

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PLAINS COMMERCE BANK, :

4 Petitioner :

5 v. : No. 07-411

6 LONG FAMILY LAND AND :

7 CATTLE COMPANY, INC., :

8 ET AL. :

9 - - - - - x

10 Washington, D.C.

11 Monday, April 14, 2008

12

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

16 APPEARANCES:

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

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

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAULA A. BANKER, ESQ.	
4	On behalf of the Petitioner	3
5	DAVID C. FREDERICK, ESQ.	
6	On behalf of the Respondents	17
7	CURTIS E. GANNON, ESQ.	
8	On behalf of the United States, as amicus	
9	Curiae, supporting the Respondents	36
10	REBUTTAL ARGUMENT OF	
11	PAULA A. BANKER, ESQ.	
12	On behalf of the Petitioner	47
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:07 a.m.)

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

7 ORAL ARGUMENT OF PAUL A. BANKER

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. BANKER: I think that has been well
21 established: That the regulatory -- there is certainly
22 another side to the story about the merits of the
23 discrimination.

24 JUSTICE GINSBURG: But it's not -- it's not
25 uncommon that a State would adopt a Federal standard as

1 its -- as its own on a question of civil rights. A
2 State might stay, well, we choose to construe our human
3 rights law in accord with the Federal -- Federal law?

4 MR. BANKER: No. That's, that's not
5 uncommon. But I think it's important to focus on the
6 background about, out of which this discrimination claim
7 arose. And, you, know it began in the first instance
8 with the bank, a nonmember, entering into a contract
9 with a South Dakota corporation. And the South Dakota
10 corporation, the Long Family Land and Cattle Company, is
11 not a tribal member, cannot be --

12 JUSTICE GINSBURG: But it is an organization
13 of Indians?

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

17 JUSTICE SCALIA: Can a State distinguish
18 when it grants a corporation status between non- Indian
19 and Indian corporations.

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

21 JUSTICE KENNEDY: Can you incorporate under
22 tribal law.

23 MR. BANKER: You cannot incorporate under
24 tribal law.

25 JUSTICE SCALIA: Wasn't part of the

1 transaction the obtaining of back-up liability on the
2 part of the individual Indians who, who owned the
3 corporation? Didn't they guarantee the loan?

4 MR. BANKER: You have to be specific about
5 the loan guarantees and the contracts that we are
6 talking about. Before 1996, before the loan contracts
7 that are at issue here, there were lending relationships
8 and loan guarantees that were made. And after 1996,
9 when additional loans were made, there were personal
10 guarantees that were made. There was no attempt ever to
11 enforce those personal guarantees, but they were part of
12 the record.

13 JUSTICE SCALIA: No, but it does give the
14 whole thing a decided flavor of dealing with, with
15 Indians on the reservation. You're dealing with a
16 corporation that, that's majority owned or entirely
17 owned. Is it majority or entirely?

18 MR. BANKER: I believe it is certainly 51
19 percent.

20 JUSTICE SCALIA: Yes.

21 MR. BANKER: There is a question about
22 whether it's more.

23 JUSTICE SCALIA: And then you get guarantees
24 from, on reservation Indians. It smells like dealing
25 with Indians on the reservation to me. Of course, this

1 certainty that you're -- that you're asking, your client
2 could have obtained that certainly by inserting a choice
3 of law provision providing that any disputes would be
4 resolved somewhere else, couldn't it?

5 MR. BANKER: There is no question that this
6 whole question would have been avoided had there been a
7 choice of forum selection that placed the dispute
8 resolution squarely in South Dakota courts. In the
9 absence of that, in the silence of that --

10 JUSTICE SCALIA: In the absence of that, why
11 should we bend over backwards to give something that has
12 the smell of dealing with the Indians any other name?
13 Your clients can fully protect themselves by a choice of
14 forum provision.

15 MR. BANKER: I think that in the face of
16 silence in the contract, the general rule controls
17 rather than its exceptions.

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

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

24 CHIEF JUSTICE ROBERTS: Right. Well, just
25 like this and there was a choice of forum provision,

1 says, well, you've got to bring this in State court. I
2 thought there were restrictions on whether or not tribal
3 law can be enforced in State courts.

4 MR. BANKER: Well, I think it's the question
5 of who the plaintiff is if the Long Family Land and
6 Cattle Company, the South Dakota corporation, had had a
7 contract with the bank that said your forum for dispute
8 resolution is South Dakota courts, and the Long Family
9 Land and Cattle Company had commenced an action in South
10 Dakota courts, I think the dispute could have been
11 resolved there.

12 CHIEF JUSTICE ROBERTS: Even if it -- well,
13 that's if it's a contract claim. What if it's a
14 discrimination or Indian common law claim arising out of
15 the contractual relationship?

16 MR. BANKER: That's a more difficult
17 question. You know, there was -- it isn't part of the
18 question presented, but there was a dispute in the
19 underlying tribal court about the nature of the
20 discrimination claim, whether it rose under Federal law
21 or what was its underlying basis. That was resolved in
22 favor of it being a tribal law claim.

23 As I understand the tribal court of appeals'
24 explanation of that on an underlying basis that there is
25 little difference between the tribal law claim and the

1 underlying Federal discrimination law.

2 JUSTICE SCALIA: Is it a contract claim?

3 MR. BANKER: Is it a --

4 JUSTICE SCALIA: Is it a contract claim?

5 Was -- was -- was the claim a claim for discrimination
6 in contracting so that it was part of the contract
7 claim.

8 MR. BANKER: No. I believe that the
9 discrimination --

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

12 MR. BANKER: It is a freestanding tort
13 action.

14 JUSTICE STEVENS: Would the -- would the
15 jurisdiction issue be any different if it were a
16 contract claim? Supposing your client -- they had
17 brought suit against your client claiming a breach of
18 contract, would there have been tribal court
19 jurisdiction?

20 MR. BANKER: Well, we have to look at, you
21 know, who were the contracting parties. The contracting
22 parties were the bank on the one hand and the Long
23 Family Land and Cattle Company on the other. So the
24 individual tribal members I don't believe would have had
25 a breach of contract.

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

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

7 JUSTICE GINSBURG: Did they --

8 JUSTICE STEVENS: The question isn't whether
9 that was an appropriate plaintiff. Do you think the
10 tribal court would have had jurisdiction of such a
11 contract claim?

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

14 JUSTICE GINSBURG: I thought that the
15 bank -- I thought that the Long Company was a plaintiff
16 in the tribal court?

17 MR. BANKER: The Long Company was a
18 plaintiff in the tribal court.

19 JUSTICE GINSBURG: And as I understand it,
20 the Long Company asserted, along with the individuals,
21 contract claims?

22 MR. BANKER: That's correct.

23 JUSTICE GINSBURG: But the Long Company did
24 not make a tort claim?

25 MR. BANKER: That's correct.

1 JUSTICE GINSBURG: So why isn't this
2 judgment, even if you're right about the individuals in
3 the tort claim, why isn't this judgment good at least as
4 to the contract claim, which are not challenging and
5 which runs to the benefit of the Long Company which has
6 nothing to do with the tort claim that you are
7 challenging?

8 MR. BANKER: Because of the way that the
9 case was tried. If you look at the general verdict form
10 at page 192 -- 191 and 192 in the joint appendix, you'll
11 see that the jury -- the tribal court jury was asked
12 interrogatories about liability: Liability for
13 contract, liability for discrimination.

14 When they got to question 6 on page 192, the
15 question was asked of the jury if you answered "yes" to
16 question four for the other liability questions, four
17 being the discrimination claim, then award damages. And
18 so the jury awarded \$750,000 of undifferentiated
19 damages. Whether it was for contract, whether it was
20 for tort is not for us to now second-guess. There was a
21 general award of damages. And the jury was instructed
22 that they could award damages for breach -- for
23 discrimination.

24 So, you know, that is a feature of how the
25 case was tried. It is a feature of the way that the

1 jury returned its verdict. And at this point it's
2 impossible to know -- the \$750,000 that was ultimately
3 awarded was far less than what the Longs were asking for
4 for breach of contract, and they didn't say they were
5 not asking for damages for discrimination in the
6 tribal -- in the tribal court.

7 So for this Court to say now that there was
8 no jurisdiction over the discrimination claim would
9 basically invalidate that underlying judgment.

10 JUSTICE SOUTER: Mr. Banker, you several
11 times have raised a point which seems to me to go to the
12 nature of the first exception in Montana on an issue we
13 haven't discussed yet, and I want to get clear on it.
14 You have emphasized consistently through your argument
15 the need for consent whether we call it actual,
16 explicit, some kind of consent to at least the
17 regulatory jurisdiction upon which a judicial
18 jurisdiction is premised. And my understanding is that
19 that's not what -- I don't have Montana in front of me,
20 but my understanding is that that is not what Montana,
21 in effect said with respect to the -- to the first
22 exception. As I recall what the court said in Montana
23 it was that there may be situations in which a nonmember
24 enters into a consensual relationship with the tribe or
25 tribal members, and as a result of that consensual

1 relationship, it then would be appropriate to recognize
2 jurisdiction, for example, to tax regulatory
3 jurisdiction.

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

15 MR. BANKER: Well, what Montana said, the
16 actual language of Montana said a tribe may regulate
17 through taxation, licensing or other means the
18 activities of nonmembers who enter consensual
19 relationships with the tribe or its members, through
20 commercial dealings, contracts, leases or other
21 arrangements.

22 JUSTICE GINSBURG: So the consensual
23 relationship is what you just said, contracts, leases or
24 other commercial. So the consent is to the commercial
25 relationship.

1 MR. BANKER: Well, I mean, my interpretation
2 of that is -- I mean, Montana in its first exception
3 meant that the consent was in the consensual
4 relationship, then any business dealings with the tribe
5 or its members would result in tribal ability to
6 regulate, and that hasn't been the case, as this Court
7 has, you know, decided --

8 JUSTICE SOUTER: But the point of my
9 question was do you agree that there -- within the --
10 the description of the exception in Montana, that there
11 need not be a consent, either to the regulation or to an
12 adjudicatory jurisdiction to enforce the regulation?

13 MR. BANKER: Not in the actual language of
14 Montana, but in reading Strate and in reading Hicks and
15 in reading Atkinson Trading Company, that is my
16 interpretation of the --

17 JUSTICE SOUTER: So you're saying the
18 Montana exception has been modified by later cases.

19 MR. BANKER: That is correct.

20 JUSTICE SOUTER: Okay.

21 JUSTICE GINSBURG: Certainly not in Strate,
22 which you quoted before as saying if you have
23 jurisdiction to regulate, then have you jurisdiction to
24 enforce the regulation.

25 MR. BANKER: True, but I think Strate is an

1 important part of that history.

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

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

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

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

18 JUSTICE SOUTER: So the first -- but as I
19 understand it the first exception would have no
20 independent application unless the second exception were
21 met -- were satisfied, i.e., there was a tribal need
22 based on self-government, economic self-protection and
23 so on which, which would in effect validate the tribe's
24 attempt to regulate, which seems in effect to say that
25 everything turns on the second exception, not the first.

1 MR. BANKER: Well, I think the first
2 exception could still have meaning, in the sense that it
3 grants the tribe the ability to regulate. The question
4 really is how far does that ability go and how far does
5 it stretch. I don't think that it stretches to
6 adjudication, and I further don't think it stretches to
7 adjudication of nonconsensual tort claims.

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

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

11 Mr. Frederick.

12 ORAL ARGUMENT OF DAVID C. FREDERICK

13 ON BEHALF OF THE RESPONDENTS

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

16 I'd like to address both standing and the
17 merits, but because there are some additional wrinkles
18 on the standing question in light of how it was briefed
19 in the reply brief, I'd like to make three brief points
20 on the merits before addressing standing.

21 First, the bank engaged in a seven-year
22 business relationship with the Longs, knowing that they
23 were Indians and deriving substantial commercial
24 benefits from the Longs' tribal status through the BIA
25 loan guarantees. Second, the bank has not challenged

1 tribal court jurisdiction over the breach of contract
2 claim or the bad faith claim, which are the core claims
3 in the case.

4 JUSTICE GINSBURG: Well, they said they
5 don't need to because they said if they win on their
6 claim, then their whole case --

7 MR. FREDERICK: And I'll address that,
8 Justice Ginsburg, on the general verdict point, which is
9 there is actually some law of this which I would like to
10 describe for the Court my understanding of. My third
11 point, though, is that both the district court and the
12 Eighth Circuit below found significant that the bank had
13 conceded tribal court jurisdiction in its motion for
14 summary judgment on its counterclaim, and they found
15 that concession to be important to note, and both courts
16 below found the Indian character of the Long family
17 company to be notable as well. Under this Court's two
18 court rule, those fact findings are entitled to
19 significant respect.

20 Now, as to the standing question Justice
21 Ginsburg, let me get to your point on the general
22 verdict. This is ultimately a question of tribal
23 procedural law, how the tribal court would treat
24 vacature of a claim deemed to be an invalid claim.

25 CHIEF JUSTICE ROBERTS: Where do I look that

1 up in tribal law?

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

14 CHIEF JUSTICE ROBERTS: I'm sorry; I don't
15 understand. I'm looking at joint appendix 191 to 192.
16 You have special interrogatories, including number 6 but
17 also number 4 and then they have damages. And it's not
18 clear whether those damages are based on the finding of
19 liability under 4 or 6.

20 MR. FREDERICK: That's my point, Mr. Chief
21 Justice. In the trial transcript which is contained at
22 roughly pages 555 through 562 of the tribal court
23 record, there was colloquy on how these special
24 interrogatories were to be framed. The bank objected to
25 number 4, the discrimination count on the ground that a

1 company cannot be discriminated against, only
2 individuals can be discriminated against. That
3 objection was sustained, and so special interrogatory 4
4 was written as you see it in the joint appendix. The
5 bank did not object to the general verdict question on
6 damages, so the law on Rule 49(a)(3) would be that
7 special verdict is deemed to be waived, and now there is
8 some --

9 JUSTICE GINSBURG: There is no objection --

10 JUSTICE SCALIA: Wait. They are, they are
11 not objecting to a -- to a general verdict. They are
12 objecting to the fact that in their view, one of the
13 elements of that -- of that general verdict is based
14 upon what they assert is an invalid claim in the -- in
15 the Indian court.

16 MR. FREDERICK: Precisely so, Justice
17 Scalia.

18 JUSTICE SCALIA: I don't know that they
19 waive that when they when -- when they allow a general
20 verdict to go.

21 MR. FREDERICK: The way cases say general
22 verdicts should be deemed, if there is an invalid claim,
23 there are competing views about what to do with that
24 when the damages awarded is treated as a general
25 verdict. There is a circuit split on the question of

1 what you do when there has not been a specific objection
2 preserved and there is a general verdict and one invalid
3 claim and evidence that supports a valid claim.

4 Now recall, they don't challenge the breach
5 of contract claim. Our brief points out how the
6 evidence supports damages for breach of contract. Now
7 Judge Kozinski in the Ninth Circuit in a case called
8 McCord v. Maguire 83 F 2d 1271 says that this waiver
9 rule means that their ability to challenge the general
10 verdict would be waived and they would be forced to live
11 with the verdict if evidence supports it. Under that
12 rule --

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

15 MR. FREDERICK: That's correct. That's
16 correct. The First Circuit in a case called Gillespie
17 versus Sears Roebuck, 386 F3d 21 takes the position that
18 if you have not filed your objection you have not waived
19 it.

20 CHIEF JUSTICE ROBERTS: Who wrote that? You
21 gave us the benefit of the author of the Ninth Circuit,
22 but not the First.

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

25 JUSTICE GINSBURG: You're not asking us to

1 resolve that circuit split in this case.

2 MR. FREDERICK: No. What I'm saying is that
3 the tribal court, which would be looking to Federal law
4 to resolve the effect of a supposed tainted claim -- if
5 you were to conclude that a discrimination complaint is
6 a tainted claim -- would have to evaluate what effect
7 that has on the final judgment. And because there is a
8 circuit conflict on that question, unfortunately, I
9 cannot give you a definitive answer as to how the tribal
10 court would resolve that.

11 My point, though, is that if this Court
12 concludes that there is a redressibility problem in this
13 case, which we would submit, respectfully, there is, the
14 appropriate course would be to vacate and remand for the
15 lower courts to certify the question to the tribal court
16 of appeals or to make some further inquiry into the law
17 to determine how --

18 JUSTICE SCALIA: The tribal court of appeals
19 would have to be finding Federal law. It wouldn't be
20 Indian law; it would be Federal law.

21 MR. FREDERICK: It is --

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

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

11 CHIEF JUSTICE ROBERTS: And, presumably,
12 tribal -- whatever tribal precedent there may be, as
13 well.

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

16 CHIEF JUSTICE ROBERTS: Well, neither could
17 -- and neither could anybody, right? I mean if anybody
18 could find it, you could. It's because it's not
19 published anywhere, right?

20 MR. FREDERICK: Well, there are published
21 decisions. This Court -- this is a question of first
22 impression.

23 JUSTICE SCALIA: Certainly, your reliance
24 upon the Federal rules doesn't impress me as much as it
25 did when you first told me about it, because apparently

1 the Federal rules mean whatever the tribal courts say
2 they mean; is that right?

3 MR. FREDERICK: No. I think, Justice
4 Scalia, the Court would look at the various sources of
5 law --

6 JUSTICE SCALIA: And come to its own
7 decision as to what they mean.

8 MR. FREDERICK: Yes.

9 CHIEF JUSTICE ROBERTS: One of the points
10 you mentioned earlier is that this is an Indian
11 corporation, and that's a concept I don't understand.
12 If Justices Scalia and Alito form a corporation, is that
13 an Italian corporation?

14 (Laughter.)

15 MR. FREDERICK: I would like to beg the
16 indulgence of the Court in not answering that question
17 specifically.

18 (Laughter.)

19 MR. FREDERICK: My point --

20 JUSTICE SCALIA: And do we get special loan
21 guarantees?

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: I understand the
24 concept of a minority-owned or an Indian-owned
25 corporation, but the point here is you are trying to say

1 that the corporation is a member of the tribe. And I
2 just don't know. And I certainly don't think the State,
3 when it incorporated this entity, said: You're a
4 different type of corporation than every other; you're
5 an Indian corporation.

6 MR. FREDERICK: Well, to the contrary,
7 Mr. Chief Justice. There is a State supreme court case
8 on point called Pourier, which we cited in our brief,
9 which says that a majority-owned corporation under South
10 Dakota State law shall be treated as a member of that
11 tribe for the tax purposes that were at issue in that
12 case. So --

13 CHIEF JUSTICE ROBERTS: How would a normal
14 -- I guess a non-Indian or non-Italian or non-Irish --
15 corporation dealing with the Long Family Land and Cattle
16 Company know that it was an Indian corporation --

17 MR. FREDERICK: Well, I --

18 CHIEF JUSTICE ROBERTS: -- putting apart the
19 particulars in this case?

20 MR. FREDERICK: Mr. Chief Justice, let me
21 step back and say I'm not here to advocate that there
22 can be different racial characteristics of corporations.
23 What is anomalous about this case and the way the BIA
24 has set up this program is that the BIA establishes
25 principles of Indian identity so that it can determine

1 whether it satisfies congressional mandates for Indian
2 financing.

3 CHIEF JUSTICE ROBERTS: Well, I know the BIA
4 says that. But if you're a bank and somebody comes in
5 and says: I'm a corporation; I would like a loan, is
6 the bank supposed to start asking questions about
7 whether there are Indian shareholders, and how many, and
8 all of that?

9 MR. FREDERICK: Banks typically do require
10 lots of documentation, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: So they should have
12 a check box on their loan application that says: Are
13 you an Indian?

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

17 CHIEF JUSTICE ROBERTS: I'm asking you
18 about: In a general case, let's say they don't require
19 BIA loan guarantees. They require, just as in this
20 case, collateral.

21 MR. FREDERICK: They did not. They required
22 more, and that's the important point. The facts
23 actually matter.

24 CHIEF JUSTICE ROBERTS: Well, I am sure the
25 facts here matter. I have a hypothetical question. A

1 bank dealing with an Indian-owned corporation, how are
2 they supposed to find out, or may they find out, whether
3 it's an Indian-owned corporation, particularly when
4 under your approach, when they do form that contract,
5 they are subjecting themselves to tribal-court
6 jurisdiction?

7 MR. FREDERICK: I would acknowledge that
8 when there are no BIA loan guarantees required, a bank
9 may or may not know of the identity of the owners of the
10 corporation.

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

14 MR. FREDERICK: Without further facts, no.
15 Here, though, the bank required the BIA loan. It went
16 on to the reservation to scrutinize the collateral. It
17 required personal guarantees from the tribal members.
18 It got collateral in guarantees on the personal effects
19 and chattels.

20 It knew that the corporation was doing all
21 of its business on tribal trust lands. It went into the
22 tribal headquarters to determine that the tribe was
23 comfortable with the various loan arrangements. It
24 enlisted the assistance of tribal financial officers to
25 ensure that the cash flow would be a sufficient --

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

12 MR. FREDERICK: I think, in general,
13 Mr. Chief Justice, I would agree with that hypothetical.
14 But here, if you took away the BIA loan piece, I think
15 the facts very strongly point to the bank knowing it was
16 engaging in a consensual relationship with Indians
17 because it went on tribal trust lands. It involves the
18 officers of the tribe for effectuating the loan.

19 JUSTICE ALITO: Well, there are many facts
20 here that are favorable to your position, but I would
21 appreciate it if you could articulate the rule of law
22 that you would like us to adopt in this case, the
23 general principle that you would like -- the general
24 rule that you would like us to adopt.

25 MR. FREDERICK: Justice Alito I don't think

1 I can improve on the language that's in Montana in its
2 first exception, itself, which is that there are
3 consensual relations that are licensing of commercial --

4 JUSTICE ALITO: Can that be the case: Any
5 consensual relationship between a member of the tribe
6 and a nonmember is subject to the jurisdiction of the
7 tribal courts?

8 MR. FREDERICK: No. I think that the Strate
9 case imposed a nexus requirement. I think the liability
10 has to arise out of that consensual relationship, which
11 it clearly does here.

12 JUSTICE ALITO: So an Indian goes to a bank
13 off the reservation and asks for a loan and gets the
14 loan. That contract is subject to the jurisdiction of
15 the tribal courts?

16 MR. FREDERICK: No. I don't think
17 necessarily any loan. I think I answered Mr. Chief
18 Justice's question to the effect that any kind of
19 general loan of that nature would not necessarily give
20 rise to --

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

24 MR. FREDERICK: Yes.

25 JUSTICE ALITO: All right. So the Indian

1 goes to the bank and says: I'm an Indian. Give me a
2 loan. The bank gives him a loan. That's subject to the
3 jurisdiction of the tribal courts?

4 MR. FREDERICK: No. I think, Justice Alito,
5 that there are very fine gradations in the facts. And
6 we are not asking for an articulation of a general rule
7 of the kind of sweeping effect that the Petitioners are
8 asking for.

9 We are asking for a straightforward
10 application of Montana 1 on facts here that developed
11 over a substantial number of years.

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

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

21 JUSTICE ALITO: Well, why not? What's
22 missing there?

23 MR. FREDERICK: I think what's missing is
24 the longevity of a relationship, the degree to which the
25 cause of action arose out of the answering of that ad.

1 I mean one of the features of --

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

6 MR. FREDERICK: Well, I think that the
7 necessary concomitant of having tribes with their
8 elements of sovereignty residing within States and
9 within the United States is to have somewhat less
10 bright-line features to some of these jurisdictional
11 principles. Our submission here is that the facts --

12 CHIEF JUSTICE ROBERTS: You said earlier --
13 I am sorry. You said earlier that this was a
14 straightforward application of Montana?

15 MR. FREDERICK: Given the facts that are
16 present in this case.

17 CHIEF JUSTICE ROBERTS: Yes, given the
18 facts. But isn't it true that this would be the first
19 case in which we have asserted or allowed Indian tribal
20 jurisdiction to be asserted over a nonmember?

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

25 JUSTICE KENNEDY: Do you think it's inherent

1 in Montana exception number 1, that an Indian tribal
2 court in the course of adjudicating commercial dealings
3 has the capacity to elaborate common law?

4 MR. FREDERICK: Yes. And -- and I don't
5 think --

6 JUSTICE GINSBURG: To elaborate tribal
7 common law.

8 MR. FREDERICK: That's how I understood your
9 --

10 JUSTICE KENNEDY: Tribal common law?

11 MR. FREDERICK: Yes, that's how I understood
12 Justice Kennedy's question. You know, and it is the
13 same --

14 JUSTICE KENNEDY: And you think that's
15 necessary for regulating consensual relationships?

16 MR. FREDERICK: I think that, yes, it can
17 be. I mean the -- I thought I heard the Petitioner
18 acknowledge today that if the discrimination rule had
19 been written down, that that would be perfectly fine to
20 put everybody on notice. These principles of
21 discrimination here are --

22 JUSTICE SCALIA: He backed off on that. I
23 pressed the point and --

24 (Laughter.)

25 MR. FREDERICK: Well, my -- my mission here

1 is that the bank did not avail itself of any of the
2 procedures in Rule 12 to clarify the source of the law,
3 to move to dismiss the discrimination claim, to move for
4 summary judgment on the discrimination claim.

5 CHIEF JUSTICE ROBERTS: What about -- what
6 about their point that, under our system, governing is
7 based on the consent of the governed, and in this case
8 the bank has no role to play in the nature or
9 establishment of the court to which they are being
10 subjected?

11 MR. FREDERICK: Well, in this particular
12 case, Your Honor, this bank has availed itself
13 purposefully of tribal courts on at least 14 occasions.
14 This would be the 15th case. These are set out in the
15 tribe's brief, the amicus brief, footnotes 27, 28, and
16 29.

17 JUSTICE KENNEDY: Well, and I suppose --

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

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

23 MR. FREDERICK: My point is --

24 JUSTICE KENNEDY: In other words, if you go
25 -- if you make a mistake 14 times, you're bound to 15?

1 That's kind of an estoppel.

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

13 JUSTICE GINSBURG: Mr. Frederick, before you
14 finish, I would like for to you give your best answer to
15 a lurking, underlying concern, and that is the the Chief
16 Justice brought up the outsider subjected to courts
17 where the outsider has no vote. That happens when you
18 sued in a State that's not your own, but there is the
19 right to remove and also at the end of the line is this
20 Court. And I think in the case of the tribal courts,
21 neither of those exist. There's no -- you can't remove
22 to a State or Federal court, and this Court has no
23 review authority over a tribal court's judgment.

24 MR. FREDERICK: I have two suggested
25 responses to that, Justice Ginsburg. One is that, when

1 a tribal court judgment needs to be enforced, it can be
2 brought in State court, and South Dakota follows the
3 comity rule, which means that it has to satisfy certain
4 requirements of fairness, adherence to basic principles,
5 and the law before a State -- the State court will
6 enforce the tribal court judgment. Under national --

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

9 MR. FREDERICK: That's correct. It's not
10 full faith and credit; it's comity. And that comity
11 provides for a substantive review while enforcing the
12 judgment.

13 CHIEF JUSTICE ROBERTS: Well, what if the
14 tribal law has certain cultural principles such as
15 fairness and equity of a sort that aren't recognized
16 under Federal or State law in this type of contractual
17 relationship? Does that preclude the State court from
18 giving comity or not?

19 MR. FREDERICK: The way the South Dakota
20 statute is worded, Mr. Chief Justice, unfortunately, I
21 can't give you a direct answer to that because it
22 involves a panoply of issues whether State law deems the
23 final judgment ultimately to be a fair one and -- and,
24 importantly, when this Court recognized the
25 jurisdictional point as giving rise to Federal

1 jurisdiction in National Farmers, I would submit it also
2 perhaps created the avenue for the enforcement of
3 judgments to be brought in Federal court as well. I
4 don't understand why a jurisdictional challenge and a
5 challenge to the enforcement of a judgment could not
6 give rise to the same Federal question jurisdiction
7 recognized in National Farmers.

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

12 If the Court has no further questions.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Frederick.

15 Mr. Gannon.

16 ORAL ARGUMENT OF CURTIS E. GANNON

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE,

19 SUPPORTING THE RESPONDENTS

20 MR. GANNON: Mr. Chief Justice, and may it
21 please the court:

22 This court's Montana framework confirms that
23 Indian tribes can, in some circumstances, exercise
24 legitimate authority over nonmembers and nonmember land
25 on their reservations. Unlike what has happened in the

1 criminal context, the political branches have not acted
2 to divest tribes generally of civil jurisdiction over
3 nonmembers. Both before and after Montana was decided,
4 Congress and this Court have repeatedly articulated the
5 firm Federal policy of encouraging tribal
6 self-government and have recognized that tribal justice
7 systems are an essential part of tribal governments.

8 JUSTICE SCALIA: Well, that may be; it
9 depends on what you mean by "tribal." I mean, it
10 certainly would be rational to say that all disputes
11 between members of the tribe can be resolved
12 authoritatively by the tribal court, but it's quite a
13 different thing to say that a dispute between a
14 nonmember of the tribe and a member of the tribe can go
15 to the tribal court. It's sort of the analogue to being
16 home fried in a foreign State. It's -- is pretty close.

17 MR. GANNON: Well, Justice Scalia, that's of
18 course true, that there is a difference, but the Montana
19 framework recognizes that the political branches have
20 not completely divested tribes of their jurisdiction
21 over nonmembers in circumstances like this. And --

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

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

4 JUSTICE SCALIA: Defendant, yes.

5 MR. GANNON: But I think it is -- it is the
6 case that it clearly recognized a consensual
7 relationship that is established before the lawsuit
8 begins is what provides for regulatory jurisdiction in
9 some of the cases and adjudicatory jurisdiction, as is
10 now clear from Strate and the Court's subsequent
11 decisions.

12 JUSTICE KENNEDY: In your view, does
13 jurisdiction follow all regulatory authority? If it's
14 within regulatory authority, then is it your position
15 that there is necessarily jurisdiction to enforce in a
16 tribal court --

17 MR. GANNON: Well --

18 JUSTICE KENNEDY: -- in civil cases?

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

22 JUSTICE KENNEDY: In your position, is
23 regulatory jurisdiction concomitant with civil judicial
24 jurisdiction in the tribal court?

25 MR. GANNON: Generally, yes.

1 CHIEF JUSTICE ROBERTS: What happens if the
2 bank deals with a corporation that is not an Indian
3 corporation, and then that -- the shareholders of that
4 corporation sell their shares to Indians?

5 MR. GANNON: Well --

6 CHIEF JUSTICE ROBERTS: Does the bank now
7 have a consensual relationship with an Indian
8 corporation?

9 MR. GANNON: Well, I think, Mr. Chief
10 Justice, to expand upon the discussion that you were
11 having with Mr. Frederick, that the consensual
12 relationship that's necessary to establish jurisdiction
13 in the sense of Montana's first exception requires not
14 only that there be a consensual relationship with a
15 member, and which we do think that implicit in that is
16 some knowledge at least objective knowledge that you
17 knew you were dealing with a tribal member. And so if
18 the conceptual relationship were established and with
19 somebody who was not a nonmember who subsequently ended
20 up through sales of shares to become a member, we don't
21 think that that ex post facto development would effect
22 the establishment of the original relationship.

23 JUSTICE SCALIA: You would add on the
24 reservation? I mean --

25 MR. GANNON: Yes, absolutely, Justice

1 Scalia. That is something --

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

5 MR. GANNON: Absolutely, Justice Scalia, and
6 that follows directly from the terms in Montana itself
7 because Montana says that the exceptions are are about
8 instances of, quote, "civil jurisdiction over
9 non-Indians on the reservation." And that's an
10 important factor.

11 CHIEF JUSTICE ROBERTS: Well, but the only
12 reason -- the only reason the bank is on the reservation
13 is because the land was collateral, right?

14 MR. GANNON: The only reason --

15 CHIEF JUSTICE ROBERTS: They didn't want to
16 buy land on a reservation; they wanted to make a loan
17 and get the interest or whatever, and it just turned out
18 that the Indians defaulted, and therefore they were left
19 with a land on a reservation. Is that consensual?

20 MR. GANNON: Well, everything about this
21 transaction is related to the reservation. To be sure,
22 part of it dealt with the land on the reservation, but
23 the rest of the ranch's operations, including places
24 where the bank possessed collateral and security
25 interest in personal property, were on tribal grazing

1 land.

2 CHIEF JUSTICE ROBERTS: So if it's a
3 different -- the Indian -- the corporation is owned by
4 members on the reservation, the collateral they put up
5 is off the reservation, is there consensual dealings
6 with the corporation then?

7 MR. GANNON: Well, the thing that's key
8 here, I believe, is that the subject of the contract was
9 intimately connected with the reservation itself, and
10 that's why it comes within Montana's discussion of civil
11 jurisdiction.

12 CHIEF JUSTICE ROBERTS: Yes, but the subject
13 of the contract is loan to a corporation owned by
14 Indians on the reservation. The collateral put up is
15 other land that the corporation owns or the individuals
16 own off the reservation. Jurisdiction or not.

17 MR. GANNON: Without any further facts, no,
18 I don't think that would be enough to establish
19 jurisdiction. What's important here is that the subject
20 of the contract was actually on the reservation, and
21 that's why it comes in --

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

24 MR. GANNON: Well, the loan here was for
25 specific purposes. It was for -- I mean, there were a

1 lot of specific terms in which the bank dictated lots of
2 practices on the ranch, and it knew everything about the
3 way the operation was being conducted or required
4 express approval for individual purchases and things
5 like that. And so, this is not an instance where a
6 member is engaging in business off the reservation.

7 And indeed in Blaze Construction the court
8 addressed a case in which there was a member-owned
9 corporation that was doing business on a different
10 reservation, and the parties conceded there that that
11 would not be considered to be a member for purposes of
12 Montana -- that was actually a taxation case, but it
13 would not be considered a member for purposes of these
14 exceptions.

15 JUSTICE SCALIA: Am I correct that the
16 collateral here, the land, the land that was collateral
17 was within the reservation but it was not Indian land.

18 MR. GANNON: Well, that's generally correct,
19 Justice Scalia. There is a little bit of a dispute in
20 the probate proceedings about exactly the status of the
21 land. But, yes, this transaction did involve transfer
22 of the deed to the bank, and therefore, at that point it
23 would have been -- to the extent that that transfer was
24 effective, it would have been a nonmember only on the
25 reservation.

1 JUSTICE SCALIA: And you think that that's
2 enough. It doesn't have to -- when you say "on the
3 reservation," you include as on the reservation land
4 that is no longer owned by Indians but -- but is within
5 the reservation boundaries.

6 MR. GANNON: The thing that triggers the
7 regulation here or the jurisdictional authority of the
8 tribe is the consensual relationship with the tribal
9 member. And so it's -- it's -- it's not -- this
10 isn't -- this isn't like a tort that occurred on a
11 particular piece of land while we are asking --

12 JUSTICE SCALIA: No, no, wait. You say that
13 consensual relationship is not enough. If you enter
14 into relationship with Indian in South Dakota on, you
15 know -- in the State capital, that isn't enough. It has
16 to be on the reservation. You acknowledge that. And
17 for purposes of on the reservation, it's enough that
18 you're dealing with land that is within the reservation
19 even -- even if it is no longer Indian land?

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

22 JUSTICE ALITO: Does "on the land" mean --
23 "on the reservation" mean land on the reservation or
24 does it extend any further than that?

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

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

4 MR. GANNON: In general, the sale of goods
5 off the reservation, unless there is some particularly
6 intimate connection with the reservation that -- that
7 the parties anticipate at the time, probably isn't going
8 to be enough to trigger jurisdiction. And so --

9 CHIEF JUSTICE ROBERTS: What about a home
10 equity loan for home on the reservation.

11 MR. GANNON: For a home that's on the
12 reservation?

13 CHIEF JUSTICE ROBERTS: Yes.

14 MR. GANNON: And it's for remodeling the
15 home --

16 CHIEF JUSTICE ROBERTS: Whatever home equity
17 loans are for.

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

23 CHIEF JUSTICE ROBERTS: Well, they are going
24 to add -- add a new wing onto the -- new room on to
25 their home.

1 MR. GANNON: And that's an example where I
2 do think that --

3 CHIEF JUSTICE ROBERTS: So if Chase
4 Manhattan gets a home equity loan application from
5 somebody and they grant the home equity loan, they are
6 now subject to being sued in tribal court?

7 MR. GANNON: If they know that they are
8 dealing with a member and they have not included any
9 form selection or choice of law provisions that say that
10 they want to be sued and resolve disputes in some other
11 forum, then it may well be the case that they will be
12 sued in tribal court.

13 CHIEF JUSTICE ROBERTS: What if the tribal
14 court has a rule that forum selection provisions are not
15 enforceable?

16 MR. GANNON: Well, I think it's probably
17 unlikely that the tribal courts would -- or that the
18 tribe would adopt a rule like that, because as a
19 pragmatic matter it would make it more difficult for
20 their citizens to engage in business relationships if
21 they had a categorical ban like that. And so --

22 JUSTICE GINSBURG: But then could you go
23 into Federal court under what was in farmers and say we
24 had no jurisdiction because we had a forum selection
25 clause?

1 MR. GANNON: I -- if -- if there was a forum
2 that would be a question about the nature of the
3 underlyng consent. And I do think that, in general,
4 forum selection clauses here ought to be enforced. And
5 so, it would be relevant to the scope of the consensual
6 relationship there.

7 CHIEF JUSTICE ROBERTS: Does the judgment
8 here that the bank discriminated against the Indian
9 corporation because they didn't give them as favorable
10 terms as they gave someone who hadn't defaulted on a
11 loan impede dealings with Indian corporations by outside
12 members -- outside nonmembers?

13 MR. GANNON: Well, as was pointed out
14 earlier, Mr. Chief Justice, the -- the -- the only
15 duties that the bank was exposed to here were a duty not
16 to breach contracts and not to discriminate. And the
17 only question is the source of those duties.

18 CHIEF JUSTICE ROBERTS: What was the basis
19 for the finding of discrimination?

20 MR. GANNON: It was the -- under --
21 according to the jury instruction it was a person or
22 entity denied a privilege to a person based solely upon
23 that person's race or tribal identity.

24 CHIEF JUSTICE ROBERTS: It had nothing to
25 do -- the bank's justification had nothing to do with

1 the fact that the entity had defaulted earlier?

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Banker, you have two minutes remaining.

6 REBUTTAL ARGUMENT OF PAULA A. BANKER
7 ON BEHALF OF THE PETITIONER

8 MR. BANKER: I think when you step back in
9 listening to the arguments of opposing counsel, you
10 know, what is the other way that tribal courts get --
11 that the tribes get jurisdiction over nonmembers? Well,
12 Congress can provide it. And if we look at this Bureau
13 of Indian Affairs loan guaranty program, which Congress
14 authorized, Congress didn't provide jurisdiction over
15 nonmembers in implementation of that program.

16 So you've got an elaborate loan program and
17 it's designed to provide capital to tribes and tribal
18 members, and Congress is silent on that.

19 Now, in other instances Congress has
20 provided authorization for tribal courts and tribes to
21 have jurisdiction over nonmembers. Congress is aware of
22 this Court's opinion in Montana presumably and the cases
23 that follow from it, but in the Bureau of Indian Affairs
24 loan guaranty program Congress remained silent. What do
25 we infer from that?

1 I think it is crucial when you think about
2 nonmember defendants in tribal court and whether they
3 can have their rights adjudicated there to think about
4 the structural problems, the lack of a right to remove,
5 the lack of a right to have this Court provide a
6 substantive review. There is no --

7 JUSTICE KENNEDY: What general principle
8 underscores the validity of your point that it's -- is
9 it a republican form of government law, Due Process
10 Clause? What is the general principle you rely on to
11 say we have to look to the structure of these courts?
12 If the structure is insufficient, then it violates what
13 prohibition in the Constitution?

14 MR. BANKER: I think that the -- you know,
15 the tribal courts stand outside of the Federal -- of the
16 Federal-State relationship. I think it is a question of
17 due process. I think it is a question of equal
18 protection.

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

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

24 JUSTICE KENNEDY: What is -- what is the
25 constitutional prohibition that is a restriction on

1 assigning cases to a court that does not follow the Due
2 Process Clause if it's an Indian court? It's not the
3 same as if we assign this to the American Arbitration
4 Association. What's the difference?

5 MR. BANKER: I think the difference is the
6 constitutional protections of nonmembers do not apply
7 down to tribal courts.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 The case is submitted.

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

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A	19:4 22:22	approach 27:4	16:24	Banker 1:17 2:3
ability 15:5	advocate 25:21	appropriate	author 21:21	2:11 3:6,7,9
16:16 17:3,4	Affairs 6:16	11:9 14:1,9	authoritatively	4:3,24 5:9,20
21:9	47:13,23	22:14	37:12	6:4,14,20,23
able 23:15	agree 15:9 28:13	appropriately	authority 5:14	7:4,18,21 8:5
above-entitled	37:22	11:5	5:18,19 34:23	8:15,22 9:4,16
1:13 49:11	AL 1:8	approval 42:4	36:24 38:13,14	10:3,8,12,20
absence 8:9,10	Alito 16:2 24:12	April 1:11	43:7	11:4,12,17,22
absolutely 39:25	28:19,25 29:4	Arbitration	authorization	11:25 12:8
40:5	29:12,25 30:4	49:3	47:20	13:10 14:15
accord 6:3	30:12,21 43:22	argument 1:14	authorized	15:1,13,19,25
acknowledge	44:1	2:2,10 3:3,7	47:14	16:12,15 17:1
27:7 32:18	allow 20:19	13:14 14:12	auto 44:2	47:5,6,8 48:14
43:16	allowed 31:19	16:3,11,13	avail 33:1	48:22 49:5
acted 37:1	American 49:3	17:12 36:16	availed 33:12	Banks 26:9
action 9:9 10:11	amicus 1:23 2:8	44:20 47:6	availment 34:3	bank's 46:25
10:13 30:25	33:15 36:18	arguments 47:9	avenue 36:2	based 3:13 4:6
activities 14:18	analogue 37:15	arising 9:14	avenues 36:8	16:22 19:18
44:22	anomalous	arose 6:7 30:25	avoided 8:6	20:13 33:7
actual 13:15	25:23	arrangements	award 12:17,21	46:22
14:16 15:13	answer 22:9,24	14:21 27:23	12:22	basic 35:4
ad 30:14,25	22:25 34:14	articulate 28:21	awarded 12:18	basically 13:9
add 29:23 39:23	35:21	articulated 5:4	13:3 20:24	basis 9:21,24
44:24,24	answered 12:15	37:4	aware 47:21	16:10 31:3,23
additional 7:9	29:17	articulating	a.m 1:15 3:2	46:18
16:10 17:17	answering 24:16	4:25	49:10	bears 4:5
address 17:16	30:25	articulation	B	beg 24:15
18:7 37:23	anticipate 44:7	30:6	back 25:21 47:8	began 6:7
38:2	anybody 23:17	asked 12:11,15	backed 32:22	begins 38:8
addressed 42:8	23:17	23:1 34:7	background 6:6	behalf 1:17,19
addressing 4:17	apart 25:18	asking 8:1 13:3	backwards 8:11	1:23 2:4,6,8,12
17:20	apparently	13:5 21:25	back-up 7:1	3:8 17:13
adherence 35:4	23:25	26:6,17 30:6,8	bad 18:2	36:17 47:7
adjudicate 4:9	appeals 9:23	30:9 43:11	ban 45:21	believe 6:20
adjudicated	22:16,18	asks 29:13	bank 1:3 3:5,19	7:18 10:8,24
48:3	APPEARAN...	assert 14:9	6:8 9:7 10:22	16:12 41:8
adjudicating	1:16	20:14	11:15 17:21,25	47:2
32:2	appendix 12:10	asserted 11:20	18:12 19:10,24	bend 8:11
adjudication	19:15 20:4	31:19,20	20:5 26:4,6,15	benefit 12:5
3:22,25 4:18	application	assign 49:3	27:1,8,15 28:1	21:21
5:3,8 17:6,7	16:20 26:12	assigning 49:1	28:3,5,8,15	benefits 17:24
adjudicatory	30:10 31:14	assistance 27:24	29:12 30:1,2	best 34:14 38:20
3:18 5:19 14:7	45:4	Assistant 1:21	33:1,8,12 34:5	BIA 17:24 25:23
15:12 38:9	applies 3:16	Association 49:4	39:2,6 40:12	25:24 26:3,15
adopt 5:25	apply 38:21 49:6	assume 11:1	40:24 42:1,22	26:19 27:8,15
28:22,24 45:18	appreciate	Atkinson 15:15	46:8,15	28:14
adopted 16:3	28:21	attempt 7:10		bit 42:19

Blaze 42:7	26:20 28:22	23:16 24:9,23	45:25 48:10,21	25:16
bound 33:25	29:4,9 31:16	25:7,13,18,20	49:2	compare 5:10
boundaries 43:5	31:19,23 33:7	26:3,10,11,15	clauses 46:4	compared 34:11
box 26:12	33:12,14 34:20	26:17,24 27:11	clear 4:20 13:13	competing
branches 37:1	37:25 38:6	28:1,13 29:17	19:18 30:13	20:23
37:19	42:8,12 45:11	31:2,12,17	38:10	complaint 22:5
breach 10:17,25	49:9,10	33:5,19 34:15	clearly 29:11	completely
11:2,6 12:22	cases 4:20 15:18	35:13,20 36:13	38:6	37:20 44:19
13:4 18:1 21:4	20:21 38:2,9	36:20 37:22	client 8:1 10:16	conceded 18:13
21:6 46:16	38:18 47:22	39:1,6,9 40:11	10:17	42:10
brief 17:19,19	49:1	40:15 41:2,12	clients 8:13,18	concept 24:11
21:5 25:8	cash 27:25	41:22 44:9,13	close 37:16	24:24
33:15,15	categorical	44:16,23 45:3	closely 6:14	concepts 34:12
briefed 17:18	45:21	45:13 46:7,14	Cohen's 23:6	conceptual
bright-line 31:5	Cattle 1:7 3:5	46:18,24 47:4	collateral 26:20	39:18
31:10	6:10 9:6,9	49:8	27:16,18 28:7	concern 34:15
bright-line-rule	10:23 11:5	choice 8:2,7,13	28:9 40:13,24	concession
31:23	25:15	8:25 45:9	41:4,14 42:16	18:15
bring 8:21 9:1	cause 30:25	choose 6:2	42:16	conclude 22:5
broader 5:18	certain 5:14	circuit 18:12	collected 19:13	concludes 22:12
brought 10:17	35:3,14	20:25 21:7,16	colloquy 19:23	concomitant
34:16 35:2	certainly 5:21	21:21 22:1,8	34:9	31:7 38:23
36:3	7:18 8:2 15:21	23:2	come 24:6	condition 26:16
Bureau 6:16	16:16 23:23	circumstances	comes 26:4 28:3	conduct 3:23 5:2
47:12,23	25:2 36:11	36:23 37:21	41:10,21	conducted 42:3
business 15:4	37:10	cited 25:8	comfortable	confirms 36:22
17:22 27:21	certainty 8:1	citizens 45:20	27:23	conflict 22:8
42:6,9 44:2	certify 22:15	civil 6:1 19:4,6	comity 35:3,10	Congress 5:6,6
45:20	challenge 21:4,9	37:2 38:18,23	35:10,18	37:4 47:12,13
buy 40:16	36:4,5	40:8 41:10	commenced 9:9	47:14,18,19,21
	challenged	claim 3:19 6:6	Commerce 1:3	47:24
C	17:25	8:21 9:13,14	3:4 5:12	congressional
C 1:19 2:1,5 3:1	challenging 12:4	9:20,22,25	commercial	26:1
17:12	12:7	10:2,4,5,5,7,16	14:20,24,24	connected 41:9
call 13:15 27:13	character 18:16	11:2,11,24	16:7 17:23	connection 44:6
called 21:7,16	characteristics	12:3,4,6,17	28:10 29:3	consensual 3:20
25:8	25:22	13:8 18:2,2,6	32:2	13:24,25 14:18
capacity 32:3	Chase 45:3	18:24,24 20:14	common 9:14	14:22 15:3
capital 43:15	chattels 27:19	20:22 21:3,3,5	32:3,7,10	16:7 28:16
47:17	check 26:12	22:4,6 33:3,4	common-law	29:3,5,10,22
car 30:14,15,15	Cheyenne 19:3	34:5	5:8	30:19 32:15
carving 4:13	23:5	claiming 10:17	company 1:7 3:5	38:6 39:7,11
case 3:4 12:9,25	Chief 3:3,9 8:18	claims 11:21	6:10 9:6,9	39:14 40:19
15:6 18:3,6	8:24 9:12	17:7 18:2	10:23 11:5,15	41:5 43:8,13
21:7,16 22:1	17:10,14 18:25	21:14	11:17,20,23	consent 11:13
22:13 25:7,12	19:2,14,20	clarify 33:2 34:8	12:5 15:15	13:15,16 14:4
25:19,23 26:18	21:20,23 23:11	clause 5:12	18:17 20:1	14:5,7,8,10,12

14:24 15:3,11 16:9 28:10 33:7 46:3 consensual 46:5 consequences 28:8 considered 4:19 42:11,13 consistently 13:14 constitute 4:21 constitutes 28:10 Constitution 5:12 48:13 constitutional 48:25 49:6 Construction 42:7 construe 6:2 contained 19:21 21:14 contemplated 4:10 context 4:25 37:1 contract 6:8 8:16 9:7,13 10:2,4,6,16,18 10:25 11:2,6 11:11,21 12:4 12:13,19 13:4 18:1 21:5,6 27:4 28:8 29:14 41:8,13 41:20,23 contracting 10:6 10:21,21 contracts 7:5,6 14:20,23 46:16 contractual 9:15 35:16 contrary 25:6 control 16:6 controlling 3:15 controls 8:16 core 18:2	corporation 6:9 6:10,18 7:3,16 9:6 11:2 24:11 24:12,13,25 25:1,4,5,9,15 25:16 26:5 27:1,3,10,13 27:20 28:3,4 39:2,3,4,8 41:3 41:6,13,15 42:9 46:9 corporations 6:19 25:22 46:11 correct 11:22,25 14:12 15:19 16:12 21:15,16 23:14 35:9 42:15,18 counsel 17:10 47:4,9 49:8 count 19:25 counterclaim 18:14 course 7:25 22:14 32:2 37:18 court 1:1,14 3:10,12,18 4:8 5:1,2,3 8:21 9:1,19,23 10:18 11:3,6 11:10,16,18 12:11 13:6,7 13:22 15:6 17:15 18:1,10 18:11,13,18,23 19:22 20:15 22:3,10,11,15 22:18 23:2,3 23:21 24:4,16 25:7 31:22 32:2 33:9,19 34:3,20,22,22 35:1,2,5,6,17 35:24 36:3,9 36:10,11,12,21	37:4,12,15 38:3,16,20,24 42:7 45:6,12 45:14,23 48:2 48:5 49:1,2 courts 5:16 8:8 9:3,8,10 16:9 18:15 19:5 22:15 23:7,8 24:1 29:7,15 30:3,17 33:13 34:16,20 38:20 45:17 47:10,20 48:11,15,20 49:7 court's 18:17 34:23 36:22 38:10 47:22 created 36:2 creates 34:3 creatures 48:20 credit 35:8,10 criminal 37:1 crucial 48:1 cultural 35:14 curiae 1:23 2:9 36:18 CURTIS 1:21 2:7 36:16 <hr/> D <hr/> D 3:1 Dakota 6:9,9 8:8 9:6,8,10 23:9 25:10 35:2,19 40:3 43:14 damages 12:17 12:19,21,22 13:5 19:13,17 19:18 20:6,24 21:6 DAVID 1:19 2:5 17:12 deal 34:6 43:21 dealing 7:14,15 7:24 8:12 25:15 27:1,13	28:7 31:4 39:17 43:18 45:8 dealings 14:20 15:4 32:2 41:5 46:11 deals 28:5 39:2 dealt 40:22 decided 7:14 15:7 37:3 decision 3:12 24:7 decisions 23:21 36:11 38:11 deed 42:22 deemed 18:24 19:12 20:7,22 deems 35:22 defaulted 40:18 46:10 47:1 defendant 3:23 38:3,4 defendants 4:5,8 48:2 definitive 22:9 degree 30:24 denied 46:22 Department 1:22 depends 37:9 deriving 17:23 describe 18:10 description 15:10 designed 47:17 determine 22:17 25:25 27:22 developed 30:10 development 39:21 dictated 42:1 difference 9:25 26:14 37:18 49:4,5 different 4:2,4 4:24 10:15 23:4 25:4,22	28:2 37:13 41:3 42:9 difficult 9:16 34:12 45:19 direct 35:21 directly 40:6 discriminate 46:16 discriminated 20:1,2 46:8 discrimination 3:19 5:23 6:6 9:14,20 10:1,5 10:9 12:13,17 12:23 13:5,8 19:25 22:5 32:18,21 33:3 33:4 34:8,9 46:19 discussed 13:13 discussion 39:10 41:10 dismiss 33:3 disposed 31:23 dispute 8:7 9:7 9:10,18 37:13 42:19 disputes 8:3 37:10 45:10 distinguish 6:17 district 18:11 divest 37:2 divested 37:20 documentation 26:10 doing 27:20 42:9 due 48:9,17,19 48:21,23 49:1 duties 46:15,17 duty 46:15 D.C 1:10,19,22 <hr/> E <hr/> E 1:21 2:1,7 3:1 3:1 36:16 earlier 24:10 31:12,13 46:14
---	---	--	---	---

47:1 economic 16:22 effect 13:21 16:23,24 22:4 22:6 29:18 30:7 39:21 effective 42:24 effects 27:18 effectuating 28:18 Eighth 18:12 either 15:11 elaborate 32:3,6 47:16 elements 20:13 31:8 emphasized 13:14 encouraging 37:5 ended 39:19 enforce 7:11 8:20,23 15:12 15:24 35:6 38:15 enforceable 45:15 enforced 9:3 35:1 46:4 enforcement 36:2,5 enforcing 35:11 36:9 engage 45:20 engaged 17:21 engaging 28:16 42:6 enlisted 27:24 ensure 27:25 enter 14:18 43:13 entering 6:8 16:7 enters 13:24 entirely 7:16,17 entitled 18:18 entity 25:3	46:22 47:1 equal 48:17 equity 35:15 44:10,16 45:4 45:5 ESQ 1:17,19,21 2:3,5,7,11 essential 37:7 establish 39:12 41:18 established 5:21 38:7 39:18 establishes 25:24 establishment 33:9 39:22 estoppel 34:1 ET 1:8 evaluate 22:6 everybody 32:20 evidence 21:3,6 21:11,13 ex 39:21 exactly 42:20 48:22 example 14:2 45:1 exception 4:10 4:11 5:1,11 13:12,22 15:2 15:10,18 16:14 16:16,19,20,25 17:2 29:2 32:1 39:13 43:21 exceptions 3:13 3:16 4:13 8:17 40:7 42:14 exercise 5:15 36:23 exercising 5:15 exist 34:21 expand 39:10 explanation 9:24 explicit 13:16 explored 36:11	exposed 46:15 express 42:4 extend 43:24 extends 16:4 extent 42:23 <hr/> F <hr/> F 21:8 face 8:15 facilitating 6:16 fact 18:18 19:8 20:12 40:3 47:1 facto 39:21 factor 40:10 facts 26:22,25 27:14 28:6,15 28:19 30:5,10 31:11,15,18 41:17 fair 34:11 35:23 fairness 35:4,15 faith 18:2 35:7 35:10 fall 16:8 family 1:6 3:5 6:10 9:5,8 10:23 11:5 18:16 25:15 far 13:3 17:4,4 farmers 31:22 36:1,7 45:23 favor 9:22 favorable 28:20 46:9 feature 12:24,25 features 31:1,10 Federal 4:1,22 5:25 6:3,3 9:20 10:1 19:4,5 22:3,19,20,23 22:23 23:8,24 24:1 34:22 35:16,25 36:3 36:6,9 37:5 38:3 45:23 48:15	Federal-State 48:16 filed 21:18 final 22:7 35:23 financial 27:24 financing 26:2 find 23:15,18 27:2,2 finding 4:8 19:9 19:18 22:19 46:19 findings 18:18 fine 21:24 30:5 32:19 finish 34:14 firm 37:5 first 3:4 4:10,15 4:16 5:1,10 6:7 13:12,21 15:2 16:14,15,18,19 16:25 17:1,21 21:16,22 23:21 23:25 29:2 31:18 33:21 37:25 39:13 flavor 7:14 flow 27:25 focus 6:5 follow 38:13 47:23 49:1 follows 23:9 35:2 40:6 footnotes 33:15 forced 21:10 foreign 37:16 form 12:9 24:12 27:4 45:9 48:9 forming 14:8 forum 8:7,14,25 9:7 45:11,14 45:24 46:1,4 found 18:12,14 18:16 four 12:16,16 framed 19:24 framework 36:22 37:19	Frederick 1:19 2:5 17:11,12 17:14 18:7 19:2,20 20:16 20:21 21:15,23 22:2,21 23:1 23:14,20 24:3 24:8,15,19 25:6,17,20 26:9,14,21 27:7,14 28:12 28:25 29:8,16 29:24 30:4,18 30:23 31:6,15 31:21 32:4,8 32:11,16,25 33:11,18,23 34:2,13,24 35:9,19 36:14 37:23 39:11 freestanding 10:10,12 fried 37:16 friend 37:23 front 13:19 full 35:10 fully 8:13,19 36:10 further 17:6,8 22:16 27:14 36:12 41:17 43:24 F3d 21:17 <hr/> G <hr/> G 3:1 Gannon 1:21 2:7 36:15,16 36:20 37:17 38:1,5,17,19 38:25 39:5,9 39:25 40:5,14 40:20 41:7,17 41:24 42:18 43:6,20,25 44:4,11,14,18 45:1,7,16 46:1
---	--	--	--	---

46:13,20 47:2 general 1:22 8:16 12:9,21 16:3 18:8,21 19:7,11 20:5 20:11,13,19,21 20:24 21:2,9 21:14 23:9 26:18 28:12,23 28:23 29:19 30:6 44:4 46:3 48:7,10 generally 37:2 38:25 42:18 Gillespie 21:16 Ginsburg 5:24 6:12 11:7,14 11:19,23 12:1 14:22 15:21 18:4,8,21 20:9 21:25 32:6 34:13,25 35:7 45:22 give 7:13 8:11 22:9 29:19 30:1,19 34:14 35:8,21 36:6 46:9 given 31:15,17 gives 30:2 giving 35:18,25 go 13:11 17:4 20:20 23:1 33:24 37:14 45:22 goes 29:12 30:1 going 44:7,19,23 good 12:3 goods 44:4 governed 33:7 48:20 governing 33:6 government 3:14 48:9 governments 37:7 gradations 30:5	grant 45:5 grants 6:18 17:3 grazing 40:25 ground 19:25 guarantee 7:3 guarantees 7:5,8 7:10,11,23 17:25 24:21 26:16,19 27:8 27:17,18 guaranty 47:13 47:24 guess 25:14 41:22 <hr/> H hailed 38:3 hand 10:22 happened 36:25 happens 34:17 39:1 headquarters 27:22 hear 3:3,18 heard 32:17 hearing 11:13 held 6:14 help 33:22 heretofore 36:10 Hicks 15:14 history 16:1 home 37:16 44:9 44:10,11,15,16 44:25 45:4,5 Honor 33:12 47:3 human 6:2 hypothetical 26:25 28:13 <hr/> I identity 25:25 27:9 46:23 impede 46:11 implementation 47:15 implicit 39:15	important 4:7 6:5 16:1 18:15 26:22 40:10 41:19 importantly 35:24 imposed 29:9 impossible 13:2 impress 23:24 impression 23:22 improve 29:1 include 3:25 5:8 43:3 included 45:8 including 19:16 40:23 incorporate 6:21,23 incorporated 25:3 incorporates 23:4 independent 16:20 Indian 4:2,4,19 5:12 6:16,18 6:19 9:14 18:16 20:15 22:20 23:6 24:10 25:5,16 25:25 26:1,7 26:13 27:13 28:4 29:12,25 30:1,16 31:19 32:1 36:23 39:2,7 40:4 41:3 42:17 43:14,19 44:1 46:8,11 47:13 47:23 49:2 Indians 6:13 7:2 7:15,24,25 8:12 17:23 28:16 39:4 40:18 41:14 43:4	Indian-owned 24:24 27:1,3 individual 7:2 10:24 42:4 individuals 11:20 12:2 20:2 41:15 indulgence 24:16 infer 47:25 inherent 3:11 31:25 inquiry 22:16 inserting 8:2 instance 6:7 42:5 instances 40:8 47:19 instructed 12:21 instruction 46:21 insufficient 48:12 interest 40:17 40:25 internal 3:15 16:6 interpret 38:21 interpretation 15:1,16 interpreted 5:7 interrogatories 12:12 19:16,24 interrogatory 19:11 20:3 intimate 44:6 intimately 41:9 invalid 18:24 20:14,22 21:2 invalidate 13:9 involve 42:21 involves 28:17 35:22 involving 38:2 Iowa 31:22 38:19 issue 7:7 10:15	13:12 25:11 issues 35:22 Italian 24:13 i.e 16:21 <hr/> J joint 12:10 19:15 20:4 judge 21:7,23 34:7 judgment 12:2,3 13:9 18:14 22:7 33:4 34:23 35:1,6,8 35:12,23 36:5 36:9 46:7 judgments 36:3 judicial 13:17 38:23 jurisdiction 3:18 10:15,19 11:10 13:8,17 13:18 14:2,3,6 14:10,11 15:12 15:23,23 16:4 16:9,10 18:1 18:13 23:4 27:6,12 29:6 29:14 30:3,17 31:3,4,20 34:4 36:1,6 37:2,20 37:24,25 38:2 38:8,9,13,15 38:23,24 39:12 40:8 41:11,16 41:19 43:21 44:8 45:24 47:11,14,21 jurisdictional 31:10 35:25 36:4 43:7 jury 12:11,11,15 12:18,21 13:1 19:9 46:21 justice 1:22 3:3 3:9,24 4:14 5:5 5:17,24 6:12
--	--	--	--	--

6:17,21,25 7:13,20,23 8:10,18,24 9:12 10:2,4,10 10:14 11:1,7,8 11:14,19,23 12:1 13:10 14:22 15:8,17 15:20,21 16:2 16:13,18 17:10 17:15 18:4,8 18:20,25 19:2 19:14,21 20:9 20:10,16,18 21:13,20,25 22:18,22 23:3 23:11,16,23 24:3,6,9,20,23 25:7,13,18,20 26:3,10,11,15 26:17,24 27:11 28:1,13,19,25 29:4,12,21,25 30:4,12,21 31:2,12,17,25 32:6,10,12,14 32:22 33:5,17 33:19,20,24 34:13,16,25 35:7,13,20 36:13,20 37:6 37:8,17,22 38:4,12,18,22 39:1,6,10,23 39:25 40:2,5 40:11,15 41:2 41:12,22 42:15 42:19 43:1,12 43:20,22 44:1 44:9,13,16,23 45:3,13,22 46:7,14,18,24 47:4 48:7,19 48:24 49:8 Justices 24:12 Justice's 29:18 justification	46:25 <hr/> K KENNEDY 6:21 31:25 32:10,14 33:17 33:20,24 38:12 38:18,22 48:7 48:19,24 Kennedy's 32:12 key 41:7 kind 3:21 13:16 14:7,8 29:18 30:7,13,19 34:1 knew 27:20 39:17 42:2 know 5:9,13 6:7 9:17 10:21 12:24 13:2 15:7 20:18 25:2,16 26:3 27:9 28:5,9 32:12 34:5 40:3 43:15 45:7 47:10 48:14 knowing 17:22 28:15 knowledge 39:16,16 known 29:21,22 Kozinski 21:7 <hr/> L lack 3:11 48:4,5 land 1:6 3:5 6:10 9:5,9 10:23 25:15 36:24 40:13,16 40:19,22 41:1 41:15 42:16,16 42:17,21 43:3 43:11,18,19,22 43:23 lands 27:21 28:17	language 5:10 5:11 14:16 15:13 29:1 Laughter 24:14 24:18,22 32:24 law 4:2,4,19 6:3 6:3,22,24 8:3 8:20 9:3,14,20 9:22,25 10:1 18:9,23 19:1,3 20:6 22:3,16 22:19,20,20,23 23:4,6,6 24:5 25:10 28:21 32:3,7,10 33:2 34:6,12 35:5 35:14,16,22 38:21 45:9 48:9 laws 4:1 lawsuit 38:7 leases 14:20,23 left 16:14,15 40:18 legislative 5:14 legitimate 36:24 lending 7:7 let's 26:18 44:1 liability 7:1 12:12,12,13,16 19:19 29:9 licensing 14:17 29:3 light 17:18 line 34:19 listening 47:9 little 9:25 42:19 live 21:10 loan 6:16 7:3,5,6 7:8 17:25 24:20 26:5,12 26:15,19 27:8 27:15,23 28:14 28:18 29:13,14 29:17,19 30:2 30:2 40:16 41:13,24 44:2	44:10 45:4,5 46:11 47:13,16 47:24 loans 7:9 26:16 28:2 44:17 Long 1:6 3:5 6:10 9:5,8 10:22 11:4,15 11:17,20,23 12:5 18:16 25:15 longer 43:4,19 longevity 30:24 Longs 3:19 13:3 17:22,24 look 4:6 5:9 10:20 12:9 18:25 23:7 24:4 31:4 47:12 48:11 looking 19:15 22:3 lot 42:1 lots 26:10 42:1 lower 22:15 lurking 34:15 <hr/> M Maguire 21:8 majority 7:16 7:17 majority-owned 25:9 making 26:16 mandates 26:1 Manhattan 45:4 matter 1:13 23:5 26:23,25 45:19 49:11 McCord 21:8 mean 15:1,2 23:17 24:1,2,7 31:1 32:17 33:21 37:9,9 39:24 41:23,25 43:22,23 48:23 meaning 17:2	means 3:22 5:2 14:17 21:9 35:3 meant 5:3 15:3 41:23 member 6:11 25:1,10 28:11 29:5 37:14 39:15,17,20 42:6,11,13 43:9 45:8 members 6:15 8:23 10:24 13:25 14:19 15:5 27:17 34:10 37:11 41:4 46:12 47:18 member-owned 42:8 mentioned 24:10 mere 40:3 merely 16:7 merits 5:22 17:17,20 met 16:21 Minn 1:17 Minneapolis 1:17 minority-owned 24:24 minutes 47:5 missing 14:13 30:22,23 mission 32:25 mistake 33:25 modified 15:18 Monday 1:11 Montana 3:12 4:6 5:10 13:12 13:19,20,22 14:5,14,15,16 15:2,10,14,18 16:4 29:1 30:10,20 31:14 32:1 36:22
--	--	--	---	---

37:3,18,23 40:6,7 42:12 43:21 47:22 Montana's 39:13 41:10 morning 3:4 motion 18:13 move 33:3,3 Mutual 31:22 38:19	39:19 42:24 48:2,23 nonmembers 3:12 5:15 14:18 34:11 36:24 37:3,21 46:12 47:11,15 47:21 49:6 non-Indian 25:14 non-Indians 40:9 non-Irish 25:14 non-Italian 25:14 normal 25:13 28:7 notable 18:17 note 18:15 notice 30:13 32:20 notion 31:24 number 19:3,11 19:16,17,25 30:11 32:1	operations 28:8 40:23 opining 23:5 opinion 47:22 opinions 21:24 opposing 47:9 oral 1:13 2:2 3:7 17:12 36:16 organization 6:12 organized 6:15 original 39:22 ought 46:4 outside 46:11,12 48:15 outsider 34:16 34:17 owned 7:2,16,17 41:3,13 43:4 owners 27:9 owns 41:15	27:17,18 40:25 person's 46:23 Petitioner 1:4 1:18 2:4,12 3:8 32:17 47:7 Petitioners 30:7 piece 28:14 43:11 placed 8:7 places 40:23 Plains 1:3 3:4 plaintiff 9:5 11:5,9,15,18 play 33:8 please 3:10 17:15 36:21 point 4:17 13:1 13:11 14:13,13 15:8 18:8,11 18:21 19:20 22:11 24:19,25 25:8 26:22 28:15 32:23 33:6,23 34:4 35:25 42:22 48:8,22 pointed 46:13 points 17:19 21:5 23:7 24:9 policy 37:5 political 37:1,19 position 21:17 28:20 38:14,22 possessed 3:18 40:24 post 39:21 Pourier 25:8 power 3:11 5:15 practices 42:2 pragmatic 45:19 precedent 23:12 23:15 Precisely 20:16 preclude 35:17 predicate 31:3 premised 13:18 present 31:16	presented 9:18 preserved 21:2 presided 34:7 pressed 32:23 presumably 23:11 47:22 pretty 37:16 previous 38:2 pre-empt 4:22 pre-emption 4:1 4:22 principle 16:3 28:23 48:7,10 principles 3:14 4:7 25:25 31:11 32:20 35:4,14 privilege 46:22 probably 44:7 45:16 probate 42:20 problem 22:12 problems 48:4 procedural 18:23 procedure 19:4 19:5,6 procedures 33:2 34:6 proceedings 42:20 process 4:18 48:9,17,19,21 48:23 49:2 program 25:24 47:13,15,16,24 prohibition 48:13,25 property 40:25 protect 8:13,19 16:5 protecting 3:14 protection 48:18 protections 49:6 provide 47:12 47:14,17 48:5 provided 47:20
<hr/> N <hr/> N 2:1,1 3:1 name 8:12 narrow 3:13 national 31:22 35:6 36:1,7 nature 9:19 13:12 29:19 33:8 46:2 necessarily 29:17,19 30:19 38:15 necessary 16:5 30:12 31:7 32:15 39:12 need 13:15 15:11 16:21 18:5 needs 35:1 neither 3:15 23:16,17 34:21 new 44:24,24 newspaper 30:14 nexus 29:9 Ninth 21:7,21 23:2 non 6:18 nonconsensual 17:7 nonmember 3:19,23 4:5,8 5:2 6:8 13:23 29:6 31:20 34:7 36:24 37:14,24 38:3	<hr/> O <hr/> O 2:1 3:1 object 20:5 objected 19:24 objecting 20:11 20:12 objection 19:8 19:10,12 20:3 20:9 21:1,18 objective 39:16 obtained 8:2 obtaining 7:1 occasion 33:21 occasions 33:13 occurred 43:10 occurring 44:22 odd 31:2 officers 27:24 28:18 Okay 15:20 operation 42:3	<hr/> P <hr/> P 3:1 page 2:2 12:10 12:14 pages 19:22 panoply 35:22 parallel 5:13 part 6:25 7:2,11 9:17 10:6 16:1 37:7 40:22 particular 33:11 43:11 particularly 27:3 44:5 particulars 25:19 parties 10:21,22 42:10 44:7 PAUL 3:7 PAULA 1:17 2:3,11 47:6 percent 7:19 perfectly 32:19 person 46:21,22 personal 7:9,11	<hr/> P <hr/> P 3:1 page 2:2 12:10 12:14 pages 19:22 panoply 35:22 parallel 5:13 part 6:25 7:2,11 9:17 10:6 16:1 37:7 40:22 particular 33:11 43:11 particularly 27:3 44:5 particulars 25:19 parties 10:21,22 42:10 44:7 PAUL 3:7 PAULA 1:17 2:3,11 47:6 percent 7:19 perfectly 32:19 person 46:21,22 personal 7:9,11	<hr/> P <hr/> P 3:1 page 2:2 12:10 12:14 pages 19:22 panoply 35:22 parallel 5:13 part 6:25 7:2,11 9:17 10:6 16:1 37:7 40:22 particular 33:11 43:11 particularly 27:3 44:5 particulars 25:19 parties 10:21,22 42:10 44:7 PAUL 3:7 PAULA 1:17 2:3,11 47:6 percent 7:19 perfectly 32:19 person 46:21,22 personal 7:9,11

provides 19:8 35:11 38:8	R 3:1	13:24 14:1,8	44:3,3,5,6,10	26:3,11,17,24
providing 8:3	race 46:23	14:23,25 15:4	44:12,20,22	27:11 28:1
provision 8:3,14 8:25	racial 25:22	17:22 28:10,16	reservations	31:2,12,17
provisions 19:6 45:9,14	raised 13:11	29:5,10,22	36:25	33:5 35:13
published 23:19 23:20	ranch 42:2	30:20,24 35:17	reserve 17:9	36:13 37:22
purchase 30:15	ranch's 40:23	38:7 39:7,12	residing 31:8	39:1,6 40:11
purchases 30:15 42:4	rational 37:10	39:14,18,22	resolution 8:8 9:8	40:15 41:2,12
purpose 6:15	reading 15:14 15:14,15	43:8,13,14	resolve 22:1,4 22:10 45:10	41:22 44:9,13
purposefully 33:13	really 17:4	46:6 48:16	resolved 8:4 9:11,21 37:11	44:16,23 45:3
purposes 3:25 4:19,21 25:11	reason 4:3,12 40:12,12,14	relationships 7:7 14:19 32:15 45:20	respect 13:21 18:19	45:13 46:7,18
41:25 42:11,13 43:17	REBUTTAL 2:10 47:6	relevant 46:5	respectfully 22:13	46:24 47:4 49:8
put 32:20 41:4 41:14	recall 13:22 21:4	reliance 23:23	Respondents 1:20,24 2:6,9 17:13 36:19	Roebuck 21:17
puts 30:13	recognize 4:7 14:1 37:25	rely 48:10	responds 34:4	role 33:8
putting 25:18	recognized 3:13 35:15,24 36:7 37:6 38:6	remained 47:24	response 14:14	room 44:24
	recognizes 37:19	remand 22:14	responses 34:25	rose 9:20
	record 7:12 19:23	remodeling 44:14	rest 40:23	roughly 19:22
Q	redressibility 22:12	remove 34:19,21 48:4	restriction 48:25	rule 8:16 18:18 19:7 20:6 21:9 21:12,14 23:3 23:8,9 28:21 28:24 30:6 31:5 32:18 33:2,21 35:3 45:14,18
qualified 38:20	regulate 5:1 14:16 15:6,23 16:16,24 17:3	repeatedly 37:4	restrictions 9:2	rules 19:4,5 22:23 23:24 24:1
qualifying 3:20 3:21	regulating 3:22 32:15 44:21	reply 17:19	result 13:25 15:5	runs 12:5
question 3:17 6:1 7:21 8:5,6 9:4,17,18 11:8 12:14,15,16 15:9 17:3,18 18:20,22 20:5 20:25 22:8,15 22:24 23:21 24:16 26:25 29:18 32:12 36:6 46:2,17 48:16,17	regulation 3:24 3:25 4:16,18 4:19,21,23 5:7 5:11 15:11,12 15:24 43:7	republican 48:9	returned 13:1	S
questions 12:16 17:8 26:6 36:12	regulatory 5:18 5:21 13:17 14:2,6,9 38:8 38:13,14,23	requested 19:9	review 34:23 35:11 48:6	S 2:1 3:1
quite 37:12	rejected 31:24	require 26:9,18 26:19	right 4:16 8:24 12:2 23:17,19 24:2 29:25 34:19 40:13 48:4,5,23	sale 44:4
quote 40:8	relate 14:11	requirement 29:9,23	rights 4:5 6:1,3 48:3	sales 39:20
quoted 15:22	related 40:21	requirements 35:4	rise 29:20 30:19 35:25 36:6	satisfied 16:21
	relations 3:15 16:6 29:3	requires 39:13	River 19:3 23:5	satisfies 26:1
	relationship 3:21 9:15	reservation 7:15 7:24,25 27:16 29:13 39:24 40:4,9,12,16 40:19,21,22 41:4,5,9,14,16 41:20 42:6,10 42:17,25 43:3 43:3,5,16,17 43:18,23,23	ROBERTS 3:3 8:18,24 9:12 17:10 18:25 19:14 21:20 23:11,16 24:9 24:23 25:13,18	satisfy 35:3
R				saying 5:13,17 15:17,22 22:2 34:2,4
				says 9:1 21:8 25:9 26:4,5,12 30:1,16 40:7
				Scalia 3:24 4:14 5:5 6:17,25 7:13,20,23 8:10 10:2,4,10

20:10,17,18 21:13 22:18,22 23:3,23 24:4,6 24:12,20 29:21 32:22 37:8,17 38:4 39:23 40:1,2,5 42:15 42:19 43:1,12 43:20 scope 46:5 scrutinize 27:16 Sears 21:17 second 4:10 16:20,25 17:25 second-guess 12:20 security 40:24 see 5:12 12:11 20:4 selection 8:7 45:9,14,24 46:4 self 3:14 self-government 16:6,22 37:6 self-protection 16:22 sell 30:14 39:4 sense 17:2 39:13 set 25:24 33:14 seven-year 17:21 shareholders 26:7 39:3 shares 39:4,20 shows 30:14 side 5:22 significant 18:12,19 silence 8:9,16 silent 47:18,24 simply 31:23 Sioux 19:3 23:6 sister 35:8 situation 28:3,6 situations 13:23 smell 8:12	smells 7:24 solely 46:22 Solicitor 1:21 somebody 26:4 30:13 39:19 45:5 somewhat 31:9 sorry 19:14 31:13 sort 11:13 31:2 35:15 37:15 sought 8:20,23 source 33:2 46:17 sources 23:8 24:4 SOUTER 5:17 13:10 15:8,17 15:20 16:13,18 South 6:9,9 8:8 9:6,8,9 23:9 25:9 35:2,19 40:3 43:14 sovereign 3:11 sovereignty 31:8 speaking 30:20 special 19:6,16 19:23 20:3,7 24:20 specific 7:4 14:6 19:8,10 21:1 41:25 42:1 specifically 24:17 38:1 split 20:25 22:1 squarely 8:8 stand 48:15 standard 5:25 standing 17:16 17:18,20 18:20 start 26:6 state 4:22 5:25 6:2,17 8:21 9:1 9:3 23:8 25:2,7 25:10 34:18,22 35:2,5,5,8,16 35:17,22 36:9	37:16 38:20 43:15 States 1:1,14,23 2:8 31:8,9 36:17 status 6:18 17:24 42:20 statute 35:20 statutes 4:22 stay 6:2 step 25:21 47:8 STEVENS 10:14 11:1,8 story 5:22 straightforward 30:9 31:14 34:10 stranger 33:18 Strate 15:14,21 15:25 29:8 38:10 stretch 17:5 stretches 17:5,6 strongly 28:15 structural 48:4 structure 48:11 48:12 subject 27:11 29:6,14 30:2 30:17 41:8,12 41:19,23 45:6 48:21 subjected 33:10 34:16 subjecting 27:5 submission 31:11 submit 22:13 36:1 submitted 49:9 49:11 subsequent 38:10 subsequently 39:19 substantial 17:23 30:11	substantive 35:11 48:6 sue 11:6 sued 11:3 34:18 45:6,10,12 sufficient 27:25 suggest 28:6 suggested 34:24 suit 10:17 summary 18:14 33:4 supporting 1:24 2:9 36:19 supports 21:3,6 21:11,13 suppose 33:17 33:20 supposed 22:4 26:6 27:2 Supposing 10:16 supreme 1:1,14 25:7 sure 26:24 40:21 surprise 34:5 sustained 20:3 sweeping 30:7 system 23:5 33:6 systems 37:7 <hr/> T <hr/> T 2:1,1 tainted 22:4,6 takes 21:17 talking 4:15 7:6 14:5 tax 14:2 25:11 taxation 14:17 42:12 term 5:7 terms 40:6 42:1 46:10 Thank 17:10,14 36:13 47:3,4 49:8 thing 5:6 7:14 28:4 29:22	37:13 41:7 43:6 things 16:5 42:4 think 4:3,7,9,12 4:24 5:3,4,20 6:5 8:15 9:4,10 11:4,9,12 15:25 17:1,5,6 23:3 24:3 25:2 28:12,14,25 29:8,9,16,17 30:4,18,23 31:6,25 32:5 32:14,16 34:20 36:8 38:5 39:9 39:15,21 41:18 43:1 44:18 45:2,16 46:3 47:8 48:1,1,3 48:14,16,17 49:5 third 18:10 thought 9:2 11:14,15 16:2 16:11 32:17 three 17:19 time 17:9 23:3 44:7 times 13:11 33:25 today 3:17 32:18 told 23:25 tort 10:10,12 11:24 12:3,6 12:20 17:7 43:10 town 40:2 Trading 15:15 transaction 7:1 40:21 42:21 transactions 16:8 transcript 19:21 34:9 transfer 42:21 42:23 treat 18:23
--	--	--	---	--

treated 20:24 25:10	43:8 45:18	12:18	30:16 34:11	2
treating 34:10 34:11	tribes 3:11 5:14	unfortunately 22:8 35:20	35:19 42:3 47:10	2d 21:8
treatise 23:6	31:7 36:23	United 1:1,14,23	went 27:15,21	2008 1:11
trial 19:21 34:8	37:2,20 47:11	2:8 31:9 36:17	28:17	21 21:17
tribal 3:14,17	tribe's 16:23	usually 31:3,4	We'll 3:3	27 33:15
4:8 6:11,14,22	33:15	V	We've 3:24	28 33:15
6:24 8:20,22	tried 12:9,25	v 1:5 21:8	win 18:5	29 33:16
9:2,19,22,23	trigger 44:8	vacate 22:14	wing 44:24	3
9:25 10:18,24	triggers 43:6	vacature 18:24	worded 35:20	3 2:4
11:3,6,10,16	true 15:25 31:18	valid 21:3	words 22:24	36 2:9
11:18 12:11	37:18	validate 16:23	33:24	386 21:17
13:6,6,25 15:5	trust 27:21	validity 48:8	wouldn't 22:19	4
16:4,5,9,16,21	28:17	various 24:4	29:23	4 19:17,19,25
17:24 18:1,13	trying 24:25	27:23	wrinkles 17:17	20:3
18:22,23 19:1	turned 40:17	vehicle 44:2	written 20:4	47 2:12
19:3,5,22 22:3	turns 16:25	verdict 12:9	32:19	49 19:6
22:9,15,18	two 3:13 4:13	13:1 18:8,22	wrote 21:20	49(a)(3) 19:7
23:7,12,12	18:17 28:2,2	20:5,7,11,13	X	20:6
24:1 27:17,21	34:24 36:8	20:20,25 21:2	x 1:2,9	5
27:22,24 28:17	47:5	21:10,11 23:9	Y	51 7:18
29:7,15 30:3	type 25:4 35:16	verdicts 19:7,7	years 30:11	555 19:22
30:17 31:19	types 5:14 28:2	20:22	\$	562 19:22
32:1,6,10	typically 26:9	versus 3:5 5:15	\$750,000 12:18	6
33:13,19 34:3	U	21:17	13:2	6 12:14 19:11,16
34:6,6,9,20,23	ultimately 13:2	view 20:12	0	19:19
35:1,6,14	18:22 35:23	38:12	07-411 1:5 3:4	8
36:10 37:5,6,7	uncommon 5:25	views 20:23	1	83 21:8
37:9,12,15	6:5	violates 48:12	1 19:3 30:10	
38:16,20,21,24	underlying 3:13	vote 34:17	32:1	
39:17 40:25	4:6 9:19,21,24	W	10:07 1:15 3:2	
43:8 45:6,12	10:1 13:9	wait 20:10 43:12	11:08 49:10	
45:13,17 46:23	34:15	waive 20:19	12 33:2	
47:10,17,20	underlying 46:3	waived 19:9,12	1271 21:8	
48:2,15,20	underscores	20:7 21:10,18	14 1:11 33:13,25	
49:7	48:8	waiver 21:8	15 33:25	
tribal-court	understand 4:14	walks 40:2	15th 33:14	
27:5,12	9:23 11:19	want 13:13	17 2:6	
tribal-law 4:25	16:19 19:15	22:25 28:9	191 12:10 19:15	
tribe 8:19,22	24:11,23 36:4	40:15 45:10	192 12:10,10,14	
13:24 14:9,16	understanding	wanted 40:16	19:15	
14:19 15:4	13:18,20 14:4	Washington	1996 7:6,8	
17:3 19:3 23:6	18:10	1:10,19,22		
25:1,11 27:22	understood 32:8	Wasn't 6:25		
28:18 29:5	32:11	way 4:4 12:8,25		
37:11,14,14	undifferentiat...	20:21 25:23		