No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

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

BRIEF FOR THE PETITIONERS

Edward F. Harold
FISHER & PHILLIPS LLP
201 St. Charles Ave.
Suite 3710
New Orleans, LA 70170
(504) 522-3303

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

QUESTION PRESENTED

Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state that Dollar General Corporation has no parent company and no publicly traded company owns 10% or more of its stock. Dolgencorp, LLC is a wholly owned subsidiary of Dollar General Corporation.

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BRIEF FOR THE PETITIONERS

Petitioners Dollar General Corp. and Dolgencorp, LLC, respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1-36) is published at 746 F.3d 167. The dissent from denial of rehearing en banc (Pet. App. 92-94) is published at 746 F.3d 588. The district court's opinion (Pet. App. 39-54) is published at 846 F. Supp. 2d 646. A prior decision of the district court denying temporary injunctive relief (Pet. App. 55-74) is unpublished.

The opinion of the Supreme Court of the Mississippi Band of Choctaw Indians (Pet. App. 75-91) is unpublished. The order of the District Court of the Mississippi Band of Choctaw Indians was oral and not transcribed.

JURISDICTION

The judgment of the court of appeals was initially entered on October 3, 2013. Pet. App. 1. A timely petition for rehearing was filed on October 17, 2013. The court of appeals denied petitioners' timely petition for rehearing en banc, issued a revised opinion, and re-entered judgment on March 14, 2014. Pet. App. 1-2, 92. Petitioners filed a timely petition for a writ of certiorari on June 12, 2014. This Court granted the petition on June 15, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no relevant constitutional or statutory provisions in this case.

STATEMENT OF THE CASE

Indian "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," absent express congressional authorization. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). This Court thus has held that tribal courts cannot hear *criminal* cases against nonmembers absent specific authorization from Congress. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). This case presents the question whether and when a tribe may nonetheless subject nonmembers to *civil* suit in tribal court for millions of dollars in punitive and other damages on the basis of unwritten tribal tort law.

I. Background On Tribal Courts

The Court's decisions regarding tribal court jurisdiction have turned in significant part on the special nature and history of tribal justice systems. *See, e.g.*, *Oliphant*, 435 U.S. at 196; *Duro v. Reina*, 495 U.S. 676, 693 (1990). As the Bureau of Indian Affairs has noted, "few Indian tribes had operating judicial systems in place in the late 1970's."[1] Even as

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[1] *Court of Indian Offenses*, U.S. Dep't Interior, Indian Affairs, http://www.bia.gov/WhoWeAre/RegionalOffices/SouthernPlains/WeAre/ciospr/index.htm (last visited Aug. 29, 2015).

late as 2002, less than sixty percent of tribes surveyed by the Federal Bureau of Justice Statistics reported having any kind of court system.[2] Instead, until very recently, most tribes relied on traditional methods of dispute resolution that varied significantly among tribes and differed substantially from state and federal legal systems. *See generally, e.g.*, *Oliphant*, 435 U.S. at 191, 196-97; Eric K. Gross, *Evaluation/Assessment of Navajo Peacemaking*, No. 187675 (1999).[3]

Today, the existence, nature, and development of tribal courts remain varied. Some larger tribes have sophisticated legal systems similar to those found in many states. But most are small, working with limited resources.[4] In 2000, the average tribal

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[2] Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, NCJ 205332, at iii (2005) (hereinafter "*Census of Tribal Justice Agencies*"). The exact percentage of tribes with court systems is unclear. *Compare, e.g.*, *id.*, *with* ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 120 (2012) ("[M]ore than half of the 565 federally recognized tribes in the United States do not even have courts.").

[3] *Available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf.

[4] *See* Alaska Legal Servs. Corp., *2011-2012 Alaska Tribal Court Survey Report* 4 (2012) (hereinafter " *Alaska Tribal Court Survey*"), *available at* https://www.tribalcourtsurvey.org/_files/2011-2012AlaskaTribalCourtSurveyReport.pdf (of tribes responding to survey question, "[n]early 40%" reported "a budget of $0 for their court system, with all the work being done by part-time volunteers"); Am. Indian Law Ctr., Inc., *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final*

courts system had a single full-time judge.[5] Many tribal judges lack legal training.[6] In 2005, more than forty percent of tribes had no appellate courts.[7]

The independence of tribal judiciaries varies as well. *See Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring); *Duro*, 495 U.S. at 693. "Many tribes still operate under the BIA-drafted constitutions of the 1930s that vested tribal councils with executive power – line authority, with the power to hire and fire – over all reservation entities, including the courts." CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 290 (2005). Indeed, in some tribes the tribal council *is* the tribal court.[8] The lack of judicial independence

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Report 28 (2000) (hereinafter "*Survey of Tribal Justice Systems*").

[5] *Survey of Tribal Justice Systems*, *supra*, at 28.

[6] *See, e.g.*, Justin B. Richland, *"What Are You Going to Do with the Village's Knowledge?" Talking Tradition, Talking Law in Hopi Tribal Court*, 39 L. & SOC'Y REV. 235, 243 (2005) (hereinafter "*Talking Tradition*"); Neil Nesheim, Nat'l Ctr. for State Courts, Inst. for Court Mgmt., *Evaluating Restorative Justice in Alaska: The Kake Circle* 11 (2010), *available at* http://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2010/Evaluating%20Restorative%20Justice%20in%20Alaska-The%20Kake%20Circle.ashx (finding that of the "53 magistrates in Alaska, more than 40% are *not* law trained") (emphasis in original).

[7] *See Census of Tribal Justice Agencies*, *supra*, at 20 (only fifty-eight percent of tribal court systems reported having some kind of appellate process in 2005)

[8] *See, e.g.*, *Alaska Tribal Court Survey*, *supra*, at 3 (of tribes responding to survey, "[e]ighteen Tribes indicated that their tribal council also serves as the tribal court, while twenty-one

has sometimes led to political interference with tribal justice.[9]

Tribal court procedures also vary from tribe to tribe and often depart significantly from the procedures practiced in state and federal courts.[10] For that reason, it is significant that most of the federal Constitution does not apply to tribes or their judicial systems. *See Duro*, 495 U.S. at 693; *Talton v. Mayes*, 163 U.S. 376, 384 (1896). And although the Indian Civil Rights Act (ICRA) requires as a matter of statutory law that tribes comply with some constitutional norms – for example, by affording litigants due process, *see* 25 U.S.C. § 1302(a)(8) – its protections are incomplete. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978). Nor is there any easy way for civil defendants to obtain federal redress for violations of ICRA or any other federal right.

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reported having courts as separate bodies"); Max Mizner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 108-09 (2005) (hereinafter "*Treating Tribes Differently*") (noting, for example, that the Pueblo of Laguna has established "a Court of Appeals consisting of the Pueblo Governor and the Six Village Representatives").

[9] Joseph Thomas Flies-Away, Carrie Garrow & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 122 (Miriam Jorgensen ed., 2007) ("A common scenario among some nations is that elected officials repeatedly meddle in court cases (overturning decisions, firing judges, or cutting off the court's finances) . . . .").

[10] *See, e.g.*, Larry Nesper, *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe*, 48 Current Anthropology 675, 679 (2007).

There is no direct review of tribal supreme court decisions in this or any other federal court. *See Hicks*, 533 U.S. at 385 (Souter, J., concurring) (citing 28 U.S.C. § 1257(a)). Federal habeas review of tribal court judgments is provided only for criminal convictions. 25 U.S.C. § 1303. And there is no private right of action to enforce ICRA against a tribe. *See Santa Clara Pueblo*, 436 U.S. at 52. Moreover, the federal removal statute – which often permits out-of-state defendants sued in state court to remove their cases to the neutral forum of a federal court – does not apply to cases in tribal court. *See Hicks*, 533 U.S. at 368 (citing 28 U.S.C. § 1441).

In many tribal systems, defendants who are not members of the tribe can face distinct disadvantages. Numerous tribes, including the Mississippi Band of Choctaw Indians, require their courts to apply tribal law, custom, and traditions, looking to state law only to fill in gaps in tribal law. *See* Choctaw Tribal Code § 1-1-4; *Talking Tradition*, *supra*, at 243. Those traditions can vary considerably from state or federal legal principles. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008). Accordingly, it is important that outsiders subject to tribal jurisdiction be able to determine the requirements of tribal law. But that is often difficult. *See Hicks*, 533 U.S. at 384-85 (Souter, J., concurring) (noting that the "law applicable in tribal courts is . . . unusually difficult for an outsider to sort out"); *see also* Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*,

106 LAW LIBR. J. 199, 199-200 (2014).[11] Some tribes have detailed written codes, but many rely extensively on unwritten tribal traditions. *See Plains Commerce Bank*, 554 U.S. at 338; *Hicks*, 533 U.S. at 384 (Souter, J., concurring).[12] One survey found that as of 2000, nearly forty percent of tribes had not extensively codified their laws and that forty percent had some unpublished tribal laws or customs applying to non-Indians.[13] Moreover, "a number of important topics, such as environmental regulation, torts, and crimes against children . . . are found in only a minority of codes."[14] While those topics may be addressed in tribal court decisions, that case law may be undeveloped in tribal courts that are often only a few decades old. And, in any event, many tribal courts do not publish their opinions.[15]

As a result, the content of tribal law is often knowable only to a few tribe members, as reflected in the fact that some tribal codes, including the Choctaw's, authorize courts to seek advice from tribal elders to determine the relevant requirements of

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[11] *Available at* http://www.aallnet.org/mm/Publications/llj/LLJ-Archives/Vol-106/no-2/2014-11.pdf.

[12] *See also Treating Tribes Differently*, *supra*, at 109; *Talking Tradition*, *supra*, at 244.

[13] *Survey of Tribal Justice Systems*, *supra*, at 15, 19.

[14] *Id*. at 19.

[15] *See id.* at 26 (more than a quarter of tribes do not make their judicial decisions accessible to nonmembers).

tribal law in particular cases. *See* Choctaw Tribal Code § 1-1-4.[16]

Nonmembers also tend to face juries composed of individuals from a tribe to which the plaintiff belongs, but the defendant does not. Indeed, some tribes have traditionally excluded nonmembers from their civil jury pools. *See, e.g.*, *Oliphant*, 435 U.S. at 194 & n.4; Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 215 (2007); Saginaw Chippewa Tribal Law, tit. III, § 3.903; Ute Indian Law and Order Code § 1-6-1(2). In small communities, it also may be difficult to find jurors who are not related to, or at least acquainted with, the plaintiff. And it is often not possible to afford defendants a change of venue to avoid a proven risk of bias, because there are no other venues.[17]

Nonmembers' status as outsiders thus can give rise to a substantial risk of unfair treatment. *See, e.g.*, Larry Nesper, *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe*, 48 CURRENT ANTHROPOLOGY 675, 682 (2007) (reporting that in one tribe "tribe members working as lay advocates . . .

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[16] *See also, e.g.*, Hoopah Valley Tribal Code tit. II, ch. 1, § 2.1.05; Blackfeet Tribal Law & Order Code ch. 2, § 2; Coushatta Tribe of La. Judicial Codes tit. IX, § 1; Chickasaw Nation Code tit. 5, § 5-102.7; Pawnee Tribe of Oklahoma Code tit. I, § 8.

[17] By petitioners' count, there are at least 100 tribal court systems that list only a single venue on the tribe's or the tribal court's website.

often seek to foreground political dimensions of the regulatory regime by explicitly identifying with their clients as fellow tribe members"); *see also Bird v. Glacier Electric Coop., Inc.*, 255 F.3d 1136, 1152 (9th Cir. 2001) (refusing to enforce $2 million tribal court judgment against nonmember due to plaintiffs' "appeal to racial prejudice" during trial). And as the multi-million-dollar claim in this case illustrates, the stakes for nonmembers can be high. *See, e.g.*, *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999) (jury issued $250 million wrongful death award to victim of railroad accident, later reduced by tribal court to $25 million).

The variation in tribal justice systems is unsurprising, as it reflects enormous diversity among tribes themselves. There are 566 federally recognized tribes[18] and 326 reservations.[19] Many of these reservations are less than two square miles.[20] The vast majority of tribes have populations of less than 10,000 people.[21] It may be difficult for a tribe with a few thousand members to run a justice system on par with a state or the federal government.

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[18] *See* 80 Fed. Reg. 1942 (Jan. 14, 2015).

[19] *See Frequently Asked Questions*, U.S. Dep't Interior, Indian Affairs, http://www.bia.gov/FAQs/ (last visited Aug. 29, 2015).

[20] *See id*.

[21] Office of Assistant Secretary – Indian Affairs, U.S. Dep't Interior, *2013 American Indian Population and Labor Force Report* 24 tbl.4 (2014), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf.

II. Factual And Procedural Background

The recent and varied development of tribal justice systems is one of the reasons this Court has repeatedly held that tribes lack the power to subject nonmembers to trial in tribal court for criminal offenses. *See Duro v. Reina*, 495 U.S. 676, 694 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-197 (1978). The Fifth Circuit in this case nonetheless held that all tribes – big and small, with sophisticated or simple justice systems – have (and, indeed, have always had) the inherent authority to subject nonmembers to tort suit in tribal court, even for millions of dollars in punitive damages, so long as the tort arises from some sort of consensual relationship with a tribe or its members.

A. Factual Background

Petitioner Dolgencorp, LLC operates a retail store selling basic household merchandise and consumable goods at the Town Center on the reservation of the Mississippi Band of Choctaw Indians. Pet. App. 2. It leases the store space from the Tribe. *Id*. In 2003, Dale Townsend was employed as the store manager. *Id*. All Dollar General employees are required to comply with a code of conduct that prohibits, among other things, sexual harassment and workplace assaults. *See* J.A. 86-90.

The Tribe operates a job training program, known as the Youth Opportunity Program (YOP), which places young tribal members in short-term positions with local businesses for educational purposes. Pet. App. 2-3. Businesses participating in the program benefited by receiving up to six weeks of temporary labor by the youths paid for by the Tribe.

Id. 5. While the Tribe requires the young tribe members and their parents to sign a contract acknowledging program rules, J.A. 77-81, businesses participating in the program are not given any contract or provided any specific rules that govern their participation in the program, *see* Pet. App. 86 (any agreement between Tribe and businesses was "unwritten"). As a tribal representative later admitted in the federal district court proceedings, the program was not essential to the financial viability of the tribe or government relations. J.A. 68.

In the spring of 2003, Townsend agreed to permit a YOP placement at the Dollar General store. Pet. App. 3. That decision was in direct violation of Dollar General's written policies that forbid employment of minors in Dollar General stores, and would have been grounds for termination had Dollar General been aware of it. J.A. 83.

Respondent John Doe is a member of the Mississippi Band of Choctaw Indians and was a participant in the YOP. Pet. App. 3. The YOP assigned Doe to the Dollar General store. *Id.* Doe alleges that in July 2003, during his assignment at the store, Townsend sexually assaulted him. *Id.* Upon learning of the allegations, the Tribe permanently expelled Townsend from the reservation. *See* Pet. App. 57, 77-78.

B. Proceedings In The Tribal Court

Although Doe could have brought claims in state court,[22] his family chose instead to pursue litigation in the courts of his tribe. In January 2005, the Does sued Townsend and petitioners in Choctaw tribal court, alleging that petitioners were vicariously liable for Townsend's criminal conduct, or were negligent in his hiring, training, and supervision. Pet. App. 3. The Complaint demanded "actual and punitive damages in a sum not less than 2.5 million dollars." *Id*.

The defendants moved to dismiss on the ground that the tribal court lacked jurisdiction. Pet. App. 3. The tribal district court denied the motions in an unwritten ruling. *Id*. In August 2005, the defendants filed a Petition for Permission to Appeal with the Supreme Court of the Choctaw Tribal Court. *Id.* On February 8, 2008, the Choctaw Supreme Court allowed the appeals and in the same order affirmed the exercise of jurisdiction. *Id*. at 75-91.

C. Proceedings In The District Court

On March 10, 2008, petitioners and Townsend filed suit in the District Court for the Southern District of Mississippi, seeking to enjoin the litigation in tribal court. Pet. App. 4.[23] The district court

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[22] *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

[23] Federal courts may consider collateral challenges to tribal court proceedings and enjoin litigation over which the tribal court lacks jurisdiction, so long as the jurisdictional objections are first exhausted through the tribal courts. *See*

granted summary judgment in respondents' favor in relevant part. *Id*. 37-38.

The court recognized that under *Montana v. United States*, 450 U.S. 544, 565 (1981), "and its progeny, there is a presumption against tribal civil jurisdiction over non-Indians." Pet. App. 42 (citing *Montana*, 450 U.S. at 565). But the court held that by agreeing to provide a position for Doe at its store, petitioners "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id*. 46. At the same time, the court held that the tribal courts had no jurisdiction over Townsend, the actual alleged perpetrator, because, in the court's view, Townsend did not have a sufficient consensual relationship with Doe or the Tribe. *Id*. 71-73.

D. Court of Appeals Ruling

1. A divided panel of the Fifth Circuit affirmed. Pet. App. 1-2. The panel presumed that when "tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Id*. 10 (citation and quotation marks omitted). So it viewed the jurisdictional question as whether Doe's tort claims fell within the legislative jurisdiction of the Tribe. *Id*. The panel explained that "*Montana* and its progeny provide two exceptions to the general rule that Indian tribes cannot exercise civil [legislative] jurisdiction over

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Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850-53 (1985).

non-members." *Id*. 4 n.1. "The first *Montana* exception, also known as the consensual relationship exception, provides that a tribe may regulate conduct that has a nexus to some consensual relationship between the non-member and the tribe or its members." *Id*.

The panel then held that by agreeing to take on Doe as an intern, petitioners engaged in a "consensual relationship" with a tribe or tribe member within the meaning of the first *Montana* exception. *Id*. 12.[24] The panel further held that because of that consensual relationship, petitioners were subject to tribal court jurisdiction for tort claims for the harm Doe suffered "in the course of his employment." *Id*. 13-14. Accordingly, the panel held, all that is required to subject nonmembers to tort claims in tribal court is a "logical nexus" between the activity giving rise to the tort claim and "some consensual relationship between a business and the tribe or its members." *Id*. 17.

Judge Smith dissented. He noted that under *Oliphant*, "store manager Townsend could not have been criminally prosecuted in tribal court for the alleged molestation of John Doe." *Id*. 23. "Although

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[24] Respondents did not claim that the second *Montana* exception – which allows tribes to regulate conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" – applied. Pet. App. 10 n.2 (quoting *Montana*, 450 U.S. at 566); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (conduct falling within second exception "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.") (citation omitted).

the Supreme Court has not yet explicitly adopted an *Oliphant*-like rule for civil cases, it has 'never held that a tribal court had jurisdiction over a nonmember defendant.'" *Id*. 24 (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001)).

In Judge Smith's view, because the relationship between petitioners and Doe had no impact on tribal self-government or internal relations, it could not form the basis for the application of *Montana*'s consensual relationship exception. Pet. App. 23-28. But even if the consensual relationship exception applied, the dissent concluded, petitioners' participation in the tribal job training program did not carry implicit consent to be subject to the jurisdiction of the tribal court for "any and all tort claims actionable under tribal law" arising from Doe's internship. *Id*. 31. Judge Smith noted that the "elements of Doe's claims under Indian tribal law are unknown to [petitioners] and may very well be undiscoverable by it," given that tribal law includes unwritten "customs . . . and usages of the tribes" that trump state common law. *Id*. 30 (ellipsis in original) (quoting Choctaw Tribal Code § 1-1-4) (internal quotation marks omitted). This is in stark contrast to the type of regulation encompassed by the first *Montana* exception, which "envisages discrete regulations consented to *ex ante*." *Id*. 32.

2. The court of appeals denied rehearing en banc over the dissent of five judges.

3. This Court granted certiorari.

SUMMARY OF ARGUMENT

Tribal courts lack civil jurisdiction over nonmembers absent congressional authorization (*e.g.*, in a statute or treaty) or the defendant's unambiguous consent (*e.g.*, in a forum selection clause of a contract). This is so for two independent reasons.

I. First, the same treaties, history, and considerations of the United States' overriding sovereignty that led this Court to conclude that tribal courts lack *criminal* jurisdiction over nonmembers in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), make clear that tribes likewise have been divested of the inherent authority to subject nonmembers to *civil* suit in tribal court.

Incorporation-era treaties contemplated that *all* disputes between tribal members and United States citizens would be resolved through appeal to the Federal Government, which often agreed to provide the equivalent of civil relief to injured tribe members. Congress evinced the same understanding, both in the legislation it enacted (*e.g.*, giving territorial courts civil jurisdiction over disputes between Indians and non-Indians) and the legislation it did not enact (*e.g.*, failing to provide this Court jurisdiction to review the decisions of tribal courts or to provide citizens a means to remove cases from tribal courts to federal court). Surveying this legal landscape in 1891, this Court explained that the "general object of these statutes is to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction

of all actions to which its own citizens are parties on either side." *In re Mayfield*, 141 U.S. 107, 116 (1891).

Even setting this history aside, tribal court jurisdiction over nonmembers is fundamentally incompatible with the United States' "overriding sovereignty." *Oliphant*, 435 U.S. at 209. In *Oliphant*, this Court held that criminal jurisdiction over nonmembers was inconsistent with the United States' territorial sovereignty because it permitted citizens to be tried by an authority existing outside the constitutional structure and unconstrained by the provisions of the Constitution designed to protect citizens' liberty. The same is true of civil claims, which implicate the Constitution's equally important concern that citizens not be arbitrarily deprived of their property.

Accordingly, Congress, not this Court, is the appropriate body to decide whether, when, and under what conditions tribal courts may exercise civil jurisdiction over nonmembers. But even absent congressional action, tribes retain their traditional power to exclude outsiders, including for violation of tribal laws. Injured tribe members may bring claims in state, and sometimes federal, court. And tribal courts can exercise civil jurisdiction over nonmembers if the defendant unambiguously consents to it (for example, through a forum selection clause in a mineral lease).

II. In the past, this Court has avoided the question whether a tribe may ever subject nonmembers to civil suit in tribal court by concluding that the conduct at issue was not even subject to tribal regulation, and holding that tribal courts may not adjudicate claims regarding conduct tribes cannot

regulate. The Court could do so again in this case. In *Montana v. United States*, 450 U.S. 544 (1981), this Court held that tribes generally lack legislative authority over nonmembers, subject to two narrow exceptions. Respondents have abandoned any claim that this case falls under the second exception, and it does not fall under the first.

The first *Montana* exception allows tribal regulation, "*through taxation, licensing, or other means*, [of] the activities of nonmembers who *enter consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (emphasis added). Regulation through tort litigation in tribal court is not an "other means" within the contemplation of this exception. The exception's premise is that nonmembers have manifested consent to tribal regulation through their conduct. But knowing consent to tribal rules is impossible when the regulation takes the form of civil suits in which tribal juries decide the meaning of unwritten tort law, the content of which is often impossible for nonmembers to determine in advance.

Moreover, because tort law regulates such a broad swath of human conduct, allowing its application to nonmembers would effectively permit the first *Montana* exception to swallow the general rule that tribes have lost the right to pervasively regulate nonmember conduct on tribal land. And it would permit regulation of conduct that has, at most, a tangential relationship to the core purpose of the *Montana* exceptions, which is to protect the "tribe's sovereign interests [in] managing tribal land, protecting tribal self-government, and controlling

internal relations." *Plains Commerce Bank*, 554 U.S. at 334 (citations and internal punctuation omitted).

ARGUMENT

This Court has repeatedly held that tribes generally lack regulatory authority over nonmembers, and that even the limited laws that may be applied to outsiders cannot be enforced through criminal prosecutions in tribal court. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). Accordingly, there is no question that the Tribe in this case lacked jurisdiction to impose even a dollar in criminal fines on the nonmember alleged to have assaulted plaintiff Doe in Dollar General's store. The tribal court nonetheless claimed the power to levy millions of dollars in punitive damages against Dollar General as punishment for its alleged violations of unwritten tribal tort law that imposes vicarious and other forms of liability on nonmember companies for the on-reservation crimes of their employees.

The Fifth Circuit erred in upholding that assertion of tribal court jurisdiction, for two independent reasons. First, tribal courts lack jurisdiction over nonmembers in civil as well as criminal cases, absent the defendant's unambiguous consent (*e.g.*, in a forum selection clause) or congressional authorization (*e.g.*, in a statute or treaty). Although this limitation should apply to all civil suits in tribal court, this Court can resolve this case more narrowly by holding that tribal courts lack such jurisdiction at least over tort claims. Second, at the very least, tribes' civil adjudicative jurisdiction

extends no further than their legislative authority. And in this case, the Tribe lacks authority to apply its unwritten tort law to petitioners as a means of regulating any consensual relationship petitioners may have with the Tribe or its members.

I. Tribes Generally May Not Exercise Legislative Or Adjudicative Authority Over Nonmembers Absent Congressional Authorization.

Upon incorporation into the United States, tribes became subject to plenary federal control. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As a consequence, tribes continue to possess only "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status," *Wheeler*, 435 U.S. at 323, unless Congress specifically delegates or restores such divested powers back to the tribes. This residual inherent tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Tribes thus may tax activities on tribal land, determine tribal membership, regulate domestic relations among members, and "exclude outsiders from entering tribal land." *Id*. at 327-28. "But tribes do not, as a general matter, possess authority over non-Indians who come within their borders. . . ." *Id*. at 328.

This strict limitation on tribal power over nonmembers extends to exercises of both legislative and adjudicative authority.

Legislative Authority. In *Montana v. United States*, 450 U.S. 544 (1981), this Court addressed the scope of tribes' legislative authority, concluding that "Indian tribes have lost any right of governing every person within their limits except themselves," subject to two narrow exceptions. *Id*. at 565 (citation and internal quotation marks omitted). Under what has become known as the first *Montana* exception, a

> tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. Under the second *Montana* exception, a tribe retains

> inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566.[25]

The exceptions to the rule "are 'limited' ones, and cannot be construed in a manner that would 'swallow

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[25] *Montana*'s general proscription against tribal regulation of nonmember conduct "applies to both Indian and non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Accordingly, "the existence of tribal ownership" of the land on which an activity takes place "is not alone enough to support regulatory jurisdiction over nonmembers." *Id*.

the rule,' or 'severely shrink' it." *Plains Commerce Bank*, 554 U.S. at 330 (citations omitted). Moreover, a tribe's regulation of nonmembers, even under the *Montana* exceptions, "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id*.

Adjudicative Authority. The federal Constitution protects liberty and property not only through substantive limits on legislative power, but also through measures designed to assure fair civil and criminal trials throughout the United States. *See, e.g.*, U.S. Const. art. III, §§ 1, 3; *id*. amends. V-VIII, XIV. Given that tribal courts operate outside this constitutional structure, and given the recent and uneven development of tribal justice systems, this Court has considered the question of tribal adjudicative power to be distinct from its legislative jurisdiction. *See Hicks*, 533 U.S. 357-58 & n.2.

Thus, the Court has held that tribes lack any inherent authority to enforce their laws through criminal prosecution of nonmembers in tribal court. *See Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 195 (1978). The Court also has held open the possibility that the same may be true of civil suits. *See Hicks*, 533 U.S. at 358 & n.2. At the very least, the Court has held, a tribal court's civil adjudicative authority extends no further than the tribe's legislative authority. *See Plains Commerce Bank*, 554 U.S. at 330; *Hicks*, 533 U.S. at 357-58; *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

In this case, respondents' attempt to subject petitioners to tort claims in tribal court exceeded both the Tribe's adjudicative and legislative jurisdiction.

II. Tribal Courts Lack Adjudicative Jurisdiction Over Nonmembers, Absent Congressional Authorization Or The Unambiguous Consent Of The Defendant.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court held that tribal court criminal jurisdiction over nonmembers is inconsistent with the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts" at the time tribes were incorporated into the United States, *id*. at 206, as well as the "overriding sovereignty" of the United States, *id*. at 209. In the years since, this Court has recognized that tribal court *civil* jurisdiction is "not automatically foreclosed" by *Oliphant*'s holding. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985). Instead, the Court has held that determining the "existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of the relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-56 (footnote omitted). Moreover, the Court has required as a matter of comity that tribal courts generally be allowed to conduct that analysis in the first instance. *Id*. at 856; *see also, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19-20 (1987).

More recently, however, the Court has noted that it has "never held that a tribal court had jurisdiction over a nonmember defendant." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). And it has made clear that its decisions requiring tribal exhaustion do not

"broadly confirm tribal-court civil jurisdiction over claims against nonmembers arising from occurrences on any land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997); *see also Hicks*, 533 U.S. at 358 n.2.

In fact, the analysis this Court has directed tribal courts to conduct with respect to civil jurisdiction leads to the same conclusion this Court reached regarding criminal jurisdiction in *Oliphant*.

A. Treaty History Reflects The Expectation That Tribes Would Not Retain Any Authority To Subject Nonmembers To Any Form Of Tribal Justice, Criminal Or Civil.

Deciding the scope of tribes' retained inherent authority must begin with an examination of the treaties, legislation, and other history surrounding to the tribes' incorporation into the United States.

1. In *Oliphant,* the Court thus began by asking whether at the time of incorporation, tribes and the federal government would have understood tribes to retain the right to subject nonmember American citizens to tribal justice. The answer, the Court held, "would have been obvious." 435 U.S. at 210.

To start, "[u]ntil the middle of this century [*i.e.*, the middle of the 1900s] few Indian tribes maintained any semblance of a formal court system." *Oliphant*, 435 U.S. at 197. With respect to those few tribes that did have court systems, from "the earliest treaties . . . it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect." *Id*. Many treaties expressly withheld

that power from the tribes, assigning to the Federal Government responsibility for punishing misconduct by nonmember citizens on tribal lands. *Id*. at 197 n.8. The only exception was a provision in some early treaties under which nonmembers illegally attempting to settle on Indian lands "forfeit the protection of the United States of America" so that "Indians may punish him or not as they please." *Id*. (citation omitted). But that exception proved the rule that tribes generally lacked the power to subject nonmember citizens to tribal justice. *Id*.

Especially pertinent to this case, the Court pointed to the example of "the 1830 Treaty with the Choctaw Indian Tribe, which had one the most sophisticated tribal structures" of the time. *Oliphant*, 435 U.S. at 197. While the treaty guaranteed the Tribe broad powers of self-government, that grant plainly did not include the power to subject American citizens to the tribal justice system: "the Choctaws at the conclusion of this treaty provision 'express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations.'" *Id*. at 197 (emphasis in original) (quoting Treaty with the Choctaw, Art. IV, 7 Stat. 333, 334 (1831)). "Such a request for affirmative congressional authority is inconsistent with [any] belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty." *Id*. at 197-98.

2. Nothing in these treaties or their surrounding context suggests that although tribes were stripped of their power to subject nonmember citizens to *criminal* adjudication, they retained the authority to

subject to them civil trials, including trials exposing them to tort claims and quasi-criminal measures like punitive damages.

To be sure, the treaties generally did not specifically address civil (as opposed to criminal) jurisdiction in terms, but that undoubtedly reflects that most tribes did not have court systems, much less court systems that distinguished between civil and criminal matters in the Anglo-American style. *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 144 (2d ed. 2010) ("There was, in short, no distinction between tribal criminal and civil jurisdiction."). Tribal justice mixed the essential components of both civil and criminal law, often focusing more heavily on compensation to the injured than American criminal law. *See id*. Accordingly, in denying tribes the power to punish nonmember citizens for violating tribal law, the treaties necessarily contemplated that citizens would thereby be insulated from *any* exposure to the tribal justice system. Certainly, no treaty of which petitioners are aware (and certainly none with the Choctaw) expressly granted tribes the authority to subject American citizens to civil suits or any other form of tribal justice.

Any claim that the treaties implicitly granted tribes civil jurisdiction over citizens is belied by numerous features of the agreements. For one thing, some treaties – including a treaty with the Choctaw – "specifically granted the right of self-government to the tribes [but] specifically excluded jurisdiction over nonmembers." *Hicks*, 533 U.S. at 382 (Souter, J., concurring) (citing, *e.g.*, Treaty with the Choctaw and Chickasaw, Art. 7, 11 Stat. 611, 612 (1855)) (other

citations omitted); *see also, e.g.*, 2 Op. Att'y Gen. 693, 695 (1834) (concluding that it was "very certain" that American citizens "were not amenable to the laws or courts of the Choctaw nation");[26] Treaty with the Creeks and Seminoles, Art. XV, 11 Stat. 699, 704 (1856) (tribe would be "secured in the unrestricted right of self-government . . . *excepting, however*, all white persons, with their property, who are not, by adoption or otherwise, members" of the tribe) (emphasis added). Obviously, subjecting nonmembers to tribal court jurisdiction for civil claims would have been inconsistent with these limitations.

Instead, the treaties contemplated that the Federal Government would resolve all aspects of any disputes between tribes and American citizens. The 1830 treaty with the Choctaw is typical. It provides that all "acts of violence committed upon persons and property of the people of the Choctaw Nation either by citizens of the U.S. or neighboring Tribes" would be "referred to some authorized Agent by him to be referred to the President of the U.S. who shall examine into such cases and see that every possible degree of justice is done to said Indian party of the Choctaw Nation." Treaty with the Choctaw, Art. VII, 7 Stat. 333, 334 (1831); *see also, e.g.*, Treaty with the

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[26] In an 1855 opinion, the Attorney General concluded that Choctaw courts could exercise civil jurisdiction "over such white men as of their own free will and accord choose to become members of the nation." 7 Op. Att'y Gen. 174, 185 (1855). But he expressly declined to extend that conclusion to persons "trading with the Indians, or sojourning among them." *Id*. at 186.

Apaches, Art. 4, 10 Stat. 979, 979 (1852) (requiring tribe to "refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment").[27] In other treaties, the Government went further and specifically agreed to provide indemnification for certain injuries suffered by Indians at the hands of citizens, affording a remedy akin to civil tort damages. *See, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 563 (1883) (quoting terms of treaty with the Sioux); Treaty with the Choctaw and Chickasaw, Art. 14, 11 Stat. 611 (1855) (providing that "full indemnity is hereby guaranteed to the party or parties injured"); Treaty with the Creeks and Seminoles, Art. 18, 11 Stat. 699 (1856) (same).[28]

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[27] *See also, e.g.*, Treaty with the Rikara, Art. 6, 7 Stat. 259, 260 (1825) (same); Treaty with the Cheyenne, Art. 5, 7 Stat. 255, 256 (1825) (same); Treaty with the Sioune and Ogallala, Art. 5, 7 Stat. 252, 253 (1825) (same). Conversely, treaties provided that if any "Choctaw . . . commit[s] acts of violence upon the person or property of a citizen of the U.S.," the "person so offending shall be delivered up to an officer of the U.S." so that the offender "may be punished as may be provided in such cases, by the laws of the U.S." Treaty with the Choctaw, Art. VI, 7 Stat. 333, 334 (1831).

[28] *See also, e.g.*, Treaty with the Rikara, Art. 6, 7 Stat. 259, 260 (1825); Treaty with the Sac and Foxes, Art. 4, 7 Stat. 84, 85 (1804); Treaty with the Osages, Art. 9, 7 Stat. 107, 109 (1808); Treaty with the Quapaws, Art. 6, 7 Stat. 176, 178 (1818); Treaty with the Kiowa and Comanche, Art. I, 15 Stat. 581, 582 (1867); Treaty with the Cheyenne and Arapahoe, Art. I, 15 Stat. 593, 593 (1867); Treaty with the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute, Art. VI, 15 Stat. 619, 620 (1868); Treaty with the Sioux, Art. I, 15 Stat. 635, 635 (1868); Treaty with the Crow, Art. I, 15 Stat.

Accordingly, the treaties reflected an understanding that tort-like claims against nonmembers would be resolved by petitioning the Federal Government for relief, not by subjecting nonmembers to tribal courts. Consistent with that understanding, widespread tribal assertion of civil jurisdiction over nonmembers is a recent phenomenon. While the lack of reliable, accessible records of tribal proceedings makes it impossible to say with certainty when the first such assertions of jurisdiction took place, petitioners have found no discussion of such cases in the federal reporters prior to the 1960s. *See United States ex. rel Rollingson v. Blackfeet Tribal Court of the Blackfeet Indian Reservation*, 244 F. Supp. 474 (D. Mont. 1965); *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975); *cf. Oliphant*, 435 U.S. at 197 (noting that attempted exercises of "criminal jurisdiction over non-Indians . . . is a relatively new phenomenon," seemingly also arising in the middle of the twentieth century); *Alberty v. United States*, 162 U.S. 499, 501 (1896) (noting that at the end of the nineteenth century, the Cherokee Nation disavowed any civil or criminal jurisdiction over even nonmembers who married citizens of the Nation).

This is not to say that the treaties deprived tribes of all power over nonmembers. The treaties acknowledged, for example, tribes' right to exclude

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649, 649 (1868); Treaty with the Northern Cheyenne and Northern Arapahoe, Art. I, 15 Stat. 655, 655 (1868); Treaty with the Navajo, Art. I, 15 Stat. 667, 667 (1868); Treaty with the Shoshonees and Bannacks, Art. I, 15 Stat. 673, 673 (1868).

nonmembers from their lands. *See, e.g.*, Treaty with the Choctaw, Art. XII, 7 Stat. 333, 335 (1831). And this included some power to license and tax those permitted onto tribal territory (although the right was sometimes made subject to approval by federal officials). *See, e.g.*, Treaty with the Choctaw and Chickasaw, Art. 16, 11 Stat. 611, 615 (1855). But the remedy for violation of such conditions on entry was exclusion from the reservation or appeal to the Federal Government for relief, not subjecting citizen offenders to the tribal justice system. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 182-83, 183 n.37 (1982) (Stevens, J., dissenting) (collecting cases); *Morris v. Hitchcock*, 194 U.S. 384, 389-90 (1904); *see also* Pet. App. 57 (explaining that Tribe in this case exercised power to exclude Townsend, the alleged perpetrator, from the reservation).

B. Congress And This Court Evinced The Same Understanding In Incorporation-Era Legislation And Decisions.

1. In *Oliphant*, this Court also looked to legislation and judicial decisions for further evidence of the contemporary understandings of the authority retained by the tribes after their incorporation into the United States. *See* 435 U.S. at 201-02. The Court noted that Congress initially had little reason to address directly the question of tribal court jurisdiction over nonmembers "because of the absence of formal tribal judicial systems." *Id*. at 201. But the Court found support for the proposition that tribes retained no criminal jurisdiction over nonmembers in legislation that extended federal law in various ways to activities on tribal land, consistently carving out only controversies between members of the tribe. *See*

id. at 201-02. The Court noted, for example, that early legislation provided for *federal* jurisdiction over offenses by non-Indians against Indians. *Id*. at 201. Congress also extended federal enclave law to Indian country with the sole exception of "any offense committed by one Indian against another." *Id*. at 201 (Act of Mar. 3, 1817, § 2, 3 Stat. 383, 383 (codified as amended at 18 U.S.C. § 1152)). And even that limited reservation of authority was cut back by the Major Crimes Act of 1855, when Congress federalized certain serious offenses by tribe members even when committed against another member of the tribe. *See id*. at 203 (citing Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153)).

The courts of the era shared the same view of tribal courts' limited jurisdiction over nonmembers. In *In re Mayfield*, 141 U.S. 107 (1891), this Court surveyed "Congress's various actions and inactions," concluding that they "demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts," *Oliphant*, 435 U.S. at 204.

2. There is no basis to conclude that Congress or the courts nonetheless believed that tribes had retained the inherent authority to subject nonmembers to tribal justice so long as the adjudication could be viewed as "civil" instead of "criminal."

a. As in the criminal context, there is a relative dearth of early legislation directly addressing tribal courts' civil jurisdiction (there being few tribal courts and Indian relations generally being addressed through treaties). But the legislation that did exist is consistent with the complete withdrawal of tribal court jurisdiction over nonmembers.

To start, no legislation came close to recognizing the existence of any such tribal authority. To the contrary, in several early statutes governing trade with Indian tribes, Congress provided that if a U.S. citizen took or injured the property of a tribal member, the offender would be tried in federal court and required to pay twice the value of the property to the injured party, with the Federal Government guaranteeing payment of at least the value of the lost property. *See* Act of Mar. 30, 1802, ch. 13, § 4, 2 Stat. 139, 141; Act of June 30, 1834, §16, 4 Stat. 729, 731.

When Congress expressly addressed judicial resolution of civil disputes in Indian country, it conferred jurisdiction on *federal* courts to resolve civil claims between Indians and citizens, providing that the "judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all *civil* and criminal cases arising in the country *in which members of the nation* by nativity or adoption *shall be the only parties.*" Act of May 2, 1890, 26 Stat. 81, 94 (emphasis added).

Likewise, it appears that for more than a century, the Court of Indian Offenses and so-called "CFR" courts (which were established by the Federal Government on reservations lacking tribal court systems) exercised civil jurisdiction over disputes involving nonmembers only if the nonmember consented. *See Hicks*, 533 U.S. at 383 (Souter, J., concurring) (citing 25 C.F.R. § 11.103(a) (2000)).[29]

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[29] With little explanation, the Bureau of Indian Affairs amended the regulations in 2008 to broaden the courts' jurisdiction over non-consenting nonmembers so long as at least

Congress's understanding that tribal courts lacked civil jurisdiction over nonmembers is further reflected in the laws Congress did *not* enact. In some of its earliest legislation, Congress protected out-of-state defendants from unfair disadvantage in the home courts of their adversaries in a variety of ways, but applied none of those protections to tribal courts. For example, Congress afforded this Court appellate jurisdiction over the decisions of state courts of last resort, but not over tribal courts. *See* 28 U.S.C. § 1257(a). Congress further authorized removal of state cases to federal court when the plaintiff and defendant were citizens of different states, but said nothing about removal of cases from tribal courts. *See Hicks*, 533 U.S. at 385 (Souter, J., concurring) (discussing 28 U.S.C. § 1441(a)). And it was not until the 1960s that Congress imposed any requirements on the procedures employed in tribal courts. *See Duro v. Reina*, 495 U.S. 676, 693 (1990). Surely these omissions reflect that Congress had no inkling that citizens of the United States would be subject to courts other than those identified in, and subject to the protections of, the U.S. Constitution.

To the extent it sheds any light on the transformation of tribal sovereignty in the 1700s and 1800s, more recent legislation is in accord.[30] For

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one party to the suit was an Indian. *See* 73 Fed. Reg. 39,859, 39,860 (July 11, 2008) (promulgating 25 C.F.R. § 11.116).

[30] The question of retained inherent jurisdiction requires an examination of the sources of law and common understanding during the era of the tribes' incorporation into the United States. *See Oliphant*, 435 U.S. at 196-206. Recent legislation may shed light on whether Congress has *restored* a

example, consistent with its chipping away at tribal criminal jurisdiction even over tribe members, Congress enacted Public Law Number 280 in 1953 to permit states to assume both criminal and civil jurisdiction over Indian land within the state. *See* Act of Aug. 15, 1953, 67 Stat. 588, 588-589; *Duro*, 495 U.S. at 680 n.1.[31] Moreover, in 1968, Congress imposed substantial restrictions on the operations of tribal governments, including tribal courts, to ensure fair treatment of the tribes' *own members* at the hands of their own governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). Among the limitations in the Indian Civil Rights Act was a sharp curtailment in the power of tribal courts to punish even member-on-member crime. The Act, for example, limited criminal sentences to six months in jail and criminal fines to $500. *See* ICRA § 202(7), 82 Stat. 73, 77 (1968).[32] To impose even those modest sanctions, the statute required tribes to afford their members a laundry list of specific protections, including most of the guarantees of the Bill of Rights. *See* 25 U.S.C. § 1302(a)(3)-(4), (6)-(10), (c).

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sovereign power lost at incorporation, *see United States v. Lara*, 541 U.S. 193, 199 (2004), but has limited relevance to the logically antecedent question of whether the power was retained in the first place, *see Oliphant*, 435 U.S. at 211-12.

[31] Congress subsequently amended the law to require tribes' consent to state assumption of this jurisdiction. *See* Pub. L. 90-284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79 (codified at 25 U.S.C. § 1322).

[32] The limits were later extended to three years per offense, or a total punishment of nine years per proceeding, and $15,000. *See* 25 U.S.C. § 1302(a)(7), (b).

In comparison, ICRA's relative silence regarding tribal courts' civil jurisdiction can only be read as reflecting Congress's understanding that tribal courts generally lacked jurisdiction over nonmembers – having capped the pecuniary criminal penalties that tribal courts may impose even upon their *own members*, and required strict observance of federally specified procedural guarantees, it is hardly plausible that Congress nonetheless believed that tribal courts would have authority to impose millions of dollars in civil compensatory and punitive damages on *nonmembers*, but failed to provide comparable limits and protections.

b. During the incorporation era, this Court shared the same basic understanding that tribal courts retained jurisdiction, both civil and criminal, only over disputes among members of the tribe. Thus, in 1891 this Court surmised that the

> policy of congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact. . . .

In re Mayfield, 141 U.S. at 115-16. Without distinguishing between civil and criminal adjudications, the Court explained that:

> The general object of these statutes is to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States

> jurisdiction of all actions to which its own citizens are parties on either side.

Id. at 116.

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None of this should be surprising. Even today, subjecting a citizen of the United States, "within our domestic borders, to a sovereignty outside the basic structure" of our Constitution "is a serious step." *Lara*, 541 U.S. at 212 (Kennedy, J., concurring in the judgment). At the very different time of incorporation, it would have been unthinkable. In that era, the federal government viewed "most Indian tribes [as] characterized by a 'want of fixed laws [and] competent tribunals of justice." *Oliphant*, 435 U.S. at 210 (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834)). The systems of tribal justice that did exist were foreign to most Americans and operated unconstrained by the Bill of Rights, the set of restrictions on government Americans viewed as essential to the protection of both liberty and property. And all too often the treaties through which tribes were incorporated into the United States were entered into in the immediate aftermath of open hostilities. In that context, it is far more believable that everyone – tribes and the federal government alike – understood that tribal justice systems were limited to resolving intra-tribal disputes.

C. Civil Tribal Court Jurisdiction Over Nonmembers, Absent Their Consent Or Congressional Authorization, Is Inconsistent With The United States' Overriding Sovereignty.

Even "ignoring treaty provisions and congressional policy," this Court concluded in *Oliphant* that tribes lack inherent authority to enforce their laws against nonmembers through their criminal courts for the independent reason that such jurisdiction is "inconsistent with [tribes'] status" and with the "overriding sovereignty" of the United States. 435 U.S. at 208-09 (emphasis, citation, and internal quotation marks omitted); *see also Duro*, 495 U.S. at 686 (the power to subject nonmembers to criminal trials in tribal courts is one of the "manifestation[s] of external relations between the Tribe and outsiders" that is "inconsistent with the Tribe's dependent status"). That irreconcilable conflict arises from tribal court jurisdiction over civil matters as well.

"Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant*, 435 U.S. at 209. One of the principal interests of the federal sovereign has always been ensuring that "its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id*. at 210. "Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id*.

The same is true of attempts to subject nonmembers to civil claims in tribal court. "Whatever might be said of the historical record, we must view it in light of [the defendant's] status as a citizen of the United States." *Duro v. Reina*, 495 U.S. at 692. To be sure, this Court has emphasized that the deprivation of liberty attendant many criminal convictions gives rise to especially serious constitutional concerns. *See, e.g.*, *id*. at 687-88. But our Constitution is designed to protect citizens within the territory of the United States from unfair deprivations of property as well. *Oliphant* thus precludes tribal courts from exercising criminal jurisdiction over nonmembers even if the tribe seeks only criminal fines. Subjecting nonmembers to civil claims for punitive and other damages by a sovereign operating within the boundaries of the United States but existing outside the constitutional structure is just as inconsistent with the constitutional plan.

Of course, tribes retain special powers over their own members. But the "retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians *who consent* to be tribal members." *Duro*, 495 U.S. at 693 (emphasis added). That is, tribal authority outside of this constitutional framework "comes from the consent of its members." *Id*. It is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Id*. at 694. That additional extra-constitutional power, however, may extend no further than its justification, precluding "an extension of tribal authority over those who have not given the consent

of the governed that provides a fundamental basis for power within our constitutional system." *Id*.

In addition, the "special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate." *Duro*, 495 U.S. at 693. This Court has repeatedly noted that tribal courts can vary considerably from the norms that govern the judicial systems contemplated by the Constitution. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008); *Duro*, 495 U.S. at 693. In both civil and criminal cases, tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve." *Duro*, 495 U.S. at 693. The Bill of Rights applies to neither criminal nor civil trials in tribal court. *Id*.; *Plains Commerce Bank Bank*, 554 U.S. at 337. The potential "subordinat[ion] to the political branches of tribal governments" that characterizes some tribal courts, *Duro*, 495 U.S. at 693 (citation and internal quotation marks omitted), is also a feature that applies to both civil and criminal cases.

Indeed, subjecting nonmembers to civil claims in tribal court is, in some ways, even *more* concerning, given that ICRA provides far less explicit protection for civil, compared to criminal, trials. For example, in criminal trials, ICRA protects against unreasonable searches, prohibits double jeopardy, provides a right against self-incrimination, guarantees a speedy and public trial by jury, imposes strict limits on criminal fines, provides a right to counsel, establishes minimum qualifications for presiding judges, and requires that criminal statutes be made available to the public. *See* 25 U.S.C. § 1302(a)(2)-(4), (6)-(7), (c). In contrast, ICRA does

not require that tribes publish their civil law. It does not extend the Seventh Amendment right to civil jury trials to tribal court. *See Santa Clara Pueblo*, 436 U.S. at 63. And although it requires tribes to provide "due process" generally, 25 U.S.C. § 1302(a)(8), some courts have construed this requirement to place fewer restrictions on tribal courts than the Due Process Clause imposes on state and federal courts, *see, e.g.*, *Alvarez v. Tracy*, 773 F.3d 1011, 1022 (9th Cir. 2014).

Holding that tribal courts nonetheless have civil jurisdiction over nonmembers would raise serious constitutional questions. This Court's "cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Duro*, 495 U.S. at 693-94 (citing *Reid v. Covert*, 354 U.S. 1 (1957) (addressing limits of court martial jurisdiction over civilians)); *see also Lara*, 541 U.S. at 208-09 (leaving open question whether Congress's subjecting nonmember Indians to tribal court criminal jurisdiction violates Due Process or Equal Protection Clauses); *id*. at 212 (Kennedy, J., concurring in the judgment) (calling statute "unprecedented" and casting doubt on its constitutionality). As it has in the criminal context, this Court should construe the scope of tribal authority in a way that avoids such serious constitutional questions. *See Duro*, 495 U.S. at 693-94.

D. Congress Is Best Suited To Decide Whether, When, And Under What Conditions Tribal Courts May Exercise Civil Jurisdiction Over Nonmembers.

By basing its allowance of tribal court jurisdiction in a theory of retained sovereign authority, the Fifth Circuit was necessarily compelled to hold that this power is available to *any* tribal court system, large or small, developed or undeveloped, trustworthy or corrupt. Unless the Court is likewise prepared to say that tribal courts' maturity, objectivity, and fairness have no bearing on the scope of tribal court jurisdiction, it should be obvious that Congress is far better suited to decide whether, when, and under what conditions tribal courts should be afforded jurisdiction over nonmembers.

No court, including this one, is well positioned to scrutinize the functioning of the hundreds of tribal court systems in this country. But Congress may conduct such an inquiry, or delegate it to an expert agency, using the considerable fact-finding resources of the legislative and executive branches. *Cf.* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908(b), 127 Stat. 54, 125 (creating application process by which Attorney General could approve expedited tribal court assumption of jurisdiction over nonmember domestic violence defendants).

Moreover, Congress is not compelled to reach a one-size-fits-all solution, but may parcel out jurisdiction based on a review of particular tribes' judicial systems. *See* Violence Against Women

Reauthorization Act of 2013, § 908(b). Congress may also decide to grant jurisdiction over particular kinds of cases or issues, as it did in the Violence Against Women Reauthorization Act in the criminal context. *See* 25 U.S.C. § 1304 (conferring tribal court jurisdiction over nonmembers accused of domestic violence on tribal lands). And as it has done there, Congress may enact specific requirements and limitations to protect nonmember defendants. *See id*. § 1304(d)-(e). Congress might, for example, decide to permit removal of cases involving nonmember defendants to federal court or authorize this Court to review tribal judgments in cases involving nonmembers. Or just as Congress has limited the amount of criminal fines that may be imposed even on tribe members, *see* 25 U.S.C. § 1302(a)(7), Congress might cap civil judgments, or limit or eliminate altogether some forms of relief, such as punitive damages. *Cf.* 42 U.S.C. § 1981a (establishing damages caps for certain federal civil rights claims).

E. Accepting Petitioners' Position Does Not Leave Tribes Powerless To Enforce Legitimate Rules Against Nonmembers.

Petitioners recognize that in *Montana*, this Court held that tribes retain some limited legislative authority to create rules for nonmember conduct on land within tribal control. No doubt, for example, tribes may forbid nonmembers from assaulting tribal police officers, as occurred in *Oliphant*. But as this Court's decision in that case demonstrates, it does not follow that tribes have free rein to enforce even entirely legitimate rules against nonmembers through litigation in tribal courts. Nor does denying

tribal courts civil jurisdiction over nonmembers (absent the defendant's consent or congressional authorization) render those regulations meaningless for lack of any way to enforce them.

To start, tribes retain their traditional power to exclude nonmembers from their lands for non-compliance with legitimate tribal rules. *See Plains Commerce Bank*, 554 U.S. at 327-28. For example, the Tribe exercised that power in this case to expel the alleged perpetrator from the reservation. Pet. App. 57. Excluding nonmembers who violate tribal law not only protects the tribe from further harmful conduct, but also may provide leverage to negotiate penalties or compensation for victims in exchange for withholding that sanction.

Second, injured tribe members may bring suit in state, and often federal, court. As citizens of the states in which they reside, tribe members may file suit in state court for injuries suffered on a reservation within that state. *See, e.g.*, *Strate*, 520 U.S. at 459; *Three Affiliated Tribes v. World Eng'g, P.C.*, 476 U.S. 877, 880 (1986); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172-73 (1973). Where appropriate, choice of law principles may require state courts to apply tribal law in such cases. Moreover when the citizenship of the parties is diverse, tribal plaintiffs may often also file suit in federal court. 28 U.S.C. § 1332. Accordingly, at any point during the last nine years of litigation over tribal court jurisdiction, the Does could have submitted their claims to the more neutral forum of a sovereign of which both the plaintiffs and the defendants were members.

Third, tribes can litigate civil claims against nonmembers without permission from Congress so long as the defendant consents. The right to avoid tribal court jurisdiction is a personal right, akin to the right to a judicial forum to resolve a legal claim, which may be waived. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 219-20 (1959) (noting that even if state otherwise lacks jurisdiction over non-consenting tribe member, state court may hear suit filed by tribe member); *id.* (assuming tribal court may exercise civil jurisdiction over suit filed *by* nonmember); *cf. also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (parties may waive right to judicial forum by agreeing to submit to arbitration). A nonmember may, for example, consent by initiating the litigation in tribal court. *See Williams*, 358 U.S. at 219-20. Or a nonmember may consent by appearing voluntarily to defend a case in tribal court without interposing a timely jurisdictional objection. *Cf., e.g.*, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (personal jurisdiction may thus be waived).

A defendant may also consent in advance, for example, by agreeing to a forum selection clause in a contract. *See Plains Commerce Bank*, 554 U.S. at 364 (Ginsburg, J., dissenting). Thus, a tribe can ensure tribal court jurisdiction over mineral lease disputes by insisting on provisions in their leases that require such disputes to be resolved in tribal court on the basis of tribal and federal law. And while the Court need not decide the question in this case, *see infra*, at 46, it is also possible that tribes could condition other tribal government benefits, including the right to do

business on a reservation, on a nonmember's agreement to submit certain disputes to tribal court adjudication. *But cf.* Cert. Supp. Br. 10-12 (noting risk of allowing tribes to leverage right to exclude from reservation into authority to pervasively subject nonmember conduct to tribal regulation and adjudication).

However, none of this helps respondents in this case. Regardless of the specific mode of consent, it must be knowing and unambiguously expressed. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 341-42 (bank did not consent to tribal criminal jurisdiction over former customer's discrimination claims by filing eviction proceeding in tribal court); *cf. Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998) (holding that the "waiver of employees' statutory right to a judicial forum" must be "clear and unmistakable"). And there is no basis to claim that petitioners consented, expressly or by implication, to the tribal jurisdiction asserted in this case. Certainly petitioners never consented to this specific tribal court litigation, instead objecting to the court's jurisdiction at every turn. *See* Pet. App. 3-5. Nor have petitioners ever consented to tribal court adjudication of these claims in a contract with Doe (with whom petitioners had no contract) or the Tribe. While the Tribe required Doe and his parents to sign an agreement with the tribe to participate in the Youth Opportunity Program, J.A. 77-81, there was no contract governing Dollar General's acceptance of Doe's placement in the store. And while the store is operated on the reservation pursuant to a lease with the Tribe, the district court correctly found that nothing in the lease comes close to unequivocally

consenting to tribal court jurisdiction over tort claims against petitioners by members of the tribe. *See* Pet. App. 62-63.[33] To the contrary, the only provisions addressing choice of forum provide solely for tribal court jurisdiction over disputes concerning the lease itself. *See* J.A. 47-48; Petr. Cert. Supp. Br. 8-9. That the lease provides only for tribal court jurisdiction over disputes about the lease strongly suggests that the parties did not contemplate tribal jurisdiction over anything else. Finally, the only condition imposed on obtaining a business license on the reservation is the promise to pay applicable taxes. *See* Pet. App. 76 n.1 (quoting Choctaw Tribal Code § 14-1-3(1)).

Any claim that petitioners have otherwise *implicitly* consented to tribal jurisdiction through its contacts with the tribe and its members is both unsupported and insufficient. Such a claim "is little more than a variation of the argument" – rejected by this Court time and again – "that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him." *Duro*, 495 U.S. at 695; *see also Plains Commerce Bank*, 554 U.S. at 328; *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993).

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[33] Nor, as the district court observed, is there a sufficient nexus between that commercial relationship and the tort claim asserted. *See* Pet. App. 62-63; *see also Plains Commerce Bank*, 554 U.S. at 338 ("[W]hen it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'") (citation omitted).

Accepting petitioners' position simply puts tribal jurisdiction over nonmembers in roughly the same position as state court jurisdiction over citizens of other states. That is, in state court, out-of-state defendants may agree to submit to a state court's jurisdiction in advance (*e.g.*, through a contract) or at the time of litigation (*e.g.*, by failing to object to the court's jurisdiction). But otherwise they generally retain the right to require the case be adjudicated in the forum of a sovereign to which both parties belong by removing the case to federal court. *See* 28 U.S.C. § 1441. So, too, nonmembers of a tribe may consent to tribal court jurisdiction, but generally retain the right to require the plaintiff to litigate the case in the courts of a state (or federal) government in which all parties equally participate.

III. Tribes May Not Regulate Nonmember Conduct Through Unwritten Tort Law Under The First *Montana* Exception.

The tribal court lacked jurisdiction in this case for a second, independent reason. "According to [this Court's] precedents, 'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)). And, as discussed, "efforts by a tribe to regulate nonmembers" are "presumptively invalid." *Id.* (citation and internal quotation marks omitted). Instead, tribes' legislative jurisdiction over nonmembers is confined to the two categories of cases described by the *Montana* exceptions, the first premised on the regulated party's consent and the second on the need for tribal self-protection. *See id.*

at 332, 341. Respondents have abandoned any claim that jurisdiction in this case can be supported under the second exception. *See* Pet. App. 10. So the question is whether it can be justified under the first. It cannot.

A. The First *Montana* Exception Provides A Narrow Allowance For Regulation Of Nonmembers, Premised On Consent Of The Governed.

Under the first *Montana* exception, a "tribe may regulate, *through taxation, licensing, or other means*, the activities of nonmembers who *enter consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added). Application of this exception is guided by three principles.

First, tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Plains Commerce Bank*, 554 U.S. at 337. Accordingly, when construing the scope of this exception, courts must avoid the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Id*.

Second, the *Montana* exceptions "are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Id*. (citations and internal quotation marks and citations omitted).

Third, like all exercises of retained inherent authority, regulations under the first *Montana* exception ultimately "must stem from the tribes' inherent sovereign authority to set conditions on

entry, preserve tribal self-government, or control internal relations." *Id*. at 337.

The Fifth Circuit's conclusion that tribes may impose tort liability on any company doing business on a reservation so long as the alleged tort has a "logical nexus to some consensual relationship between a business and the tribe or its members," Pet. App. 17, cannot be squared with these principles.

B. Regulation Through Unwritten Tort Law Is Not An "Other Means" For Regulating Consensual Relationships Within The Meaning Of The First *Montana* Exception.

Petitioners do not contest for purposes of this case that tribes may engage in *some* forms of regulation of nonmember businesses operating on tribal lands, including possibly matters relating to the employment of tribe members. *See Plains Commerce Bank*, 554 U.S. at 334-35. Nor do petitioners dispute that "the tribal tort at issue here is a form of regulation." *Id*. at 332. Instead, the question is whether regulation through tort litigation in tribal court is among the "other means" of regulating consensual relationships this Court contemplated when it described the first *Montana* exception. *See Montana*, 450 U.S. at 565. It is not.

The essence of the first *Montana* exception is consent. *Montana*, 450 U.S. at 565. That consent provides the only possible justification for subjecting a citizen of the United States to a legal authority existing outside of, and unconstrained by, our constitutional structure, particularly when the nonmember's conduct poses no serious threat to the

political integrity, economic security, or health or welfare of the tribe. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 337; *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment); *Duro v. Reina*, 495 U.S. 676, 694 (1990).

Just as a tribe's *adjudicatory* jurisdiction can be established by a defendant's express consent through a forum selection clause, a nonmember may consent to a tribe's *legislative* jurisdiction through a choice of law provision in a contract or by similar express means. As noted, there was no such express consent in this case. So the question is whether petitioners *implicitly* consented through their conduct. Nonmember consent can arise only from knowingly accepting conditions on their right to enter tribal lands or enjoy tribal resources. *See Plains Commerce Bank*, 554 U.S. at 335. But for that implied consent to be knowing and voluntary, nonmembers must be provided clear notice of what activities will subject them to tribal authority and what the governing law requires of them. *See id*. at 337-38.

Thus, in illustrating the kinds of regulation permitted by the first *Montana* exception, this Court cited to cases involving laws whose application and meaning could be discerned *ex ante* with reasonable certainty. *See Montana*, 450 U.S. at 565-66 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959) (contract dispute); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tax on grazing livestock on tribal land); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (business permit tax); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-54 (1980) (tax on cigarette sales occurring on reservation)). In three of these cases, a tribe was permitted to enforce a

written statute or ordinance that had been approved by the Federal Government and provided clear requirements with respect to discrete activities. *See Washington*, 447 U.S. at 144, 153; *Morris*, 194 U.S. at 385 & n.1; *Buster*, 135 F.3d at 940. The nonmember plaintiff in the fourth case sought enforcement of a contract against Navajo customers. *See Williams*, 358 U.S. at 222-23.[34]

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[34] In *Williams*, this Court did not directly hold that Navajo courts would have jurisdiction over such a claim, only that Arizona's courts lacked jurisdiction. *Id*. It is fair to say, however, that the opinion suggests that the Court assumed that the suit could be heard in the courts operating on the Navajo reservation. *See id*. at 223. However, those courts were not tribal courts like the ones at issue in this case. Instead, the only courts operating on the Navajo reservation at the time were Courts of Indian Offenses, established and ultimately controlled by the Federal Government. *See id*. at 222 ("Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."); *United States v. Wheeler*, 435 U.S. 313, 327 (1978) (explaining that "before the Navajo Tribal Council created the present Tribal Code and tribal courts" in 1958-59, "the Bureau of Indian Affairs established a Code of Indian Tribal Offenses and a Court of Indian Offenses for the reservation"). Such courts are obviously differently situated than tribal courts operating outside the purview of the Federal Government and the U.S. Constitution. *See Duro*, 495 U.S. at 689-90 (treating jurisdiction exercised by Courts of Indian Offenses as a form of *federal*, not *tribal*, power).

In addition, the suit in *Wilson* was brought *by* a nonmember against a tribal defendant. As discussed above, a nonmember may consent to tribal jurisdiction by filing suit in tribal court. *See supra* at 43-44. But it is an entirely different question whether a tribal court may exercise jurisdiction over an unconsenting nonmember defendant. *See Nevada v. Hicks*,

Notably, none of the examples this Court gave to illustrate the first *Montana* exception involved a tort claim. Indeed, this Court has never upheld application of tribal tort law to a nonmember. For good reason: tort law is fundamentally different. For one thing, tort law creates particularly difficult problems of notice and consent. Unlike tax statutes and business licensing requirements, tort law is generally unwritten. In this case, for example, any company wishing to determine the tort rules applicable to its business would find that while the Choctaw Tribal Code expressly provides jurisdiction to hear tort claims against nonmembers, *see* Choctaw Tribal Code § 1-2-3(g), it contains no codification of general tort law. *See id.* § 1-1-4.

Tribal court precedent may provide some guidance on the content of tribal tort law, but given that many tribal court systems have only recently been created, precedents can be sparse, in addition to often being difficult to access. *See, e.g.*, Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 LAW LIBR. J. 199, 199-200 (2014). At the same time, nonmembers cannot count on tribal law mirroring the state or federal law with which they may be more familiar. *See, e.g.*, *Plains Commerce*, 554 U.S. at 338 (noting

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533 U.S. 353, 358 n.2 (2001). That, no doubt, is why, at the time of *Wilson*, "general federal law prohibit[ed] Courts of Indian Offenses (tribunals established by [federal] regulation for tribes that have not organized their own tribal court systems) from exercising jurisdiction over unconsenting nonmembers." *Id.* at 383 (Souter, J., concurring) (citing 25 C.F.R. § 11.103(a) (2000)); *see also supra* at 32-33 n.29.

"novel" legal rule applied by tribal court based on "Lakota tradition as embedded in Cheyenne River Sioux tradition and custom"). Indeed, these differences can be a point of pride among the tribes, reflecting each tribe's "unique customs, languages, and usages." *Duro*, 495 U.S. at 693.

Accordingly, as a practical matter, it is often impossible for a business to discern the content of all the tort law and tribal traditions potentially applicable to its relationship with tribal employees and customers. Like other tribes, the Choctaw contemplate that even tribal judges may be ignorant of the law they must apply in all its relevant details, providing that, when "doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages." Choctaw Tribal Code § 1-1-4; *see also supra* at 7 n.16 (collecting citations to other tribal codes)

In addition, to meaningfully consent in advance to tribal tort regulation, a nonmember must be able to know *when* it will apply. That is easy enough to discern when it comes to taxes, contracts, and business licenses. But when jurisdiction is founded on the tribal membership of an employee, or the tribal identification of a corporation, it may be difficult or impossible for a business to know whether any particular transaction or course of conduct is governed by tribal law. It would require, for example, that a company doing business on the reservation inquire into the race and tribal membership of its employees and customers, and have a way of determining the tribal identity of a corporation that may have owners, officers, and

employees of various ethnic groups and tribal affiliations.

The notice difficulties are compounded by the requirement that the conduct concerning a tribe or its member must take place on tribal land. *See Plains Commerce Bank*, 554 U.S. at 333. While in some cases, a defendant may conduct business on a clearly marked reservation, in other cases a defendant may simply be passing through land difficult to identify as tribal. After all, in many states, reservations consist of a patchwork of small land holdings that may or may not be marked as tribal land. The reservation of the Mississippi Band of Choctaw Indians, for example, "contains more than 35,000 acres of land situated throughout Mississippi in ten different counties."[35]

The special role tribal courts play in developing and administering tort law provides further reason for caution. *See Duro*, 495 U.S. at 693. The features of tribal courts that risk unfair treatment of outsiders – the lack of judicial training and independence, the risk of local bias and the limited protections against it, etc., *see supra* at 2-9, 39 – give rise to the risk that the law a business reasonably expected to govern its conduct will not be the law applied to it in a particular litigation.

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[35] *MBCI Communities*, Mississippi Band Choctaw Indians, http://www.choctaw.org/aboutMBCI/community/index.html (last visited Aug. 29, 2015).

C. As Construed By The Fifth Circuit, The First *Montana* Exception Would Swallow The Rule.

The Fifth Circuit's decision also cannot be reconciled with this Court's instruction that the *Montana* exceptions not be permitted to "swallow the rule" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank*, 554 U.S. at 330 (citations and internal quotation marks omitted).

Tort law is quite different from the specific taxes and contract enforcement this Court had in mind in *Montana*, in that tort law applies to nearly every aspect of a nonmember's conduct on the reservation. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 6 (5th ed. 1984) (noting breadth of tort law's purview). Allowing tribes to impose tort law obligations with respect to every consensual relationship nonmembers form with a tribe or its members effectively means tribal regulation of nearly everything a nonmember does on the reservation. In this way, the breadth of tribal regulation is comparable to the criminal jurisdiction this Court has held tribes necessarily surrendered upon incorporation into the United States. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). And it comes close to re-establishing the tribes' clearly divested authority to govern everyone who comes onto tribal land. *See Duro*, 495 U.S. at 685-86.

D. The Fifth Circuit's Application Of The First *Montana* Exception Untethers Tribal Regulation From The Tribes' Interest In Managing Tribal Land, Protecting Self-Government, And Controlling Internal Relations.

The scope of the jurisdiction claimed in this case thus illustrates a deeper flaw in the Fifth Circuit's reasoning. For imposing tort regulation on nearly everything a company does on a reservation extends the tribe's legislative power far beyond what is necessary to protect the "tribe's sovereign interests [in] managing tribal land, protecting tribal self-government, and controlling internal relations." *Plains Commerce Bank*, 554 U.S. at 335 (citations and internal punctuation omitted); *see also Montana*, 450 U.S. at 564 (the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").

This case illustrates the problem. Although a tribe may understandably wish to regulate nonmember conduct that injures tribe members, the retained inherent power of self-government has never extended to all nonmember conduct that harms a tribe member; to the contrary, from the earliest days of incorporation, tribes have been expected to turn to the states and the Federal Government to remedy the harmful conduct of nonmembers. *See supra* § II.A; *Strate*, 520 U.S. at 457-58. Moreover, the conduct at issue in this case has no bearing on *internal* relations as this Court has conceived of that power. *See Hicks*, 533 U.S. at 360-61 (authority over internal relations

includes power to determine tribal membership, prosecute member-on-member crimes, and regulate domestic relations) (citing *Montana*, 520 U.S. at 459).

Nor does the regulatory power asserted here have a sufficient relation to "managing tribal land." *Plains Commerce Bank*, 554 U.S. at 334. The tort asserted in this case does not, for example, concern the sale of tribal land, the extraction of reservation resources, or the zoning of property within the reservation. *See, e.g.*, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tax on resource extraction); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tax on grazing on tribal lands). To be sure, the tort alleged took place on a reservation. But, this Court has repeatedly emphasized that a tribe's retained inherent authority to manage tribal property and control entry onto reservation land does not extend so far as to authorize pervasive regulation of nonmembers' conduct on reservation land. *See Plains Commerce Bank*, 554 U.S. at 328; *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993); *Duro*, 495 U.S. at 685-86, 695-96; *Montana*, 450 U.S. at 565.[36]

That the first *Montana* exception did not open the door to pervasive tribal regulation of

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[36] Even if tribes had the authority to condition entry onto tribal reservations upon nonmembers' consent to tribal tort regulation of all their consensual interactions with the tribe and its members, this Tribe has never conveyed such a condition to nonmembers.

nonmembers should be unremarkable given the history described above. The *Montana* exceptions were intended to codify – not dramatically expand – the prior boundaries of tribal authority recognized in this Court's cases on the basis of its analysis of the history of the United States' treaties with the tribes and the necessary consequences of their incorporation into the United States. For the reasons discussed above, that history is inconsistent with any claim that Tribes have retained authority to regulate nonmembers through the medium of tort suit in tribal courts. The recent vintage of tribal attempts to subject nonmembers to tort claims in tribal court is strong reason to doubt that it was understood as an essential aspect of tribal authority to be retained after incorporation.

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Petitioners do not deny the conscientious effort of many tribes to improve the quality, objectivity, and professionalism of their courts. But that is a "consideration[] for Congress to weigh in deciding whether Indian tribes should finally be authorized to" exercise civil court jurisdiction over nonmembers. *Oliphant*, 435 U.S. at 212. It has "little relevance" to the question whether the jurisdiction claimed in this case has *existed for more than a century*, even before tribes had modern court systems and even for those tribes that lack fair and reliable judicial systems today. *Id*. History and the decisions of this Court make clear that the authority asserted by the Tribe in this case is not a power tribes retained, but is one they must ask Congress to restore.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Edward F. Harold
FISHER & PHILLIPS LLP
201 St. Charles Ave.
Suite 3710
New Orleans, LA 70170
(504) 522-3303

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

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