mortgage their fee land. *See* Longs' C.A. App. 12, 22, 49-58. Petitioner also required Kenneth, Maxine, Ronnie, and Lila Long to grant to petitioner security interests in their equipment, vehicles, crops, feed, and livestock (including the cattle that grazed exclusively on the Tribal Grazing Unit). *See* 1st Aff. ¶ 10; Second

Affidavit of Ronnie and Lila Long at 4 (D.S.D. filed Dec. 22, 2005) ("2d Aff.").

As a condition for each loan, petitioner further required the Longs to obtain BIA guarantees. *See* 3d Aff. ¶ 11. Petitioner paid BIA premiums for those guarantees, each of which involved a three-party agreement that petitioner signed. *See id.* The guarantees specifically referenced the Indian Financing Act of 1974 and Interior Department regulations. *See id.* ¶ 10. The Longs' mortgage recorded at the Dewey County Courthouse also referenced the BIA loan guarantees. *See* 1st Aff. ¶ 10. Modifications of the guarantees requested by petitioner such as that in 1992 were duly signed by both the BIA and petitioner. *See* 3d Aff. ¶ 9.

Petitioner also insisted on micro-managing the Longs' checking accounts and ranch spending. Virtually all purchases of any significance required specific approval by petitioner. *See* Def. Ex. 1. In that way, petitioner maintained constant contact with the Longs and control of their expenditures. *See id.*; Trial Record ("TR") 198-204, 286-89, 318-22.

On July 17, 1995, Kenneth Long died. In his will, he devised his 2,230 acres owned in fee within the Reservation to his four children (one of whom was Ronnie), all of whom are members of the CRST. *See* 1st Aff. ¶ 9. Under South Dakota law, which has adopted the Uniform Probate Code and generally follows familiar common-law principles, the will immediately vested title in Ronnie and his siblings, subject to probate proceedings for Kenneth's estate. *See* South Dakota Codified Laws ("SDCL") § 29A-3-101; *see also In re Estate of Roehr*, 631 N.W.2d 600, 602 (S.D. 2001) (willed property "automatically vest[s]" in the devisee "at the time of [the testator's] death . . .

subject only to the probate of the estate"). Pursuant to subsequent assignments by his siblings, title to all 2,230 acres vested in Ronnie. *See* 1st Aff. ¶ 9.

Shortly before Kenneth died, he married Paulette Rowley. On July 28, 1995, the state court accepted Paulette's application to be the personal representative in Kenneth's probate proceeding, as authorized by SDCL § 29A-3-301, and admitted his will. *See* JA86; Notice of Informal Probate and Appointment of Personal Representative, *In re Estate of Kenneth L. Long*, No. 95-4 (8th Jud. Cir. Ct., Dewey Cty., S.D. filed July 28, 1995) ("*Probate Proceeding*").[3] On August 15, 1995, the Long children filed a Demand for Notice of "any action whatsoever dealing with any proposed transfer of property belonging to the estate, or any other actions pertaining to this matter." Demand for Notice, *Probate Proceeding* (filed Aug. 15, 1995). On September 26, 1995, petitioner submitted a statement of claim alleging debts owed by the Long Company and guaranteed by Kenneth Long in the total principal amount of $635,706.30 plus interest of $51,629.79. *See* Statement of Claim, *Probate Proceeding* (filed Oct. 6, 1995). Petitioner's claim therefore imputed all of the debts of the Long Company to Kenneth's estate. On the appraisal of property in the estate filed on October 12, 1995, the appraiser assigned a value of "0.00" to Kenneth's 49% share interest in the Long Company. *See* Inventory and Appraisement at 2, *Probate Proceeding* (filed Oct. 12, 1995). The appraisal therefore showed a false deficit in the estate of debts to assets of approximately $478,000. *See id.* at 3. Other creditors filed claims against the estate after October and

[3] A complete and Clerk-certified set of the probate-court filings is available to be lodged with the Clerk upon request.

into early 1996, including a claim by the funeral home for expenses incurred for both Kenneth and Maxine Long.

In the spring of 1996, while Kenneth Long's estate was in probate, petitioner arranged a meeting on the Reservation to propose new financing for the Long Company. Petitioner inspected the Longs' fee land, met with them at their house, examined the cattle on the Tribal Grazing Unit, and met with CRST credit and finance officers at the tribal headquarters on trust land. *See* 3d Aff. ¶ 17. A bank lawyer represented petitioner, but the Longs were unrepresented. *See* 1st Aff. ¶ 15. Petitioner agreed to make operating and cattle-purchase loans requested by Ronnie Long, so long as the Longs deeded their house and fee land on the Reservation to petitioner. *See* 2d Aff. at 4. Petitioner would then sell the land back to them on a 20-year contract-for-deed.

Sometime after that meeting, petitioner unilaterally changed the terms of the bargain. In a letter to Ronnie, petitioner altered its promise to provide the Longs with financing to buy back their land under a 20-year contract-for-deed because of "possible jurisdictional problems" if petitioner sold the land on a contract "to an Indian owned entity on the reservation." JA91. In the revised agreement, petitioner changed the terms from a bank-financed 20-year contract-for-deed to a two-year lease-with-option-to-purchase, with a $468,000 balloon note due when the lease expired. *See* 2d Aff. at 5.

While it was offering this revised proposal to the Longs, petitioner was actively pressing for the filing of an Abandonment of Property in the Kenneth Long probate proceeding based on the false appraisal. That notice stated that "it is the opinion of the

personal representative that the real estate is so encumbered that it is of no benefit to the estate and that it would be to the advantage, benefit and best interests of the estate if the real estate is abandoned and transferred to [petitioner] which is the first mortgagee." Proposal for Abandonment of Real Estate ¶ 8, *Probate Proceeding* (filed Oct. 8, 1996). The probate court records do not show that any notice of these actions was provided to the Longs.

On October 29, 1996, petitioner's revised agreement produced another meeting involving the Longs, petitioner's officers and attorney, a BIA officer, and CRST financial planning officers. With winter fast approaching, the Longs had little choice but to accept petitioner's terms. Their most immediate need was to obtain an operating loan of $70,000 to feed and care for their cattle and an additional loan of $37,500 to purchase 110 calves to be fed and pastured with the Longs' other cattle on the Tribal Grazing Unit. *See* 2d Aff. at 5. Dennis Huber of the North Dakota/South Dakota Native American Business Development Center produced a cash-flow analysis for that meeting showing that the Longs could generate sufficient funds to make even petitioner's revised loan agreement workable. Petitioner and the BIA approved that cash-flow projection. *See* 3d Aff. ¶¶ 18-19; 2d Aff. at 6-7; Pls. Ex. 8A.

Despite the Longs' repeated requests for prompt action, petitioner delayed producing the final loan agreement documents for signature for five additional weeks after the October meeting. *See* 2d Aff. at 5. The documents finally produced — and drafted — by petitioner do not contain arbitration, choice-of-law, or choice-of-forum clauses. *See* JA96-103, 104-06 (Pls. Exs. 6, 7). Meanwhile, on December 2,

1996, the probate court authorized the abandonment. Paulette Long deeded the land to petitioner by Personal Representative's Deed filed December 27, 1996. *See* JA113-15 (Pls. Ex. 9).[4]

On December 5, 1996, Ronnie Long signed the loan agreement and the lease-with-option-to-purchase, relying on the Huber cash flow created in connection with the October 29, 1996 meeting. *See* Pls. Ex. 8A. The agreement contained the following terms:

- Petitioner agreed to make a $70,000 operating loan to the Long Company to feed and care for the Company's cattle;
- Petitioner agreed to make a $37,500 loan to the Long Company to purchase 110 additional cattle;
- The Longs deeded their 2,230 acres of agricultural land and their house to petitioner for a credit of $478,000 on their debt of $750,000 to petitioner;
- The Longs assigned their federal Conservation Reserve Program ("CRP") contract payments of $44,000 a year to petitioner;
- Petitioner leased the 2,230 acres back to the Longs for two years; and
- Petitioner granted the Longs an option to pay petitioner a $468,000 balloon payment in two years to recover the deed to their land.

See JA96-98, 104-05.

In the loan agreement, petitioner warranted that it had received title to what had been the Longs' land. *See* JA104 ("The Bank of Hoven has received a deed

[4] The probate proceedings for Kenneth Long's estate were never closed.

to property described in exhibit A attached hereto, through the estate of Kenneth Long."). In fact, the official transfer ordered by the probate court did not occur until three weeks later — on December 27, 1996. *See* JA115. The Estate of Kenneth Long deeded the fee land and house to petitioner, subject to petitioner's loan commitments. Petitioner never made the promised operating loan of $70,000 or the $37,500 loan to purchase additional cattle.

On December 12, 1996, unbeknownst to respondents, petitioner sent to the BIA for approval a modified cash-flow analysis with loss projections showing that the Longs' cattle ranching operations would fail. *See* JA107-12 (Pls. Ex. 8); *see* 3d Aff. ¶ 19. Neither Dennis Huber nor Ronnie Long had ever seen petitioner's modified cash flow, which was dated December 11, 1996 (and thus did not exist when the Longs signed the agreements on December 5, 1996, which were based on the Huber cash-flow projections of October 29, 1996). *See* Pls. Ex. 8A.

Petitioner's failure to pay the promised loans had catastrophic consequences for the Longs and their company. In early December 1996, when respondents made the agreement with petitioner, winter was upon them. Petitioner knew that without the operating loan the Longs could not provide feed to their cattle, without feed the cattle would starve to death, and without the cattle the Longs could not repay their loan or obtain any refinancing to repurchase their land. *See* 1st Aff. ¶ 17.

Despite respondents' repeated efforts to procure the promised funds to pay $20,000 in transportation costs to move the hay to the cattle, or even $2,000 needed to insure the cattle against winter death loss, petitioner refused to provide the necessary

funds. *See* JA120-22. BIA-guaranteed emergency loans were available for precisely such events. *See* 25 C.F.R. § 103.22 (2000). But, despite the Longs' requests for such assistance, petitioner never made any such emergency loans.

When severe winter storms struck the area in January 1997, the cattle ran out of feed. More than 500 cows and calves died. Their carcasses were discovered on the Tribal Grazing Unit. The Long family cattle ranching business — in operation for more than five decades — was wiped out. When the two-year note came due, the Longs could not repay petitioner the money to repurchase their land.

Prior to the lease's termination, Ronnie Long wrote to petitioner requesting a 60-day extension to raise financing to repurchase their land. *See* JA139 (Pls. Ex. 17). Petitioner rejected the request (*see* JA140 (Pls. Ex. 18)) and pursued purchasers for the property. In 1999, petitioner sold the Longs' land to non-Indians[5] on terms substantially more favorable than petitioner had offered the Longs and, indeed, on terms that the Longs could have satisfied. Instead of a loan requiring a two-year balloon payment of $468,000, the non-Indians paid only $23,229 per year. Because those parcels were productive farm land — and eligible for federal agricultural subsidies and other benefits totaling at least $23,000 per year — the non-Indians obtained the Longs' land essentially at no cost. *See* JA148-57 (Pls. Ex. 21).

---

[5] In Tribal Court, respondents named as defendants the non-Indians who had purchased their land from petitioner, the Maciejewskis and the Pesickas. After trial, the Maciejewskis abandoned the litigation. They are not parties here and therefore have waived any claim to relief.

3. a. On May 19, 1999, petitioner initiated litigation against respondents in Tribal Court by issuing a Notice to Quit on the "[Long Company] and Ronnie Long." JA144 (Pls. Ex. 20). Petitioner did not use any of the forms of service of process authorized under South Dakota state law, which specifically permits service of process on Indians in Indian Country. *See* SDCL § 15-6-4(c).[6] Nor did it use state law to serve the Long Company, even though it was incorporated under state law (with a designated agent for service of process). *See* JA144. Rather, petitioner asked the Tribal Court to serve the Notice to Quit on Ronnie Long and the Long Company. *See* JA146.

In response to the Notice to Quit, on July 2, 1999, respondents sought an injunction from the Tribal Court prohibiting their eviction and restraining petitioner from selling the land. On July 13, petitioner responded to the Longs' petition for a temporary restraining order. On July 30, Chief Judge Bluespruce held a hearing and denied the Longs' motion because they were unable to provide the security required under tribal law. The case proceeded on the request for an injunction.[7] Subsequently, because of the case's complexity, the CRST appointed Professor B.J. Jones, a member of the South Dakota Bar and a non-Indian who specializes in tribal law at the University of North Dakota Law School, to serve as Special

---

[6] *See Bradley v. Deloria*, 587 N.W.2d 591, 594-95 (S.D. 1998) (per curiam) ("[P]rocess is effective on a reservation . . . provided the service complies with . . . SDCL 15-6-4(c).").

[7] That opinion is summarized in pertinent part in Judge Jones's order denying petitioner's motion for summary judgment, which was filed on September 30, 2002.

Judge over the matter.[8] Judge Jones presided over the remainder of the case, including the trial and post-trial motions.

Under the CRST Law and Order Code, the Tribal Court has incorporated the Federal Rules of Civil Procedure and Appellate Procedure. *See* CRST R. Civ. P. 1(d) (1978). Respondents filed an amended complaint on January 3, 2000, to include claims for fraud and deceit, breach of contract, failure of consideration, a declaration that the deed to petitioner was void, self-help, discrimination, bad faith, and unconscionable contract. *See* JA163-75. The discrimination claim does not identify the source of law underlying it. *See* JA172-73. The relief requested in the discrimination claim is that "[t]he land sales by the bank to the Pesickas and Maciejewskis should be set aside, and the Longs should get possession and title to their land back." JA173. The discrimination claim does not request monetary damages. *See id.*

Instead of filing motions to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), to dismiss for a failure to state a claim under Rule 12(b)(6), or to clarify the claims under Rule 12(e), on February 3, 2000, petitioner filed an Answer and Counterclaim against the Longs, seeking eviction and monetary damages. *See* JA180. In that pleading, petitioner contested subject-matter jurisdiction in its answer but stated in its counterclaim that, "although Defendants deny jurisdiction of the Court, in the event the Court finds that it does have jurisdiction, both Defendants make this Counterclaim against Plaintiffs." JA184.

---

[8] Judge Jones's biographical information is available at http://www.law.und.edu/LawFaculty/jones.php.

On September 12, 2002, petitioner filed a motion for summary judgment on its counterclaim for eviction. In that motion, petitioner stated that "[t]he Court has jurisdiction over [the Long Company] and Ronnie Long and Lila Long in that the majority ownership of the corporation is owned by Ronnie Long and Lila Long, enrolled members of the [CRST] and the Court has jurisdiction over the subject matter of this action." JA187-88. Petitioner did not qualify its summary judgment motion concession on subject-matter jurisdiction in any way. *See id.*

In ruling on petitioner's motion for summary judgment on its eviction counterclaim, Judge Jones rejected respondents' argument that petitioner had obtained title to the Longs' land through fraud on the probate court. Judge Jones ruled that such matters should be brought to the state court in the first instance and that the CRST Court of Appeals "has directed this Court to maintain positive relations with state courts by attempting to honor their decisions." Order at 5 (Sept. 30, 2002) (citing cases). Judge Jones nonetheless held that a dispute of material fact existed as to whether petitioner had breached its loan agreement and whether such breach was a condition precedent to the parties' performance under the lease-purchase agreement. Judge Jones noted that petitioner disagreed that the two agreements were "related," *id.* at 6, but concluded that a trier of fact could find otherwise. The court thus rejected petitioner's motion for summary judgment on its counterclaim and set that issue for trial. *See id.* at 7-9. In a subsequent pre-trial ruling, Judge Jones ruled that the Tribal Court had subject-matter jurisdiction over all of respondents' claims, but dismissed the Longs' claim seeking rescission of

the deed based on fraud, holding that the appropriate forum for claims relating to the deed was the state probate court. *See* Order at 1 (Dec. 5, 2002).

The case proceeded to a two-day jury trial. Under the CRST Law and Order Code, a non-member litigant may request that non-members of the Tribe be empanelled as jurors, *see* CRST Law & Order Code § 1-6-1(2) (1978), but petitioner did not make such a request. Respondents' evidence on damages related solely to their breach-of-contract claim and totaled $1,753,110. *See* JA197-202. Respondents did not submit any evidence on monetary damages for their discrimination claim. *See* 3d Aff. ¶ 23 ("The Longs did not request any damages for discrimination and did not request punitive damages."). For discrimination, respondents instead sought the equitable remedy of the return of their land from the non-Indian purchasers. *See* JA173. A seven-member jury answered five substantive interrogatory questions unanimously — finding that petitioner breached the loan agreement, that the breach prevented the Longs from performing under the lease, that petitioner did not use improper self-help remedies, that petitioner discriminated against the Longs based on their Indian status, and that petitioner acted in bad faith regarding an increase in the BIA guarantee. *See* JA190-92. The jury awarded the Longs $750,000 plus prejudgment interest. *See* JA192, 195. Additionally, in a supplemental judgment, the Tribal Court decreed that the Longs could enforce the original option to purchase the 960 acres they currently occupied, but that petitioner's previous sales of two parcels of the Longs' land to the Maciejewskis and Pesickas would not be voided. Judge Jones reasoned that the jury had found for petitioner on the self-help

claim, which he construed to mean that "the sale of the land to the other parties was not done in violation of tribal law." Pet. App. A69. The jury thus rendered inconsistent findings on respondents' self-help and discrimination claims, which Judge Jones resolved in the supplemental judgment in petitioner's favor. *See id.* at A70-A71.

3. b. Both sides appealed to the CRST Court of Appeals, which consisted of a three-judge panel with two non-Indian judges (Chief Judge Frank Pommerscheim and Patrick Lee). Petitioner argued that the Tribal Court did not have subject-matter jurisdiction to hear the discrimination claim. The court of appeals held that that claim was based on tribal law. The court also held that petitioner's actions satisfied both *Montana* exceptions. Finally, the court affirmed the Longs' successful causes of action in addition to the Tribal Court's decision to restrict the Longs' repurchase option to the 960-acre parcel respondents continued to possess.

3. c. At the same time petitioner was litigating against respondents in Tribal Court, it was prosecuting a state-court action against them. On July 8, 1999, and following service of the Notice to Quit, petitioner filed a lawsuit against the Long Company and Rhonda Long (Ronnie and Lila's daughter) in the Eighth Judicial Circuit Court of South Dakota. *See* Complaint, *Bank of Hoven v. Long Family Land & Cattle Co.*, No. 99-21 (8th Jud. Cir. Ct., Dewey Cty., filed July 8, 1999).[9] The complaint alleged wrongful holdover of the Longs' land and sought $31,708.86

[9] A complete and Clerk-certified set of the state-court filings of that case is available to be lodged with the Clerk upon request.

in damages, twice the claimed actual damages, and removal of the Longs from the land. *See id.* ¶ 12.

The complaint stated expressly that "Plaintiff [petitioner] has served notice as is required under SDCL 21-16-1 upon defendant, [the Long Company]." *Id.* ¶ 9. The Longs did not contest service. On September 17, 1999, they filed an answer to the complaint, which averred expressly as follows: "Plaintiff [petitioner] filed the Notice to Quit . . . in the [CRSTC] . . . and served the Notice to Quit through the [CRSTC] . . . [and] has thereby previously submitted this matter to the jurisdiction of the [CRSTC]." Answer ¶ 13.

Apart from two notices to take the depositions of Ronnie and Lila Long, which petitioner filed in December 1999, petitioner took no action in this state-court proceeding. On December 7, 2004, the Longs' counsel wrote to the state court that "[i]t appears that this case can be dismissed because the issues between the parties have been litigated in the [CRSTC] and CRST Appellate Court." Letter from James P. Hurley to Hon. Warren G. Johnson (Dec. 7, 2004). On December 13, 2004, petitioner's counsel responded in a letter to the state court that stated in its entirety: "The above-entitled matter was commenced and has been in abeyance pending a [CRSTC] trial and Tribal Appellate Court decision. I would not object to the court dismissing the action, however, I would request that it be dismissed without prejudice." Letter from David A. Von Wald to Hon. Warren G. Johnson (Dec. 13, 2004). On December 23, 2004, the state court dismissed the case "without prejudice, and without costs to either party." Order (4th Jud. Cir. Ct., Dewey Cty., S.D. Dec. 23, 2004). The order of dismissal references and

attaches "the letter responses of counsel in response to the Court's notice of intent to dismiss for failure to prosecute." *Id.*

4. On January 7, 2005, petitioner filed a complaint seeking declaratory and related relief in federal district court. Petitioner alleged that the Tribal Court lacked subject-matter jurisdiction and denied it due process of law. On cross-motions for summary judgment, the court noted that, on appeal to the CRST Court of Appeals, petitioner did not generally appeal the jurisdiction of the Tribal Court over the lawsuit brought by the Longs, but rather appealed only the Tribal Court's subject-matter jurisdiction as to the discrimination claim. *See* Pet. App. A32.

The court then identified "the issue presented here [a]s whether this lawsuit falls within one of the *Montana* exceptions." *Id.* at A33. The court rejected petitioner's argument that the relationship between it and respondents was nothing more than a relationship between two non-member corporations:

> This assessment . . . very much ignores important facts of this case. The Long Company is a closely held corporation. CRST members have controlled at least 51% of the Long Company's outstanding stock at all times pertinent to this action. Native American control was necessary in order for the Long Company to qualify for BIA guarantees. The BIA guarantees allowed the bank to make loans to the Longs with greatly reduced risk. . . . [T]he loan agreements between the bank and the Long Company were not only crafted with tribal membership in mind; they would not likely have been possible without it.

Id. at A34-A35. The court held that petitioner's conduct — "enter[ing] consensual relationships with tribal members through commercial dealings, contracts, leases, or other arrangements," *id.* at A40-A41 — satisfied *Montana*'s first exception. In addition, the court found that petitioner had made a "significant concession" before the Tribal Court — conceding in its motion for summary judgment that "the Court has jurisdiction over the subject matter of this action" — and that petitioner "should be held to it." *Id.* at A40.[10]

5. The Eighth Circuit affirmed. The court of appeals rejected petitioner's arguments "that the tribal courts lacked jurisdiction over the Longs' discrimination claim and that it was denied due process by the tribal proceedings." Pet. App. A1-A2. The court also rejected petitioner's argument that it never formed a consensual relationship with a tribal member because the loan agreements were with the Long Company (a South Dakota corporation), stating:

> Because the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation, we conclude that it engaged in the kind of consensual relationship contemplated by *Montana*. . . . The Tribe's interest in regulating commercial transactions between its members and nonmembers does not disappear just because a corporation is also a party to those

[10] Petitioner also argued it was denied due process in Tribal Court because it did not receive proper notice that it was facing a tribal law and not a federal-law discrimination claim. The courts below rejected that claim, *see* Pet. App. A21, A41-A44, and petitioner abandons it here, *see* Pet. i n.1.

> transactions. That the Tribe was actively involved in facilitating negotiations between the Longs and the bank confirms that the Tribe had its own interest in facilitating the commercial endeavors of its members and in ensuring that they are not unfairly dispossessed of reservation land.

Id. at A12 (citation omitted). In holding that the Tribe has authority to regulate petitioner's conduct arising out of its consensual relationship with respondents,[11] the court found that "this case is not about a tribe's power to govern nonmembers 'just because they enter the tribe's territory.' Rather, this case is about the power of the Tribe to hold nonmembers like [petitioner] to a minimum standard of fairness when they voluntarily deal with tribal members." *Id.* at A13 (citation omitted).

[11] Neither the district court nor the court of appeals resolved *Montana*'s second exception. *See* Pet. App. A14 n.7.

SUMMARY OF ARGUMENT

I. Petitioner lacks Article III standing to pursue its challenge to the exercise of tribal-court authority here. As this case comes to this Court, petitioner has waived its jurisdictional challenge to all claims asserted against it in Tribal Court other than a single tort claim for discrimination. Petitioner's question presented, its federal district court complaint, and its briefing here make clear that petitioner's challenge is limited to the discrimination claim.

The only relief granted by the Tribal Court, however — damages for the loss of respondents' cattle — was based on the breach-of-contract and bad-faith claims that petitioner failed to bring before this Court in the question presented. Respondents' complaint, the trial proceedings, the jury verdict, and the post-trial motions point to one conclusion: the relief that the Tribal Court granted against petitioner was based on petitioner's breach of contract. With respect to the discrimination claim, respondents did not seek monetary damages in the Tribal Court, but rather equitable remedies that would allow respondents to repurchase all of the land at issue. The jury denied respondents that relief. Respondents moved for reconsideration, but the Tribal Court granted only a limited remedy that allowed respondents to repurchase part of their land and based that remedy only upon petitioner's breach of contract.

The record establishes that the Tribal Court granted no relief against petitioner on respondents' discrimination claim. Petitioner thus effectively prevailed on that claim, and yet seeks to base this Court's review only on that claim. Given those facts, petitioner has failed to carry its burden of establishing constitutional injury-in-fact to support Article III

jurisdiction. Alternatively, because petitioner has not challenged the Tribal Court's jurisdiction over the breach-of-contract claim, this Court should affirm on that alternate ground or dismiss the writ as improvidently granted.

II. If this Court reaches the merits, a straightforward application of the framework established by this Court in *Montana* demonstrates that the Tribal Court properly exercised jurisdiction over respondents' discrimination claim.

A. *Montana*'s consensual-relationship exception governs here. All four courts below applied that exception on this record to find that, "by enter[ing] . . . agreements [and] dealings with" respondents and other tribal members, petitioner "subject[ed] [itself] to tribal civil jurisdiction" in connection with those agreements and dealings. *Montana*, 450 U.S. at 566. Indeed, petitioner functionally concedes that point generally by failing to challenge the Tribal Court's exercise of jurisdiction over the contract claims.

Petitioner consented to tribal civil authority through its extensive and lengthy on-reservation commercial relationship with the Long Company — an Indian-owned entity — and Long family members who also were tribal members. Crucially, petitioner has known since the inception of that relationship that it was dealing with an Indian-owned entity, as it benefited substantially from the BIA-guaranteed loans that accompanied that status. The commercial relationship that gave rise to respondents' discrimination claim, moreover, involved both member-owned fee and tribal trust land within the Reservation. Given petitioner's substantial business dealings with Indians on the CRST Reservation and the benefits it received from the Indian-owned status

of the Long Company, this case presents precisely the type of consensual relationship envisioned by *Montana*'s first exception.

In addition to consenting to tribal civil authority generally, petitioner consented to the exercise of tribal *adjudicatory* authority. Petitioner itself first invoked the jurisdiction of the CRST courts, abandoned a state-court action and elected to pursue its remedies through the CRST judicial system, and then stipulated to tribal adjudicatory jurisdiction over the matters in this case in moving for summary judgment. The combination of petitioner's long-standing commercial dealings and its litigation conduct establish the propriety of jurisdiction under *Montana*'s first exception.

B. Alternatively, the Tribal Court properly exercised jurisdiction under *Montana*'s second exception, which recognizes a tribe's inherent "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." *Montana*, 450 U.S. at 566. This case involves predatory and discriminatory lending practices directed at tribal members and fits within the narrow category of conduct that imperils the economic security of the Tribe. Petitioner's conduct ruined the Long Company. Given the centrality of ranching to the Tribe as well as the federal government's interest in protecting Indian-owned entities from predatory practices that undermine the objectives of the BIA loan program, *Montana*'s second exception independently sustains jurisdiction. Because neither court below found it necessary to reach the applicability of this exception, if this Court does reach the second

Montana exception, it may wish to remand for development of a factual record.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS CASE BECAUSE PETITIONER CANNOT SHOW THAT IT HAS STANDING GIVEN THAT IT PREVAILED ON THE DISCRIMINATION CLAIM

Article III of the Constitution limits federal judicial power to resolution of "Cases" and "Controversies," "and Article III standing enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotations and ellipsis omitted). Standing "requires a plaintiff to demonstrate . . . injury in fact, causation, and redressability." *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007) (per curiam). Standing elements, moreover, "are not mere pleading requirements," and thus "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

As the case comes to this Court, petitioner has waived its jurisdictional challenge to all claims asserted against it in Tribal Court except the tort claim for discrimination. *See* Pet. i. But petitioner cannot show that it suffered any injury-in-fact arising from the jury's discrimination verdict. The relief granted in the Tribal Court arose entirely from petitioner's breach of contract. In a post-trial order, the Tribal Court rejected respondents' attempt to obtain relief on the discrimination claim. In short, respondents received no order remedying the jury's finding of

discrimination and thus petitioner is not injured by the only claim it now seeks to challenge. A jury finding superseded by a final judgment does not cause petitioner any constitutionally cognizable injury.

A. The Tribal Court's Jurisdiction Over The Contract Claims Is Not Before This Court

Respondents' amended complaint (JA158-79) raises several claims, but only the discrimination claim is before this Court. The petition presents only the question whether the Tribal Court had jurisdiction "to adjudicate civil *tort* claims." Pet. i (emphasis added). Although recognizing that respondents asserted a cause of action for "breach of contract" (Pet. 3), petitioner's argument also addresses only the tort claim. *E.g.*, Pet. 14 (complaining that petitioner "was subjected to tribal tort claims in tribal court"). Even the certiorari-stage reply brief — which in any event would have been too late to expand the scope of the question presented — refers constantly to tort claims.[12] Indeed, the reply brief concludes (at 11) by rephrasing the "narrow . . . question" that petitioner presents: "Does a tribal court have civil adjudicatory jurisdiction over a nonmember defendant to litigate tort claims . . . ?"[13]

In presenting its tort-specific question and making its corresponding argument, petitioner necessarily

---

[12] *See also*, *e.g.*, Reply Br. 4 ("[I]t does not follow that the nonmember may be forced to defend against civil *tort* claims in tribal court."), 5 (discussing tribal courts' jurisdiction "over common-law *tort* claims"), 9 (calling on this Court to "determine whether tribal courts have jurisdiction over *tort* claims against nonmember defendants") (emphasis added in each quotation).

[13] *See also* Pet. Br. 2-3 (discussing "common-law tort claims"), 12 (same); *id.* at 11 (noting district court upheld jurisdiction "over the discrimination claim").

refers only to the discrimination claim. Not only is that the only tort claim mentioned in the petition (*e.g.*, Pet. 3, 9, 12), it is the only tort claim on which the jury rendered a special interrogatory finding against petitioner. *See* JA190-92.[14]

In addition to the discrimination claim, the jury found for respondents on two contract claims — one for breach of contract[15] and one for bad faith in the performance of the contract.[16] Those contract claims are indisputably different from the tort claim that petitioner included in the question presented. Indeed, petitioner argues vigorously that "the discrimination tort at issue" in this case is entirely distinct from "a breach of contract." Br. 34. Because the two contract claims are neither set out nor fairly included in "civil tort claims," they are not before the Court. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). Because this is a separate declaratory judgment action launched by petitioner in federal district court to attack collaterally aspects of the Tribal Court's judgment — and not a direct

---

[14] None of respondents' other tort claims either made it to the jury or prevailed.

[15] Petitioner breached the contract by failing to provide agreed-upon loans needed for the survival and expansion of respondents' cattle herd. The jury decided that petitioner breached the December 5, 1996 loan agreement with respondents. *See* JA190; Pet. App. A57-A59.

[16] A bad-faith claim arises from a breach of the covenant of good faith and fair dealing implied in every contract. *See Restatement (Second) of Contracts* § 205 (1981). The jury decided that petitioner breached that covenant by failing to diligently pursue an increase in the level of BIA guarantee for loans to respondents. *See* JA192; Pet. App. A59-A60.

appeal of the Tribal Court's judgment itself — petitioner cannot now challenge the remedies that the Tribal Court ordered on the basis of the contract claims when it failed to press its challenge to those claims in its petition for certiorari.[17]

B. The Relief Granted By The Tribal Court Was Based Entirely On Respondents' Contract Claims, Which Are Not Before This Court, And Not On The Tort Claim That Is Included In The Question Presented

The relief granted by the Tribal Court was not based on the tort claim that petitioner now argues was outside of that court's jurisdiction. The relief was based entirely on petitioner's breach of contract, as shown by respondents' complaint, the trial proceedings, the verdict, and the post-trial motions.

1. Respondents' complaint sought damages on the basis of their contract claims

The complaint demanded monetary damages based on petitioner's breach of its contractual obligations. The amended complaint contained nine counts

---

[17] Petitioner's declaratory judgment action in federal district court asserted generally that: the Tribal Court lacked jurisdiction over it; petitioner was not afforded due process in Tribal Court proceedings; and respondents were not entitled to possess the 960 acres. As explained in text, petitioner has narrowed its first claim to relief solely to the discrimination claim and abandoned its second claim to relief. On its third count, petitioner lacks standing because the discrimination claim does not support that remedy, the only claim on which petitioner now challenges the Tribal Court's jurisdiction. Based on its declaratory judgment action — as narrowed by its subsequent submissions — petitioner no longer avers any concrete injury-in-fact that would be redressable by a favorable decision of this Court.

(JA163-76), including breach of contract (Count 2, JA165-67), discrimination (Count 6, JA172-73), and bad faith (Count 7, JA174). But the amended complaint attributed the loss of respondents' livestock (which was the underlying basis for all of the relief awarded) only to the contract claims.

Count 2 alleged that, "[a]s a direct result of [petitioner's] breach of the agreement, [respondents] lost 230 cows, 260 yearlings, and 3 horses," and that this "caused [respondents] to be financially unable to buy back their land from [petitioner]." JA167. Count 7 alleged that the actions constituting bad faith "caused [respondents] to suffer substantial losses for which [petitioner] is liable." JA174. Count 6, in contrast, claimed that petitioner's discrimination "prevented [respondents] from buying back their land from [petitioner]." JA173. There is no allegation that petitioner's discrimination caused the loss of any livestock.

The prayer for relief requested specific damages, injunctive relief, or both for each count *except* discrimination.[18] JA177-79. On the breach-of-contract claim, respondents requested "damages directly resulting from [petitioner's] breach of agreement in an amount determined at trial; and that title and possession of the 2,225 acres of land be returned to [respondents]." JA177. On the bad-faith claim, they requested "damages and losses suffered by [respon-

[18] The first eight paragraphs of the prayer for relief correspond precisely with eight of the nine counts. Only for the discrimination count is no specific relief sought. Only paragraph 10, which generally requested "such and further relief as is just and equitable under these circumstances," JA179, could possibly be construed as seeking recovery on the discrimination count.

dents] in the amount determined at trial." JA178. The discrimination claim alleged only that "the Longs should get possession and title to their land back." JA173.

2. At trial, respondents sought damages only on the basis of their contract claims

Throughout trial, respondents' argument for substantial relief was based on their contract claims. In the opening statement, they explained that the evidence would show that petitioner's failure to provide promised loans caused their loss of livestock in the winter of 1996-1997 and their inability to exercise the repurchase option under the loan agreement. *See* TR77-78. The discrimination claim was not mentioned. *See* TR72-79.

Both Ronnie Long's trial testimony and the evidence of damages admitted on the basis of that testimony show that respondents' claims for monetary damages were based only on petitioner's breach of its contractual duties. Respondents offered proof of damages from three causes: the loss of their livestock during the winter of 1996-1997; the loss of the loan to purchase 110 calves; and the loss of the ability to exercise the option to purchase the land. *See* JA197-202; TR171-76, 300-07. Ronnie calculated the damages on the basis of expected offspring and proceeds from the lost animals and CRP payments for the use of the land. *See* JA197-202, TR171-76, 300-07. Admitted into evidence as "Exhibit 23, Plaintiffs' Damages," his calculations totaled $1,236,792. *See* Pet. App. A60; TR308; JA197-201. All of those damages, he testified, resulted from petitioner's failure to perform its contractual obligations under the loan

agreement.[19] Ronnie also testified that, without the operating loan promised under the contract, he could not be in a position to exercise the option to purchase the land. *See* TR172.

The jury instructions also confirm that respondents' damages derived only from the contract claims. Instructions 8, 10, 10A, and 15 explained the breach-of-contract and bad-faith claims, described the measure of damages for a breach of contract and prejudgment interest, and discussed the duty to mitigate. Only Instruction 17 mentioned the discrimination claim, and it simply explained the legal standard to find discrimination. Those instructions, which the jury should be presumed to have followed, did not mention damages.

The closing statements similarly demonstrate that Exhibit 23, Ronnie Long's calculations of damages resulting from petitioner's breach of its contractual duties, *see* TR171-76, 300-07, exhaustively accounted for the damages that respondents asked the jury to award. Respondents' closing statement focused on the contract claim and attributed the Exhibit 23 damages to petitioner's breach of contract. There was no mention of damages and no reference to Exhibit 23 in connection with the discrimination claim.

---

[19] On direct examination, Ronnie Long (who had prepared the calculations in Exhibit 23) testified that the damages in Exhibit 23 were caused by petitioner's failure to provide the operating loan in breach of contract. *See* TR172. On cross-examination, he was asked, "[A]ll of those damages you claim are the result of . . . it's being the Bank's fault that you lost your cattle, right?" TR326. Long answered, "Yes." *Id.* He was then asked, "If it wasn't the Bank's fault that you lost your cattle, would you be entitled to any of those damages?" He answered, "No." *Id.*

3. The verdict shows that the damages awarded by the Tribal Court were based on respondents' contract claims

The jury awarded respondents $750,000 in damages, a substantial reduction from the amount proved in evidence. Because the jury was instructed that interest could *not* be awarded for punitive damages or intangible damages, *see* TR582, and the jury specifically found that interest should be added to the judgment, *see* JA192, that sum necessarily represents tangible, compensatory damages — that is, damages awarded on a breach-of-contract claim.

The CRST Court of Appeals upheld the damages verdict on the basis that "[respondents] provided extensive evidentiary data and testimony relative to their damages." Pet. App. A61. The court explained that "[respondents] sought damages in the amount of $1,236,792 (Exhibit 23) and thus the award of $750,000 represents an award of only 60% of the amount requested." *Id.* at A60. The CRST appellate court therefore recognized that the damages award was based entirely on Exhibit 23, which represented damages for breach of contract.

4. The Tribal Court's equitable relief was based on respondents' contract claims

Before the Tribal Court, respondents alleged that petitioner discriminated against them by selling the land at issue to non-Indians "on terms more favorable than [petitioner] required of the Longs." JA173. Petitioner counterclaimed to evict respondents from the 960-acre parcel that they occupied. *See* JA184. Respondents offered no evidence of monetary damages on discrimination but instead sought title to the entire 2,230 acres. *See* JA173. The jury answered a special interrogatory finding that petitioner had

discriminated against the Longs. *See* JA191. But it also answered a special interrogatory that petitioner had *not* violated a prohibition on self-help remedies by its sales of that land to the Maciejewskis and Pesickas. *See id.*

The Tribal Court initially rejected respondents' request for return of their land, awarding only monetary damages for breach of contract. *See* JA194-96. Respondents moved for reconsideration, arguing that the jury's breach-of-contract finding excused their failure to repurchase the land within the contractually permitted two-year period. *See* Pet. App. A70. In a supplemental judgment, the Tribal Court granted the motion, but only in part and in a way demonstrating that the final judgment was based on petitioner's breach of contract, not discrimination.

Specifically, the court refused to allow respondents to repurchase all 2,230 acres, which it held would be inconsistent with the jury's self-help finding: "The jury ruled against [respondents] on their theory that the conveyances to the other Defendants violated the law." *Id.* The court explained it lacked "the authority to set aside the contracts for deed [petitioner] entered into with the other [parties]." *Id.* It then found that "the only legal issue presented by [petitioner's] counterclaim was whether the Court should evict [respondents] from the 960 acres they presently occupy." *Id.* Formulating an equitable remedy for petitioner's breach of contract (not for its discrimination) in light of the jury's rejection of petitioner's eviction counterclaim, the court held that respondents "continue to possess an option to purchase the 960 acres they presently occupy." *Id.* Thus, the court concluded that respondents had a right to

purchase only the land they possessed "at the amount per acre contemplated in the original option." *Id.*

C. Because The Tribal Court Granted No Relief On Respondents' Tort Claim, Petitioner Has No Standing To Challenge The Tribal Court's Jurisdiction Over The Tort Claim

Because respondents received no relief on their tort claim — despite the jury's discrimination finding — petitioner effectively prevailed on respondents' discrimination claim. Thus it has no standing to challenge the Tribal Court's jurisdiction over the claim, which is the only question presented here. Arguments that petitioner might make in support of its standing are unpersuasive.

1. The Tribal Court's equitable relief does not justify standing

Although the Tribal Court denied respondents' request to recover title to their entire 2,230 acres, it allowed them to repurchase the 960 acres that they have continued to occupy. That relief does not confer standing on petitioner. First, as explained above, that relief was expressly based on petitioner's breach of its contractual obligations, *not* on its discrimination against the Longs. *See* Pet. App. A70-A71. Even if the equitable remedy had been based on the discrimination, reversing the grant of relief would not benefit petitioner.

Under its deed of sale with the Maciejewskis, petitioner had sold the land for the same per-acre price as in the original lease-repurchase agreement with respondents, albeit on financing terms that were more favorable to the buyer than respondents had received. *See* JA173 (sale to Maciejewskis was for

1,905 acres for $401,100, or approximately $210 per acre, with generous financing). Under the Tribal Court's supplemental judgment, the court ordered that respondents "are entitled to exercise the option to purchase the 960 acres they presently occupy in the amount of $201,600" (Pet. App. A71), or $210 per acre. Thus, petitioner received the same amount per acre under the Tribal Court's supplemental judgment as under its sale to the Maciejewskis.

In the Tribal Court, petitioner had suggested that the proposed supplemental judgment was unfair because of a change in land values. But, as petitioner's own federal allegations make clear, it was subject to a contractual obligation to sell those 960 acres, *see* Compl. ¶ 18 (land subject to option was "under a contract for deed" with "Maciejewski[s]"), and that contract included the same price-per-acre terms as petitioner would sell to respondents, *see* JA173. The Tribal Court thus correctly rejected petitioner's land-value assertion, and petitioner has not subsequently pressed it. Importantly, the Maciejewskis dropped out of this litigation and no longer contest the Tribal Court's order invalidating the sale of the 960-acre parcel to them. Thus, petitioner can claim no possible injury-in-fact from an order to sell land to respondents on the same per-acre sale terms as it agreed to sell to the Maciejewskis. In any event, petitioner has not satisfied its burden to establish any concrete injury from that judgment.

2. Petitioner has waived any argument that the discrimination claim tainted the proceedings

Nor does the jury's answer to Special Interrogatory No. 6 (JA192) support petitioner's standing. That interrogatory asked that, if the jury answered

"yes" to any of the preceding special interrogatories (including discrimination), it could award monetary damages. In the CRST Court of Appeals, petitioner argued extensively that the monetary damages award was "tainted" by the mere existence of the discrimination claim in the case. Pet. App. A61. That court rejected petitioner's assertion on multiple grounds — including petitioner's having waived numerous opportunities to object at trial to the supposed taint (*see id.* at A60-A62). Even if that complaint were accurate, however, petitioner correctly identified that as only a due process argument (*see id.* at A61), which it explicitly declined to pursue in this Court. *See* Pet. i & n.1. As set forth above, because the monetary damages award was in no way supported by the discrimination claim, petitioner cannot sustain its standing on that slim basis alone.

* * *

Given the jury's rejection of respondents' self-help claim and the Tribal Court's rejection of the equitable remedy sought by respondents for discrimination, petitioner can point to nothing to establish constitutional injury.[20] This Court has held that a request for relief that is "worthless" to a party does not give rise to a justiciable controversy. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104-06 (1998). That principle applies here. In view of petitioner's failure to establish injury-in-fact, the Court need not address any novel questions of standing law to decide

---

[20] The CRST Court of Appeals noted that petitioner had waived any challenge to respondents' damages calculation. *See* Pet. App. A60-A62. In its federal complaint, petitioner similarly waived any argument of excessive monetary damages and did not assert that any component of the monetary damages derived from the discrimination claim.

this case. Rather, it should dismiss the case on the ground that, on summary judgment, "plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Lujan*, 504 U.S. at 561 (internal quotations omitted). Petitioner's failure to prove facts constituting injury-in-fact warrants dismissal of the case for lack of jurisdiction.

D. Even If Petitioner Had Standing To Challenge The Tribal Court's Jurisdiction Over The Tort Claim, The Judgment Should Still Be Affirmed On Alternate Grounds

Because petitioner has not challenged the Tribal Court's jurisdiction over the breach-of-contract claim on which relief was granted, the decision below should simply be affirmed on that basis.[21] Even if respondents had never filed their tort claim, or if the jury had found for petitioner on the tort claim, respondents still would have obtained exactly the same relief. By rejecting respondents' requested remedy for discrimination in its supplemental judgment, the Tribal Court functionally nullified the finding of discrimination by the jury and based all of the relief awarded to respondents on a breach-of-contract claim no longer contested by petitioner.

---

[21] Alternatively, if this Court prefers not to consider the standing issues, it may prefer to dismiss the petition as improvidently granted.

II. UNDER *MONTANA*, THE TRIBAL COURT PROPERLY EXERCISED JURISDICTION OVER PETITIONER

Prior to *Montana*, this Court held that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) (emphasis added); *see Williams v. Lee*, 358 U.S. 217, 223 (1959) (tribal-court civil jurisdiction over non-member was proper when non-member engaged in transactions with Indian on reservation; "[i]t is immaterial that respondent is not an Indian"). Against that backdrop, this Court has refused to extend the rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) — that tribes lack inherent criminal jurisdiction over non-members — to civil matters. *See*, *e.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855 (1985).

Montana steered a different path from *Oliphant*, holding that "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." 450 U.S. at 565.[22] That was so in

---

[22] The political branches have long supported robust tribal sovereignty. *See* Elizabeth Ann Kronk, *Promoting Tribal Self-Determination in a Post*-Oliphant *World: An Alternative Road Map*, 54 Fed. Law. 41, 42 (Mar./Apr. 2007) ("Congress intended for tribal courts to develop their own systems, restrained by a minimum of civil rights, when it passed the Indian Civil Rights Act" and, since then, "the executive and legislative branches of the federal government" have continued to "support tribal self-determination" as "congressional legislation has consistently supported and articulated the policy of tribal self-determination").

two circumstances. First, "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[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 566. Accordingly, both before and after *Montana*, it has been settled that "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings." *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997). Each of *Montana*'s exceptions independently sustains tribal-court jurisdiction here.

A. *Montana*'s First Exception Controls Here

1. Petitioner had a longstanding commercial relationship with tribal members regarding business on the Reservation

By "enter[ing] . . . agreements or dealings with" members of an Indian tribe, a non-member "subject[s] [himself] to tribal civil jurisdiction." *Montana*, 450 U.S. at 566.[23] As each of the four courts to apply this

---

[23] Although this Court has not yet upheld tribal-court civil jurisdiction over a non-member defendant, *see Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001), that does not diminish the force of this Court's holdings that such jurisdiction exists. Such a conclusion follows necessarily from the Court's repeated refusal to hold that *Oliphant* governs in the civil context and from remands in *National Farmers* and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which would have been unnecessary were there, as petitioner suggests, a *per se rule* against tribal-court civil jurisdiction over non-members.

exception in this case has held, the *Montana* first exception controls here.

a. The consensual-relationship exception applies to "private individuals who voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they . . . enter[] into." *Hicks*, 533 U.S. at 372. The exception embodies the proposition that "[n]onmembers . . . who *choose* to affiliate with the Indians" through consensual commercial dealings "may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (9th Cir.) (en banc) (emphasis added), *cert denied*, 126 S. Ct. 2893 (2006).

This case fits squarely within that exception. Petitioner has had lengthy on-reservation commercial relationships with the Long Company — an Indian-owned entity — and with Long family members who are Tribe members. The Long Company, which operated on reservation fee and trust lands,[24] was formed for the sole purpose of qualifying for BIA-guaranteed loans, a fact that was set forth conspicu-

[24] *All* land at issue here lies within a reservation whose boundaries are intact and hence is within "Indian Country." *See* 18 U.S.C. § 1151; *Solem v. Bartlett*, 465 U.S. 463 (1984) (holding that there has been no disestablishment of the CRST Reservation boundaries). Indeed, the damages from petitioner's breach of contract occurred exclusively on tribal *trust* land. *See supra* p. 12; 3d Aff. ¶ 17. And, contrary to petitioner's representations, on Kenneth Long's death, the other parcel became property of CRST *members*. *See supra* pp. 6-7. That land, under the loan agreement and the lease-with-option-to-purchase, was deeded to petitioner subject to petitioner performing under the loan agreement and subject to respondents' rights under the lease and option. Those facts have jurisdictional significance in applying *Montana*'s exceptions. *See Hicks*, 533 U.S. at 359.

ously in its Articles of Incorporation, *see* JA17, and shielded petitioner from virtually all financial risk. As petitioner explains, "[s]hortly" after incorporation "the Indian-owned Long Company . . . began lending relations with the Bank." Br. 4. *See also* 3d Aff. ¶ 8.

From 1989 until 1996, petitioner provided loans to the Long Company for its ranching and livestock operations on fee and trust land within the Reservation. As a condition for annual business operating loans that covered the purchase and management of cattle on tribal trust land, petitioner *required* the Tribe-member Longs personally to obtain guarantees from the BIA, guarantees to which they were entitled because of their good credit standing and their tribal status. *See supra* pp. 5-6; 3d Aff. ¶¶ 4, 11.[25] Petitioner's applications to the BIA showed that it was lending to a qualifying Indian-owned business entity. *See* 25 C.F.R. § 103.9. And petitioner received interest-subsidy payments on these loans from the BIA. *See* JA81-85. As petitioner stated in its 1997 letter to the North and South Dakota *Indian* Business Development Center, these BIA "credits

[25] Petitioner also provided personal loans to tribal member owners of the Long Company. *See* 3d Aff. ¶ 2. Petitioner's extensive and personal on-reservation interactions with the Longs included sending bank representatives to the Reservation and engaging in day-to-day supervision of the Long Company's financial activities. *See supra* p. 6. Negotiations over the loan agreements and debt repayment took place in tribal offices on trust land and were facilitated by BIA employees and tribal officers. *See* 2d Aff. at 4. At bottom, petitioner was aware its dealings with respondents would subject it to tribal-court jurisdiction, as evidenced by its reference to "jurisdictional problems" it would face in informing the Longs that it was withdrawing its offer to finance the Longs' repurchase of their land from petitioner. *See id.* at 5.

and loans would not have been possible without your expertise and assistance." JA116.

In short, petitioner purposefully and continuously availed itself of doing substantial business with an Indian-owned company whose "principal place of business . . . was at all times located on the CRST Reservation," 2d Aff. at 3, and which ran its cattle ranching operations primarily on tribal trust land that petitioner's officers periodically inspected. *Cf. Strate*, 520 U.S. at 446 (*Montana* recognized tribes retain power to regulate "nonmember[]" conduct on "land . . . held in trust for the Tribe"). Throughout its course of dealings with the Long Company, petitioner provided personal loans to enrolled tribal members who at various times owned land within the Reservation, relied on tribal officials to facilitate commercial interactions, and visited the Reservation multiple times. *See supra* p. 8. Perhaps most importantly, petitioner's knowledge from the inception that it was dealing with an Indian-owned company and the benefits that entailed (BIA loan guarantees) formed the very *foundation* of the parties' commercial relationship. Despite all of that, petitioner elected not to include a single forum-selection, arbitration, or choice-of-law clause in any of the commercial agreements it drafted.[26]

In these circumstances, petitioner's claim of unfairness or surprise in being subject to tribal-court jurisdiction rings especially hollow. As this Court has held in an analogous context, "[w]here a forum seeks to assert specific jurisdiction over an out-of-

---

[26] A tribal entity cannot insist on exhaustion of tribal remedies by entering into an agreement with a forum-selection clause. *See*, *e.g.*, *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995).

state defendant who has not consented to suit there, th[e] 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation and footnote omitted). Just as an out-of-state defendant can functionally consent to the burdens of jurisdiction in an unfamiliar forum through purposeful availment, *Montana*'s first exception provides that a non-member can consent to tribal-court civil jurisdiction through "commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The record establishes that petitioner has done just that.

Indeed, this case fits comfortably within the model of consensual relations described in the cases supporting *Montana*'s first exception. *See Strate*, 520 U.S. at 457 ("*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind") (citation omitted). In particular, in *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904), this Court upheld the authority of a tribe to impose a tax on non-member-owned livestock within the boundaries of a reservation. Similarly, in *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), the court upheld a tax imposed by a tribe on non-members for the privilege of doing business on a reservation with tribal members. As the Eighth Circuit here held, the exercise of tribal-court authority did nothing more or less than impose a "standard of fairness" on non-members "when they voluntarily deal with tribal members" on the reservation. Pet. App. A13.[27] If

[27] This case is thus nothing like *Strate*, with two non-Indians involved in an ordinary traffic accident, where the "Tribes were

tribes can tax non-members as a price of doing business with tribal members, it follows *a fortiori* that tribes can enforce basic standards of fair dealing.

b. "*Montana's* consensual relationship exception [also] requires that the . . . regulation imposed . . . have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The record here also supports that standard.

All of the claims against petitioner arose out of petitioner's commercial dealings with respondents and were directly tied to the loan agreement and the lease-with-option-to-purchase. Importantly, petitioner does *not* challenge tribal-court jurisdiction over respondents' breach-of-contract and bad-faith claims. But respondents' discrimination claim also arises out of the same commercial agreements that underlie those claims. *See supra* p. 8. For that reason, the exercise of tribal-court jurisdiction with respect to respondents' discrimination claim was anything but "in for a penny, in for a Pound." *Atkinson*, 532 U.S. at 656 (internal quotations omitted). Rather, there is a close and logical nexus between the discrimination claim — founded on petitioner's predatory lending practices — and the underlying commercial relations.

c. Independently, petitioner's litigation actions establish consent to tribal-court jurisdiction. Although this Court has said that *Montana*'s principles "pertain[] to subject-matter, rather than merely personal, jurisdiction," *Hicks*, 533 U.S. at 367 n.8, the Court

---

strangers to the accident." 520 U.S. at 457 (internal quotations and brackets omitted). Here, the consensual commercial relations of petitioner with an Indian-owned company and tribal members were longstanding, and those relationships underlie directly respondents' claims in Tribal Court.

also has established that tribal courts are courts of limited jurisdiction only to the extent that federal law limits their jurisdiction. *Montana* makes clear that federal law does not deprive tribal courts of their jurisdiction over a non-member when the non-member consents to tribal authority. *Compare People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880) ("[M]ere consent of parties cannot confer upon [an Article III] court of the United States the jurisdiction to hear and decide a case.").

Viewed in that light, petitioner waived or forfeited through its litigation conduct any objection to tribal-court jurisdiction. First, it was petitioner that "originally sought relief through the assistance of the CRST courts" in serving the Notice to Quit, thus availing itself of tribal process. Pet. App. A39; *see also* JA146 (submitting Notice to Quit to "Mr. Charging Cloud" of the "[CRST] Court"). Petitioner erroneously contends that it had no choice but to use tribal courts to effectuate service because "[o]ff-reservation process servers cannot effectuate valid service on the Reservation." Br. 8. In fact, petitioner could have served the Long Company's state-required agent for service of process (the Longs) in Indian Country as provided under state statutes that permit such service, or the Longs whenever they left the Reservation. *See Bradley*, 587 N.W.2d at 594-95; *supra* p. 13. By availing itself of the benefits of CRST process, petitioner consented to tribal-court jurisdiction. *Cf. Salish Kootenai College*, 434 F.3d at 1138, 1140 ("nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*"); Pet. App. A39 (finding it

"significant" that petitioner "sought relief through the assistance of the CRST courts").

Second, following service of the Notice to Quit, petitioner brought a state-court action against respondents. *See supra* pp. 17-18. Petitioner, however, never prosecuted that state-court litigation, choosing instead to defend itself and litigate its counterclaims in tribal court. Petitioner consented to the dismissal of its state-court action in 2004. *See supra* pp. 18-19. That course of events suggests that petitioner *elected* to pursue its remedies in tribal court. Having lost in tribal court when it chose to be there, petitioner should not now be allowed to complain that it should not have been there after all.

Third, petitioner consented to tribal-court jurisdiction in moving for summary judgment on its counterclaim. In its motion, petitioner averred that "[t]he Court has jurisdiction over [the Long Company] and Ronnie Long and Lila Long . . . , enrolled members of the [CRST] and *the Court has jurisdiction over the subject matter of this action*." JA187-88 (emphasis added). This was, as the district court found, a "significant concession . . . and [petitioner] should be held to it." Pet. App. A40.[28] *Cf. Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495, 495-96

---

[28] The factual determinations made by the district court and the court of appeals regarding consent, *see* Pet. App. A40 (finding petitioner's concession regarding jurisdiction was "significant"); *id.* at A5 (finding petitioner "conceded that the tribal court had jurisdiction"), should control here. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts.") (internal quotations omitted).

(1956) (per curiam) (upholding personal jurisdiction based on a stipulation entered by defendant).

2. Petitioner's Arguments Regarding *Montana*'s First Exception Are Unavailing

In response, petitioner first advances the remarkable suggestion that the *Montana* exceptions are inapposite because a tribe may not "extend[] its authority over non-Indian land." Br. 15. Thus, according to petitioner, this Court "need not determine whether either [*Montana*] exception applies, because the land at issue is non-Indian-owned fee land." Br. 21.[29] That statement is wrong factually and legally. As a factual matter, petitioner's liability to respondents arises directly out of petitioner's failure to pay to respondents loans promised for cattle-raising on tribal trust land. *See supra* p. 12. In addition, the fee land at issue in the lease-repurchase agreement belonged to a tribal member — Ronnie Long — at least when petitioner used the probate-court proceedings ostensibly to obtain title from the personal representative. *See supra* pp. 7-9.

Petitioner's argument is wrong as a legal matter as well. Even if the land at issue were not tribal trust land or Tribe-member-owned fee land, all of the land at issue here is within a reservation whose boundaries are intact. *See supra* note 24. The *Montana* framework was adopted to address precisely such situations. *See* 450 U.S. at 557-67.[30] Petitioner's

---

[29] Petitioner's brief is full of such overreaching misstatements. *See*, *e.g.*, Br. 20 ("Nonmembers' ownership of land on an Indian reservation operates to divest the tribe of any sovereignty over that land.").

[30] Petitioner also mistakenly claims (at 23) that *Bourland* supports the view that tribes lack any jurisdiction over non-Indian fee land within a reservation. *Bourland* decided whether

notion that *Montana* is inapplicable because, on petitioner's misstated view of the facts, non-Indian land was at issue finds no support in this Court's precedent.

To the extent petitioner advocates abandoning *Montana*, thus eliminating any inherent tribal authority over non-members on all lands within reservations, that position radically departs from decades of precedent. Starting with *Montana*, this Court has consistently rejected calls to extend the rule of *Oliphant* to civil jurisdiction. *See*, *e.g.*, *Hicks*, 533 U.S. at 391 (O'Connor, J., concurring in part and concurring in the judgment) (*Montana* "occup[ies] a middle ground between . . . cases that provide for nearly absolute tribal sovereignty over tribe members" and "rule that tribes have no inherent criminal jurisdiction over nonmembers"). In *National Farmers*, this Court held expressly that "the reasoning of *Oliphant does not apply*" to civil adjudicatory authority. 471 U.S. at 854 (emphasis added). "[W]hether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed." *Id.* at 855. Rather, such an

---

the federal government's taking certain land within the CRST Reservation for a federal flood-control project abrogated tribal treaty rights to regulate hunting and fishing of non-members on that land, holding that "Congress gave the Army Corps of Engineers, not the Tribe, regulatory control over the taken area." 508 U.S. at 691. The Court explained, however, that "[t]he *question remains* . . . whether the Tribe may invoke other potential sources of tribal jurisdiction *over non-Indians* on these lands" under *Montana*. *Id.* at 695 (emphases added). The Court thus expressly left "to be resolved on remand" whether the tribe had authority under the *Montana* exceptions. *See id.* at 695-96. Accordingly, petitioner could not be more wrong in suggesting (at 23) that "*Bourland* controls here."

inquiry requires an extensive legal and factual analysis. *See id.*[31]

Read together, *Montana* and *National Farmers* stand for the propositions that there is no categorical bar to the exercise of tribal *civil* authority over non-members and that tribes retain some inherent civil authority over non-members in connection with non-Indian fee land within a reservation. Nothing has changed since those decisions that would warrant this Court to depart from those rules.[32]

Second, petitioner's argument (at 31) that the Long Company is not a "tribal member" within the meaning of *Montana*'s first exception and thus that the exception is inapposite also is unfounded. First, the only cause of action petitioner now challenges concerns discrimination against only Ronnie and Lila Long, both of whom are tribal members. *See* JA191 (Special Interrogatory Form to Jury). The jury was not asked to find — and it did not find — discrimination against the Long Company. *See id.* Second, in any event, petitioner has known from the inception of its lengthy relationship with respondents that it was

---

[31] In *National Farmers*, the Court made specific findings about the difference between civil and criminal jurisdiction, *see* 471 U.S. at 854-55, findings that are controlling here.

[32] *See Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) ("[t]he Court has often recognized the 'fundamental importance' of *stare decisis*"; "the rule of law demands that adhering to our prior case law be the norm" such that "[d]eparture from precedent is exceptional, and requires 'special justification'") (opinion of Breyer, J.); *see also County of Allegheny v. ACLU,* 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

dealing with an Indian-owned corporation, a fact set forth in the company's Articles of Incorporation, *see* JA17, and crucial to every loan guarantee petitioner insisted the BIA provide, *see supra* pp. 5-6. Indeed, petitioner benefited substantially from and engaged in transactions with respondents only because of BIA guarantees. Beyond that, petitioner has had substantial consensual dealings with the Longs personally, including demanding personal guarantees and regular oversight of the Longs' daily operations of the family business. *See supra* p. 6; 1st Aff. ¶ 10; 2d Aff. at 4 (Ronnie, Lila, Kenneth, and Maxine "were all required by [petitioner] to grant security interests to [petitioner] in their personal vehicles, farm equipment, crops, feed, grain, and livestock").

Importantly, moreover, the South Dakota Supreme Court has *rejected* petitioner's view that incorporation under the laws of its state precludes classifying an entity as a tribal member. *See Pourier v. South Dakota Dep't of Revenue*, 658 N.W.2d 395, 404 (2003) ("corporation owned by . . . an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member"), *vacated in part on other grounds on partial reh'g*, 674 N.W.2d 314 (S.D. 2004). The South Dakota Supreme Court, in fact, relied on Congress's BIA program as illustrative of the principle "that the identity of those owning and operating a business is pertinent to classification of the entity" in the context of federal Indian law. *Id.* at 404-05.

Although petitioner boldly asserts that "there is no merit to the idea that . . . [petitioner] availed itself of the advantages of doing business with a member [of the Tribe]," Br. 33, that claim strains credulity.

Petitioner entered into numerous longstanding consensual relations (taking the form of commercial dealings, contracts, and leases) with an Indian-owned company and tribal members, engaged in repeated transactions with the BIA to take advantage of that status, and dealt repeatedly with the company on member-owned fee land and tribal trust land within a reservation. Indeed, including the land valued at approximately $468,000 that it took from respondents, petitioner profited in excess of $1 million through BIA payments of $392,968 (JA135-37 (Pls. Ex. 16)), $88,396 in federal CRP payments, $100,000 from Kenneth Long's life insurance, plus BIA interest-subsidy payments (JA81-83), federal crop-subsidy payments, and land sales to non-Indians in this case. In view of the "fundamental precept of Anglo-American jurisprudence that you cannot have your cake and eat it, too," *I.T. Consultants, Inc. v. Islamist Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003) (Roberts, J.), petitioner cannot profit from respondents' known Indian status and then claim surprise or unfairness regarding that status.

Third, petitioner contends the first *Montana* exception is inapplicable because tort law is not an "other means" of regulation. *See* Br. 35-39. This argument, which rests on the premise that regulatory authority can exceed adjudicatory authority, finds no support in this Court's precedent and cannot be squared with the purpose of the first *Montana* exception.

This Court's decisions establish that *adjudication* over non-Indians is part and parcel of a tribe's civil authority. In *Montana*, for example, in support of the consensual-relationships exception, this Court cited *Williams v. Lee*, which held that, as a corollary

of "the right of the Indians to govern themselves," "tribal courts" had adjudicatory jurisdiction over a non-Indian. 358 U.S. at 223. Furthermore, in both *National Farmers* and *Iowa Mutual*, this Court addressed challenges to a tribe's authority to adjudicate common-law claims over non-members and remanded for a law- and fact-intensive inquiry into whether that exercise of jurisdiction was proper. *See* 471 U.S. at 856-57; 480 U.S. at 19-20.[33]

In other contexts, the Court has rejected petitioner's assertion (at 38) that "regulation is effectuated through legislative enactment, not adjudication." This Court has recognized that common-law tort claims represent a form of regulation. *See*, *e.g.*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (tort claims "can be, indeed [are] designed to be, . . . potent method[s] of governing conduct and controlling policy"); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008). There is no principled reason that this rule — which reflects that regulatory control may be exercised by legislative *and* judicial means — applies everywhere but Indian Country.

Even if there were a logical way to disaggregate regulatory and adjudicatory authority in Indian Country, it would be unwarranted in the context of the first *Montana* exception: if a tribe can regulate non-members who enter consensual relationships with tribal members, a tribe also should be able to

---

[33] *See Brendale v. Confederated Tribes*, 492 U.S. 408, 430 (1989) (opinion of White, J.) (referring to tribal adjudication as a means of "regulat[ing]" non-members); *see also Salish Kootenai College*, 434 F.3d at 1140 ("[t]he Tribes' system of tort is an important means by which [they] regulate . . . domestic and commercial relations").

give meaning to those rules via adjudication. *Cf. Morris*, 194 U.S. at 393. This Court recognized as much in *Strate*, reading its precedent to "stand[] for nothing more than the *unremarkable proposition* that, where tribes possess authority to *regulate* the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the *tribal courts*." 520 U.S. at 453 (internal quotations and brackets omitted, emphases added). Indeed, the first exception embodies the principle that a non-Indian can *consent* (through word and deed) to tribal civil authority. *Cf. Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 2003) ("A tribe's civil jurisdiction over nonmembers . . . is broadest with respect to nonmembers who voluntarily involve themselves with tribal activities."). It would be anomalous to suppose that, while a non-member may consent to tribal civil *regulatory* authority, it cannot also consent to civil *adjudicatory* authority.

B. The Second *Montana* Exception Also Supports Tribal-Court Jurisdiction

Montana also confirmed a tribe's 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." 450 U.S. at 566. Petitioner's conduct in this case — predatory and discriminatory lending practices during a multi-year commercial relationship characterized by intrusive micro-management of their financial affairs and relating to business activities on tribal trust lands — is

precisely the sort of conduct that threatens to imperil tribal economic security.[34]

To be sure, the second *Montana* exception has been construed narrowly to reach only those cases where "the impact of the nonmember's conduct '[is] demonstrably serious'" and "'imperil[s] the political integrity, the economic security, or the health and welfare of the tribe.'" *Atkinson*, 532 U.S. at 659 (quoting *Brendale*, 492 U.S. at 431 (opinion of White, J.)). The second exception's narrowness, however, does not obviate its existence entirely. *Montana* makes clear, and this Court's subsequent cases reaffirm, that some behavior by non-members on non-Indian fee land might be so egregious, so extensive, or so extraordinary as to threaten the very integrity of the tribe's political system, the security of its economy, or the health and welfare of its members.

Thus, in *Montana*, the Court suggested that the tribe *would* have the power to regulate hunting and fishing on non-Indian fee land if there were credible evidence that the hunting and fishing on such land imperiled the subsistence or welfare of the tribe. *See* 450 U.S. at 566. And, in *Brendale*, with respect to the fee lands in closed areas, where the district court had found that the proposed use would "undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members," the Court

---

[34] Because this case fits squarely into the first *Montana* exception, neither the district court nor the court of appeals addressed application of the second exception. If this Court concludes the first exception is inapposite, it may wish to remand the matter for resolution of the issue by the lower courts in the first instance. *See*, *e.g.*, *Bourland*, 508 U.S. at 695-96. *But see Atkinson*, 532 U.S. at 657-59 (resolving application of second exception even though court of appeals did not reach issue).

upheld the power of the tribe to impose zoning restrictions under the second *Montana* exception. 492 U.S. at 443-44 (opinion of Stevens, J.).

Petitioner's conduct fits squarely within the narrow category of conduct that threatens to imperil the Tribe's economic security and its members' welfare. Petitioner engaged in a sustained campaign of aggressive, predatory, and ultimately discriminatory lending practices with tribal members and a member-owned corporation. *See supra* pp. 3-12. The tortious behavior was directly related to land held in trust by the Tribe to support the ranching economy that is crucial to its members' health and welfare and the continuing economic vitality of the Tribe. *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("[T]he Tribe's authority to tax non-Indians who conduct business on the reservation . . . is an inherent power necessary to tribal self-government and territorial management."). Indeed, the Tribe's support of this ranching economy is precisely the sort of comprehensive interest in an area of tribal culture and economy that formed the basis of tribal zoning jurisdiction over closed reservation lands in *Brendale*. *See* 492 U.S. at 438-42 (opinion of Stevens, J.).

The destruction of respondents' ranching business as a result of petitioner's tortious behavior directly implicated tribal interests. Most directly, this behavior imperiled the lease payments that the Longs owed to the Tribe for their use of the Tribal Grazing Unit. More generally, because petitioner has been deeply engaged in the economy of the Tribe by virtue of its extensive lending arrangements in connection with member ranching activity, its inclination to engage in aggressive and predatory behavior threatens the foundation of the Tribe's ranching economy and

the health and welfare of its members. Given the centrality of member ranching activity to the economic stability of the Tribe, catastrophic livestock losses such as those suffered by the Longs and fellow Tribe members in the winter of 1996-1997 had a profound impact on the well-being of the Tribe. *See* Robert Dvorchak, *South Dakota cattle perish in cold*, Pittsburgh Post-Gazette, Mar. 2, 1997, at A12.

In addition, petitioner's predatory lending practices adversely affected the comprehensive BIA guaranteed loan program as it operates on the CRST Reservation, the existence of which underlies the economic security of the Tribe and demonstrates Congress's view that fair and accessible mortgage lending is essential to tribal economies. Congress enacted the federal BIA-subsidized mortgage lending program "to provide Indian tribes and individuals capital in the form of loans and grants to promote economic and other development." H.R. Rep. No. 93-907, at 6 (1974). Congress recognized that private money markets are "practically closed to . . . Indian tribes and individuals [because they] have been categorized as poor credit risks in the private market for reasons often beyond their control." *Id.* at 7. That lack of access to the credit markets without the BIA program makes "private credit, if available at all, . . . only available at interest rates so high as to be prohibitive." *Id.* The program is meant to be mutually beneficial to Indians and lenders alike by encouraging "eligible borrowers to develop viable Indian businesses through conventional lender financing . . . that might otherwise be unavailable" (25 C.F.R. § 103.2) and thereby provide Indians with financing sources to sustain and grow economic development on reservations. Such actions promote the tribe's overall

economic security and welfare by reducing lenders' excessive risks on their loans. *See id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JAMES P. HURLEY
BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.
333 West Boulevard
Suite 400
P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040

MICHAEL F. STURLEY
LYNN E. BLAIS
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1350

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

RICHARD A. GUEST
MELODY L. MCCOY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

March 12, 2008