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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 --

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

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

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

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

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

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

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

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

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

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

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

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

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

9 (Laughter.)

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

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

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

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

25 JUSTICE SOUTER: No, but if that kind of



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

4 MR. BANKER: Well --

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

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

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

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

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

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

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

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

16 MR. BANKER: I think it comes --

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

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

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

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

8 (Laughter.)

9 MR. BANKER: Well, yes.

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

12 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. BANKER: I think --

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

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

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

1     that.  Isn't that so?

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

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

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

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

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

25                  JUSTICE SCALIA:  Can a State distinguish

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

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

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

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

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

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

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

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

3                   JUSTICE SCALIA: Yes.

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

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

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

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

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



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

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

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

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

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

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

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

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

10 JUSTICE SCALIA: Is it a contract claim?

11 MR. BANKER: Is it a --

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

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

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

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

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

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

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

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

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

15 JUSTICE GINSBURG: Did they --

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

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

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

25 MR. BANKER: The Long Company was a

1 plaintiff in the tribal court.

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

5 MR. BANKER: That's correct.

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

8 MR. BANKER: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: So you're saying the

1 Montana exception has been modified by later cases.

2 MR. BANKER: That is correct.

3 JUSTICE SOUTER: Okay.

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

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

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

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

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

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



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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

19 Mr. Frederick.

20 ORAL ARGUMENT OF DAVID C. FREDERICK

21 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE GINSBURG: There is no objection --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. FREDERICK: It is --

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

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

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

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

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

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

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

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

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

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

16                MR. FREDERICK:  Yes.

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

22                         (Laughter.)

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



1 (Laughter.)

2 MR. FREDERICK: My point --

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

5 (Laughter.)

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

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

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

25 MR. FREDERICK: Well, I --

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: I'm asking you

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

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

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

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

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

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

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

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

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

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

1 officers of the tribe for effectuating the loan.

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

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

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

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

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

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

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

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

7 MR. FREDERICK: Yes.

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

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

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

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

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

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

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

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

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

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

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

25                  CHIEF JUSTICE ROBERTS: Yes, given the

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

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

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

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

14 JUSTICE GINSBURG: To elaborate tribal  
15 common law.

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

18 JUSTICE KENNEDY: Tribal common law?

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

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

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



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

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

7 (Laughter.)

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

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

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

25 JUSTICE KENNEDY: Well, and I suppose --

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

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

6           MR. FREDERICK: My point is --

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

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

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

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

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

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

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

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

1 giving comity or not?

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

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

20 If the Court has no further questions.

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

23 Mr. Gannon.

24 ORAL ARGUMENT OF CURTIS E. GANNON

25 ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE,  
2 SUPPORTING THE RESPONDENTS

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

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

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

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

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

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

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

12 JUSTICE SCALIA: Defendant, yes.

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

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

25 MR. GANNON: Well --

1 JUSTICE KENNEDY: -- in civil cases?

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

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

8 MR. GANNON: Generally, yes.

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

13 MR. GANNON: Well --

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

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

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

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

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

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

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

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

22 MR. GANNON: The only reason --

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21                CHIEF JUSTICE ROBERTS:   Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 members, and Congress is silent on that.

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

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

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

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



1 protection.

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

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

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

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

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

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

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