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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Petitioners are the non-Indian operators of a business on a tribal reservation. Respondent Doe is a member of the tribe. Doe seeks to hale petitioners into his tribal court, asking the tribe to award him millions of dollars in damages (including punitive damages) for an alleged violation of unwritten tribal tort law by one of petitioners' employees. Petitioners do not attempt to avoid their applicable duties in tort. Rather, because petitioners have not given actual consent to the tribal court's jurisdiction, the proper forum for a claim by Doe is a neutral state court.

The starting point for this case is the strong presumption against tribes exercising jurisdiction over nonmembers such as petitioners. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008). Here, that presumption is not overcome. No statute or treaty grants the Tribe the power to finally decide Doe's private tort claim. Respondents instead assert that, when the tribes were incorporated into the United States in the 1800s, Congress accepted that every tribe retained the power to decide members' private civil claims against nonmembers. There is no evidence that the federal government of the time had that understanding and every reason to think it did not. The tribes were recently hostile. Even those tribes that did have judicial systems (and many did not) were not bound by basic constitutional protections, such as the Due Process Clause and the Seventh Amendment right to trial by jury.

By contrast, non-citizen litigants in state court were guaranteed the protections of the Constitution;

the right to avoid local bias by removing many cases to neutral federal court; and the right to seek this Court's review of rulings on questions of federal law. That prospect, in turn, encouraged the lower courts to adhere to the requirements of the Constitution. Respondents' remarkable theory is that Congress in the 1800s nonetheless intended to treat the widely varying (indeed, frequently non-existent) tribal judiciaries with greater respect and independence than it afforded the established judiciaries of the sovereign states. That claim answers itself.

Respondents ask this Court to engage in extra-record fact-finding to determine that this one tribe's courts regularly and fairly decide private tort suits by members against nonmembers. Br. 7. But their effort only proves the opposite. Respondents base their claim on the representation that they reviewed "almost 5,000 cases involving nonmembers," finding that eighty-five percent "resulted in a settlement or a win for the non-Indian party." *Id*. Notably, petitioners could test that claim – like any other inquiry about the doctrines and decisions of this tribal court – only by traveling personally to the Tribe's lone courthouse and studying individual case files, one by one. So petitioners did, reviewing a sample of 1223 cases involving nonmembers. It turns out that respondents' representation was very misleading.

In fact, only *thirteen* of the examined cases – roughly one percent – were private claims by members against nonmembers. In one, the nonmember defendant was dismissed; the other twelve are still pending. The remaining ninety-nine percent were *brought by a nonmember*, who by

definition actually consented to jurisdiction. The vast majority were breach of contract claims, most for nonpayment of a debt. More than one-third simply sought enforcement of a garnishment order of *a state court*.

These data do not support respondents' contention that tribal tort suits by members against nonmembers are commonplace and routinely resolved in the nonmembers' favor. It refutes it.

Respondents' statistics do serve to show that petitioners' position is no obstacle to the tribal courts enforcing tribal tort law in the overwhelming majority of cases – *i.e.*, those between citizens of the sovereign (the tribe's members) and whenever the nonmember actually consents to tribal court jurisdiction by filing suit in tribal court or agreeing to a forum-selection clause in a contract. To the extent respondents are correct that the experience of the Mississippi Choctaw is representative, the tribes would retain their jurisdiction in roughly ninety-nine percent of cases involving nonmembers. That is no major intrusion on tribal prerogatives.

At the very least, respondents' flawed argument highlights that while such empirical questions are *critically* important, Congress is the correct institution to gather the actual facts and adopt appropriate legal rules that account for the varying circumstances among tribal court systems. As it has in other contexts, Congress can adopt minimum standards for judicial competence and independence that ensure that claims – which raise the prospect of the tribe awarding crippling damages in favor of their members and against non-Indians – are fairly decided and that rulings on questions of federal law

are ultimately reviewable in this Court. *See* Pet. Br. 41.

For those reasons and those that follow, the judgment should be reversed.

I. Absent Actual Consent, Tribes Do Not Have The Inherent Power To Decide Tort Claims By Members Against Nonmembers.

Petitioners' first argument assumes for present purposes that tribes have the "legislative jurisdiction" to adopt tort law that governs the on-reservation conduct of nonmembers. But even on that assumption, the tribes' courts lack "adjudicative jurisdiction" to decide members' private civil claims against nonmembers under that law.

There is a well-settled presumption against tribes exercising jurisdiction over nonmembers. *See Montana v. United States*, 450 U.S. 544, 565 (1981). Everyone agrees that no legislation overcomes that presumption here, as no federal statute grants tribal courts the power to adjudicate civil claims against nonmembers.

Respondents' argument is that this Court should infer adjudicative jurisdiction from legislative silence, holding that the tribes possess it because they have not "been stripped of" it by any specific law or treaty. Br. 39. Their premise is that the tribes had this power as part of their inherent authority that pre-existed and survived incorporation into the United States.

Respondents do not attempt to show any of those things as a historical matter. Rather, they maintain that the actual history is irrelevant because prior cases supposedly state that tribes have civil

adjudicative jurisdiction as a "form of regulation." Br. 16. They insist that the burden therefore is on petitioners to overcome *stare decisis* effect of that prior precedent. *Id*. 38-39. Those arguments lack merit.

A. Upon Incorporation Into The United States Tribes Lost Any Power To Adjudicate Tort Claims By Members Against Nonmembers.

This Court has previously addressed similar questions about tribal jurisdiction under an established, commonsense framework. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (civil); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (criminal). That precedent directs courts to examine the shared understanding of the Executive, Congress, and courts at the time of incorporation, as well as the claimed power's compatibility with the United States' overriding sovereignty. Pet. Br. 23.

1. The Relevant Historical Materials Establish That Congress Did Not Understand That Tribes Would Adjudicate Tort Claims By Members Against Nonmembers.

Respondents do not seriously dispute that a historical inquiry is fatal to their position. *See* Pet. Br. 23-46; Resp. Br. 38-42. Rather, they attempt to deride petitioners' persuasive historical evidence as "amateur law-office history." Resp. Br. 39. That is true only if one calls a judicial chambers a "law office" and Chief Justice Rehnquist an "amateur"; respondents apparently fail to recognize that much of

this historical record is collected in the Chief Justice's opinion for the Court in *Oliphant*. *See* Pet. Br. 24-25, 30-31, 36. And the Court will not fail to notice the absence of any contrary historical evidence in respondents' brief.

As this Court observed proximately to the relevant period in our nation's history, upon incorporation of the tribes, it was the general policy of the United States to "vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians" 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) (emphasis added).

That is unsurprising. Respondents do not dispute that at the relevant time, few tribes had anything like a recognizable court system. Those that did overwhelmingly did not distinguish criminal and civil actions. Pet. Br. 24. Indeed, the tribal courts of the time generally do not appear to have *recognized* anything resembling the tort regime that respondents claim is subject to the tribe's *retained* adjudicative jurisdiction in this case.[1]

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[1] The fact that respondents' *amici* can identify only three tribes that distinguished between civil and criminal jurisdiction, each of which had unusually developed and westernized legal systems, shows only that most tribes recognized no such distinction. Historians Br. 13. The same conclusion follows from the fact that the *amici* ground their claim that tribes retained civil jurisdiction on materials overwhelmingly referring to criminal matters.

Those *amici* point to a smattering of examples in an effort to prove up claims that either: (i) are not disputed (that upon

This state of affairs answers the United States' point that many treaties of the period did not by their terms expressly withdraw tribes' "civil" jurisdiction over nonmembers. Br. 26-27. The relevant treaty language captured all tribal jurisdiction, which drew no distinction between criminal and civil cases. Pet. Br. 25-30. The treatise on which the United States relies explains that even as late as the 1940s, by which point tribal courts *had* distinguished civil and criminal cases, the tribes' codes typically granted their courts jurisdiction over matters in which members were defendants, but only such "other suits between members and nonmembers which are brought before the Courts *by stipulation of both parties*." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 382 (1942) (emphasis added). The Courts of Indian Offenses, which operated on reservations lacking a tribal court system, applied the same principles. *Id.*

The United States also omits that the Attorney General in 1834 concluded that it was "very certain" that absent intermarriage or adoption into a tribe, Americans were "not amenable to the laws or courts of the Choctaw nation." 2 Op. Att'y Gen. 693, 695 (1834). That conclusion is not contradicted by a later statement that, with respect to Indian Territory

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incorporation, tribes retained some regulatory jurisdiction over nonmembers); or (ii) that this Court rejected as a historical matter in *Oliphant* (that tribes retained comprehensive jurisdiction – including in *criminal* cases, Br. 14, 18 – "over non-Indians on tribal land," *id*. 8). They notably identify zero examples of tribes exercising anything resembling inherent adjudicative jurisdiction over nonmembers in tort.

where no state or territorial courts existed, tribal courts had jurisdiction over "such white men as of their own free will and accord choose to *become members* of the [Choctaw] nation." 7 Op. Att'y Gen. 180, 185 (1855) (emphasis added). That Opinion is consistent with the understanding that, particularly where state and federal courts *were* available (as they obviously are now), tribes would not have jurisdiction over members' private civil suits against Americans who had *not* joined the tribe

If the historical understanding had been to the contrary, it should have been easy for respondents to demonstrate a pattern of tribal courts asserting civil jurisdiction over nonmembers from the time of incorporation until now. But the opposite is true: they are unable to dispute that tribes began asserting this form of jurisdiction with any regularity only in the mid-1900s, roughly one *century* after incorporation. Pet. Br. 29.

Moreover, if respondents were right that the United States had always intended that tribal courts would exercise that jurisdiction, Congress surely would have done things differently. It would have articulated minimum competence and due process standards, as it did much later with respect to criminal jurisdiction over nonmember Indians and nonmember domestic violence defendants. *See* 25 U.S.C. §§ 1302, 1304. As with the courts of sovereign states, Congress would have provided a right of removal to federal court and a right to seek review in this Court of rulings on questions of federal law. At the least, it would have made this Court's interpretations of federal constitutional law binding

on tribal courts and recognized a right to a jury trial. *See* Pet. Br. 33.

Put otherwise, respondents' argument requires this Court to conclude not just that Congress was solicitous of the power of every single tribal court, but that it was substantially more so than with respect to the courts of sovereign states. At the very least, that claim is sufficiently tenuous that in the face of the existing legislative silence it cannot overcome the strong presumption against tribes exercising jurisdiction over nonmembers.

2. Tribal Court Jurisdiction Over Nonmembers Is Incompatible With The Overriding Sovereignty of The United States.

Even setting the historical record aside, it is fundamentally incompatible with the overriding territorial sovereignty of the United States for an American citizen to be deprived of liberty or property by a court system operating within the United States, but not governed by our Constitution, absent his actual consent. *See* Pet. Br. 37-40. This Court reached precisely that conclusion with respect to criminal matters in *Oliphant*. The fact that this is a civil matter so no one can go to jail, Resp. Br. 33-34, is not responsive to the problem. The affront to national sovereignty, which exists equally in the civil context, is subjecting an American citizen to the coercive power of a foreign sovereign operating within our borders unconstrained by our Constitution.

B. There Is No Merit To Respondents' Argument That This Court Already Granted Tribes Adjudicative Jurisdiction Over Nonmembers Under The First *Montana* Exception.

Because respondents cannot contest the foregoing, their only hope is to persuade this Court that it has already held that the first *Montana* exception grants tribes adjudicative authority whenever they have regulatory authority. Resp. Br. 22, 25. That argument cannot be squared with the fact that this Court took great care to specify – after *Montana* and all the other cases respondents cite – that "whether a tribe's adjudicative jurisdiction over nonmembers defendants *equals* its legislative jurisdiction" is an "open . . . question," one that "deserves more considered analysis" than it has yet received. *Nevada v. Hicks*, 533 U.S. 353, 358, 374 (2001). That is correct, as respondents misread this Court's cases.

1. Respondents argue that *Montana* authorized tribal court adjudication of private tort claims against nonmembers, implying that such suits are among the retained "other means" of "regulating" nonmembers' consensual relationships with tribes and their members. *See* Resp. Br. 22-25. In fact, the forms of "regulation" recognized and cited in *Montana* are distinguishable for two important reasons.

First, they are bodies of positive law, such as taxation and licensing. By contrast, the tribe's authority to permit private parties to *enforce* those bodies of law by judicial decree is a separate matter.

Oliphant is a perfect example: this Court did not doubt the tribe's authority to enact laws prohibiting an assault on tribal officers (legislative jurisdiction), but it held that tribes do *not* have the authority to enforce those laws against nonmembers through a criminal trial in tribal court (adjudicative jurisdiction).

Also, the first *Montana* exception involves regulations that the tribe as sovereign itself applies directly to the nonmember – for example, taxes and licensing regulations. Those measures are therefore much more easily understood as forms of tribal self-governance. In turn, a suit by the tribe itself to enforce its regulation may be "regulatory" too. This case, by contrast, is a private civil claim regarding alleged harm to an individual tribal member in his individual capacity. By definition, it is at least one material step removed from self-governance.

Any doubt is resolved by the fact that the *Montana* exceptions are a reflection of what Congress, the Executive, and the courts would have understood at the time of incorporation. They are not a discretionary grant of tribal jurisdiction by this Court. And for the reasons given in the previous section *that respondents do not seriously dispute*, there is every reason to believe that Congress did *not* anticipate that tribes would exercise civil tort jurisdiction against nonmembers. That result does not change simply by slapping the label "regulation" on that significant area of tribal authority.

3. Respondents' reliance on cases post-dating *Montana* fares no better. They invoke this Court's assumption that substantive "tribal tort *law*" is "a form of regulation." *Plains Commerce Bank*, 554 U.S.

at 332 (emphasis added); *see* Resp. Br. 16, 24. But this Court has never suggested that private tort *litigation* is a form of regulation contemplated by the first *Montana* exception.

Respondents say that *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), establishes that the *Montana* framework resolves the scope of tribes' adjudicative authority. Resp. Br. 22-23. *Hicks*, however, explained that *Strate*'s actual "holding" is merely that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 533 U.S. at 357-58; *see Strate*, 520 U.S. at 453. Having found that the tribe lacked legislative power over the conduct at issue, *id*. at 456-59, the Court had no need to consider whether it would otherwise have had adjudicative jurisdiction. *See also* Resp. Br. 22-23 (similarly erring in relying on *Atkinson Trading Co. v. Shirley*'s characterization of *Strate* as holding that the *Montana* exceptions apply to "tribal assertions of [civil] adjudicative authority") (citing 532 U.S. 645, 652 (2001)).

Respondents say that *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), rejected the idea that tribal courts *never* have civil adjudicative jurisdiction over nonconsenting nonmembers. Br. 34. Again, *Hicks* makes clear that this issue remains open. 533 U.S. at 358 n.2 (explaining that *National Farmers* "*avoided* the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions" (emphasis added)).

National Farmers did state that *Oliphant*'s categorical rule that tribes never have criminal jurisdiction over nonmembers does not necessarily

apply to every civil case in every context, noting that *Oliphant* relied on some factors that were criminal-specific. *See* 471 U.S. at 854-55. But petitioners do not contend that *Oliphant* decides this case as a matter of *stare decisis*. Instead, it establishes the governing legal framework. Petitioners undertake – and respondents reject – exactly the inquiry that *National Farmers* calls for: 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," taking into account the differences between criminal and civil jurisdiction. 471 U.S. at 855-56 (footnote omitted); *see* Pet. Br. 20-40.

4. With no sound *stare decisis* argument, respondents are left to claim that it simply "makes good sense" that tribes' adjudicative jurisdiction would follow *ipso facto* from their legislative jurisdiction. Br. 21; *see also id*. 24. That is not persuasive.

Congress would have recognized the obvious point that liberty and property are separately put at risk both by initial arbitrary lawmaking and by subsequent unfair adjudication of facts and biased application of law to facts in particular cases, including cases like this one that present the prospect of a tribe awarding one of its members a multi-million dollar punitive damage award. Our legal system includes not just the U.S. Code but the extensive Rules of Civil and Criminal Procedure designed to ensure that the law is fairly enforced in court. Similarly, American courts may refuse to

enforce a foreign judgment because of structural concerns about the adequacy of the foreign courts, even when there is no question about the foreign government's underlying authority to regulate the defendant's conduct. *See, e.g.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239-40 (2d Cir. 2012).

Respondents counter that an essential element of sovereignty is the power to always enforce the sovereign's laws in its own courts. That is simply wrong: even sovereign *states'* laws are commonly applied in other state and federal courts under choice of law principles, including after removal to federal court. Also, as discussed, respondents' data shows that tribes do not require this form of jurisdiction to adjudicate ninety-nine percent of cases involving nonmembers.

C. Tribal Courts May Exercise Jurisdiction Over Nonmembers Only If The Nonmember Actually Consents.

Respondents' argument fails even if the *Montana* framework governs the scope of adjudicative jurisdiction, because petitioners did not actually consent to the tribal court's jurisdiction. The Court will avoid construing the first *Montana* exception in a way that "risk[s] . . . subjecting nonmembers to tribal [adjudicative] authority without *commensurate* consent." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). While forms of constructive consent may suffice for imposition of taxes and licensing requirements, only actual consent is commensurate to the exercise of tribal adjudicative over tort claims against nonmembers.

There is a ready analogy to a party's consent to the resolution of a dispute outside the ordinary civil court system through binding arbitration. That decision requires actual, not constructive, consent. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998). That makes perfect sense: the party is giving up substantial constitutional protections, and "[c]ourts do not presume acquiescence in the loss of fundamental rights." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012) (citation omitted).

Respondents nonetheless maintain that a nonmember *constructively* consents to tribal court jurisdiction by engaging in a consensual relationship with a tribe or its members. Resp. Br. 29. They embrace the startling breadth of that rule: the tribe would have adjudicative jurisdiction over every claim against any nonmember having some nexus with a consensual relationship with a tribe member or a tribe. *Id*.

In this particular case, respondents claim that a party operating a business on tribal land will intuitively know that it is subject to tribal court jurisdiction, including for tort claims. Like all of respondents' arguments regarding consent, this one is simply question begging: what the nonmember would expect turns on how this Court resolves the Question Presented in this case.

It just as easily could have been said that the defendant in *Oliphant* necessarily understood that he would be subject to the tribe's criminal jurisdiction. In fact, the tribe in *Oliphant* posted notices at the entrances to the reservation "informing the public that entry onto the Reservation would be deemed

implied consent to the criminal jurisdiction of the Suquamish tribal court." 435 U.S. at 193 n.2. The tribe still lost.

Respondents themselves have expressed doubts about their own rule. For example, the Tribe apparently did not believe that petitioners constructively consented to tribal court jurisdiction over claims relating to their lease simply by engaging in a consensual relationship with a tribal landlord; it required petitioners to agree in writing that those disputes would be heard in tribal court. J.A. 47-48.[2]

Respondents' argument also creates substantial problems of administration. Jurisdictional rules must be clear in advance. *See, e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). But if respondents prevail, it will often be impossible to know *ex ante* whether adjudicative authority lies in tribal, or instead state or federal, court. What kinds of on-reservation conduct are sufficient? What if the nonmember is a business delivering goods ordered by a member? What if the nonmember knowingly

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[2] Respondents do not seriously claim that petitioners *actually* consented through the lease (which conspicuously omits any mention of tort suits or liability to third parties) or otherwise. The fact that neither the tribal court nor respondents assert that the tribal court had jurisdiction under the lease's limited choice-of-forum provision resolves that issue. *See* Pet. App. 85-86; Resp. Br. 31; *contra* U.S. Br. 13. The provision of the lease the Government cites does not constitute consent to tribal court jurisdiction because the Tribe's long-arm statute is neither a law that petitioners can "comply with" nor a law that "pertain[s] to [a] specific use of the demised premises." J.A. 45.

travels onto the reservation to purchase goods from an Indian business? What is the rule for employees of a business that does operate on a reservation? And so on. All of those are commercial activities on the reservation, but respondents and their *amici* have no administrable rule for determining when a private civil claim should be brought in tribal court.

Layer on top of that the significant uncertainty, acknowledged by respondents' *amici*, whether the activity in question is occurring on tribal land and whether the other party is a member of the tribe. *See* Petr. Br. 53-54; Miss. Br. 16-17. The inevitable uncertainty will result in wasteful collateral attacks in federal court over the tribes' power.

2. There is no merit to respondents' claim that a ruling in petitioners' favor would have sweeping implications for tribes' ability to hold nonmembers accountable for violations of tribal law.

Respondents' arguments have their greatest force with respect to the on-reservation conduct of nonmember businesses. But that is easily addressed by conditioning operation of the business on express assent to the tribal court's jurisdiction—just as the tribe did with respect to the narrow subcategory of disputes involving petitioners' lease. *See supra* at 16 n.2. The nonmember will then unmistakably know the risks it is taking and can chose whether to invest in conducting business on the reservation. In addition, even without civil adjudicative jurisdiction, tribes and their members retain the power to enforce tribal law through exclusion from the reservation and filing private actions in state court, which are ready and able to issue injunctions and grant damages against non-Indians when appropriate.

Moreover, this case does not present the question whether tribes *themselves* may sue nonmembers in tribal court for violation of rules that legitimately apply to nonmembers. Accordingly, a decision here need not force "*tribes* . . . to resort to the courts of another sovereign." Resp. Br. 24 (emphasis added). Nor does the case present the opportunity to decide whether tribes may assert adjudicative jurisdiction over nonconsenting nonmembers under the distinct, *second Montana* exception, when the defendant's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

Respondents would turn the tables by requiring the nonmember to "insist[] on binding arbitration clauses or state forum-selection and choice-of-law clauses, along with waivers of tribal sovereign immunity, as a condition of doing business on tribal lands." Br. 54. But they cannot bring themselves to say that the business could *successfully* insist on those terms. Nor do they suggest how such an agreement would be binding as against private plaintiffs like Doe. If Dollar General opens a store in Mississippi, it cannot secure a contractual agreement from that state's government that Mississippi citizens will only file suit in Georgia. In any event, that is not how it works: tribes presumptively lack jurisdiction over nonmembers; they do not gain that jurisdiction by insisting that nonmembers secure a negotiated disclaimer of it.[3]

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[3] There is no merit to respondents' claim that this Court cannot reach the broad question whether tribes ever possess

II. Because Tribes Lack Legislative Jurisdiction To Apply Unwritten Tort Law To Nonmembers, They Necessarily Lack Adjudicative Jurisdiction Over Such Claims.

Another route leads to the same conclusion that Doe's tribe lacks adjudicative authority over his suit: the tribes do not have the inherent authority to apply unwritten tort law to nonmembers, because tort law is not an "other means" for regulating consensual

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inherent adjudicative jurisdiction over nonmember defendants. They ask this Court rule for them in this case, but hold open that it may later render that ruling a complete nullity by holding that tribes lack actually any civil adjudicative jurisdiction over nonmembers whatsoever. That makes no sense. Whether tribal courts ever have adjudicative jurisdiction over nonmembers is thus properly before the Court because it is a logically antecedent question.

Although respondents say now that petitioners did not exhaust this precise argument before the tribal courts, they omitted any exhaustion objection in opposing certiorari, BIO 19-20, thereby waving it. In any event, petitioners did exhaust their claim that the tribal court lacked jurisdiction. *See* Pet. App. 78. They were not required to make the precise argument – futile under that court's jurisdictional rules – that it lacked any civil adjudicative jurisdiction against nonmembers in any case.

The argument also addresses the Question Presented, explaining why tribes lack adjudicative jurisdiction over tort claims against nonmembers. Both the tribal court and the Fifth Circuit also passed on the issue, assuming that the Tribe's adjudicative and regulatory jurisdiction were co-extensive. *See* Pet. App. 10, 82-84; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995). *Contra* U.S. Br. 25.

relationships under the first *Montana* exception. Pet. Br. 47-54.

Respondents do not seriously dispute that extending the first *Montana* exception to include tort law would dramatically expand tribes' authority over nonmembers. Indeed, it would "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 v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (citations and internal quotation marks omitted). Through its list of examples, the Court illustrated the kind of regulation the first *Montana* exception encompasses: tax provisions, licensing requirements, contract law, and the like.

Tort law is much broader. It governs essentially every interaction between people or businesses – here, every tribal member's interactions on the reservation with any nonmember. Respondents' *amici* take pains to catalogue the wide range of nonmember conduct they intend to subject to civil claims in tribal court for damages, civil penalties, civil forfeiture, and punitive damages. *See, e.g.*, NCAI Br. 4-23.

A ruling in respondents' favor will open nonmembers, and nonmember businesses in particular, to the pervasive prospect of civil suits regarding the vast majority of their activities on tribal land. For example, tribal courts recently have asserted the power to adjudicate an array of claims against nonmember businesses, ranging from personal injury claims against drug manufacturers to suits against interstate telecommunications companies. *See, e.g.*, Pet. App. 89; *Sprint Commc'ns*

Co., L.P. v. Wynne, No. 4:15-CV-04051-KES, 2015 WL 4644983 (D.S.D. Aug. 4, 2015).

Respondents' suggestion that some limitation is provided by the fact that tort must bear a "nexus" to a "consensual relationship" evaporates immediately, as they suggest that the on-reservation conduct that constitutes the tort *is* the required "consent." Br. 49. Perhaps an ordinary car accident would be too ephemeral a contact with the tribe. But respondents conspicuously omit any suggestion of where the line is drawn, again raising serious questions of administrability.

The substantive requirements of tort law are also uniquely difficult for nonmembers to discern. For example, the Tribe acknowledges that its tort law is unwritten and publicly available (if at all) only by personally appearing at the tribal court to review individual case files. Resp. Br. 7. In fact, the relevant law may be determinable only by a few tribal elders who are called upon to declare its application in individual cases. Choctaw Tribal Code § 1-1-4.

Seeking to reassure the Court, the Tribe says that it looks to Mississippi law "in the absence of on point tribal law," *id.* 49, but never describes where those gaps exist. Petitioners' review of the tribal court files, *supra* at 2-3, suggest that in fact, it is impossible to know.

Moreover, even if a particular tribe chooses to incorporate some strand of Anglo-American tort law, others need not. And for those that do, nonmember defendants frequently will have no mechanism to know *ex ante* what that strand will be. For example,

in a case like this one, a business may have no idea which of the substantially different state law rules addressing vicarious liability for punitive damages a tribe would apply. *See* Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501, 513-14 (2010).

In truth, respondents admit the inscrutability of tribal tort law when they complain that state courts will apply it differently than tribal courts. Br. 45-46. The possibility of some minor variation is an accepted cost of the long-settled practice of state courts applying foreign law. But respondents' suggestion that the substance of tribal tort law is so unknowable *ex ante* that a state court cannot correctly apply it even after full briefing and argument by the parties creates serious doubt that a nonmember defendant can know the rules of the game before it is played. That is a reason to be concerned with respondents' position, not persuaded by it.

III. Congress Is The Only Body That Can Evaluate Respondents' Claims About Recent Advancements In Tribal Justice.

Respondents and the United States maintain that in the modern era some tribes – including the Mississippi Choctaw – have well-developed and reliable judiciaries. To the extent that is so, it is to be celebrated and genuinely respected. It is not, however, directly relevant to the question presented by this case, for two reasons.

First, respondents have only the inherent adjudicative jurisdiction that Congress understood they would retain when the tribes were incorporated into the United States in the 1800s. Modern

experience is evidence that can now be presented to the legislature in support of expanding that jurisdiction; it is not evidence that can change retroactively the scope of the tribes' retained inherent authority. Put another way, respondents almost seem to concede that they would have lost this case if it had been decided by this Court in 1915 rather than 2015. But in fact, nothing expanded the tribes' inherent jurisdiction in the intervening century.

Second, the experience of this tribe obviously means very little when the holding that respondents seek would recognize jurisdiction in *every* tribal court in *every* tort case. Respondents assert that "[t]he Choctaw Courts are representative." Br. 18. But in support they cite *nothing at all*. The most the United States is willing to say is that "*many* tribal courts, including [this Tribes'] have developed" effective and respectable courts. U.S. Br. 31 (emphasis added). That is hardly a ringing endorsement of tribal courts generally. The other side's inability to establish the adequacy of tribal judicial systems more broadly is not for a lack of resources or trying, as the Bureau of Indian Affairs and the combined experience of all of respondents' tribal *amici* surely have put before this Court all the favorable evidence that exists.

Respondents attempt to assure the Court that nonmembers have *some* protection from mistreatment in the worst tribal court systems. But their reliance on the fact that a federal statute (the ICRA) requires tribes to provide some form of "due process," Br. 52, is not comforting. Many tribal courts "*routinely* have ruled that the meaning and application of the ICRA is *not* determined by Anglo-American constitutional interpretations." Robert J.

McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496 (1998) (emphasis added).

Take a case like this one. Doe asks his own tribe to award him millions of dollars in punitive damages against a foreign business. If respondents prevail, the Court can expect such claims to be commonplace. And on respondents' view, those claims can be adjudicated without a jury (or with a jury from which nonmembers are excluded), or even by an elected tribal council, all of whom know the plaintiff, with no possibility of a change in venue, and no appellate review. *See* Pet. Br. 3-9. The tribe would nominally have to provide "due process" under ICRA, but there is no guarantee it would follow this Court's interpretation of due process as prohibiting excessive punitive damages awards. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996). And even if erroneous, the tribal court's ruling on that question would be immune from direct review in this Court.

Respondents say that in some circumstances a state or federal court might refuse to enforce a tribal tort judgment. Br. 53. But on their view, such a ruling is reserved for the most extreme cases. It is in any event cold comfort to the nonmember who must litigate the collateral attack and whose on-reservation property may be seized in any event by the tribe itself in executing the tribal court's judgment in favor of its member.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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