No. 13-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court held that generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court recognized as an exception to that rule that a "tribe may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id*. (emphasis added).

The Court subsequently recognized in *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001), that it has "never held that a tribal court had jurisdiction over a nonmember defendant" in any context, so that it remains an "open question" whether tribal courts may ever exercise civil jurisdiction over nonmembers. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), this Court granted certiorari to decide whether *Montana*'s undefined "other means" include adjudicating civil tort claims in tribal court. However, the Court resolved the case on other grounds.

In this case, a divided panel of the Fifth Circuit held that tribal courts do have that jurisdiction. Five judges dissented from the denial of rehearing en banc. The case accordingly presents the issue the Court left open in *Hicks* and the Question the Court granted certiorari to decide in *Plains Commerce*:

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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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dollar General Corporation and Dolgencorp, LLC respectfully petition for a writ of certiorari to review 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 entered on March 14, 2014. Pet. App. 1. The court of appeals denied petitioners' timely petitions for rehearing en banc on March 14, 2014. Pet. App. 92. 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

Respondent Doe is a member of an Indian tribe who participated in a short internship in a store operated by petitioner Dolgencorp, LLC, a non-Indian corporation. Alleging that he had been sexually assaulted by his supervisor, Doe's family sued petitioners in tribal court on the basis of vicarious liability and/or negligence in hiring or supervising the alleged perpetrator. The Does asked the tribal court to order petitioners to pay in excess of $2.5 million in compensatory and punitive damages. The Fifth Circuit upheld the jurisdiction of the tribal court by a divided vote. Five judges dissented from the denial of rehearing en banc.

I. Legal Background

Unlike other sovereigns, such as states, Indian tribes do not have the inherent blanket authority to regulate all conduct occurring within their boundaries. Instead, this Court has long held that 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." *Montana v. United States*, 450 U.S. 544, 564 (1981); *see also, e.g.*, *id*. at 565 ("[T]he Indian tribes have lost any right of governing every person within their limits

except themselves." (citation and internal quotation marks omitted)).

Applying that principle requires distinguishing between the power of tribes over members (which is clearly bound up with the right of "self-government" and the power "to control internal relations"), *Montana*, 450 U.S. at 564, and their power over nonmembers. The Court's cases draw a further distinction between a tribe's *legislative* power to proscribe rules for nonmember conduct on tribal land and tribes' *adjudicative* authority to enforce those rules against nonmembers in tribal court.

A. The Scope Of Tribes' Legislative Authority

As a general matter, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565; *see also, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.").

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), for example, this Court held that tribes may not apply their criminal laws to nonmembers absent express authorization from Congress. "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Duro v. Reina*, 495 U.S. 676, 693 (1990).

For similar reasons, the Court also has generally prohibited tribes from exercising *civil* jurisdiction over nonmembers. "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (footnote omitted). The Court in *Montana* established two limited exceptions to that general rule:

First, 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." 450 U.S. at 565.

Second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566. This second exception permits tribes to regulate nonmember activities in the absence of consent only when the conduct "imperil[s] the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation marks and citation omitted).

B. The Scope Of Tribes' Adjudicative Jurisdiction

The *Montana* exceptions describe the scope of a tribe's legislative or regulatory authority – that is,

the power to levy taxes or issue rules governing nonmember conduct on a reservation. *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). This Court has recognized that whether tribes may enforce those rules against nonmembers in tribal courts is another question. *Id*. at 357-58.

The Court has made a point of noting that it has "never held that a tribal court had jurisdiction over a nonmember defendant." *Hicks*, 533 U.S. at 358 n.2. The Court thus held in *Oliphant* that tribal courts may not enforce *any* tribal law through criminal proceedings in a tribal court, absent congressional authorization. 435 U.S. at 212. And the Court has repeatedly left open whether, or under what circumstances, a tribal court may exercise *civil* jurisdiction over nonmembers. *See, e.g.*, *Hicks*, 533 U.S. at 358 n.2.

II. Factual And Procedural Background

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*.

The Tribe operates a job training program known as the Youth Opportunity Program (YOP) to place young tribal members in short-term positions with local businesses for educational purposes. Pet. App. 2-3. The Program had no impact on either the Tribe's governance or internal relations. *Id.* 16. Businesses participating in the program benefited by receiving

up to six weeks of temporary labor by the youth paid for by the Tribe. *Id.* 5. In the spring of 2003, Townsend agreed to Dollar General's participation in the program. *Id.* 2.

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 molested him. *Id.*

B. Proceedings In The Tribal Court

Although Doe could have brought claims in state court,[1] his family chose instead to pursue litigation in the courts of his tribe. In January 2005, the Does sued Townsend and petitioners, alleging that petitioners were vicariously liable for Townsend's criminal conduct, or were negligent in his hiring, training, and supervision. Pet. App. 3. The Does asked the tribal court to order petitioners to pay "actual and punitive damages in a sum not less than 2.5 million dollars." *Id*.

The defendants moved to dismiss on the grounds that the tribal court lacked jurisdiction. Pet. App. 3. The tribal district court denied the motions. *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

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

the same order affirmed the exercise of jurisdiction. *Id.*

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.[2] The district court granted summary judgment in respondents' favor in relevant part. *Id*. 37-38. The court recognized that under "*Montana*, and its progeny, there is a presumption against tribal civil jurisdiction over non-Indians." *Id*. 42. But relying on the first *Montana* exception, 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 respects 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 he 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.

a. The panel began by rejecting any suggestion that *Montana*'s first exception did not authorization

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[2] Federal courts may consider collateral challenges to tribal court proceedings and enjoin litigation over which the tribal court lacks jurisdiction. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985).

regulation by tort litigation in tribal court. While acknowledging the dissent's assertion that "no circuit court has upheld Indian-court jurisdiction, under *Montana*'s first exception, over a tort claim against a nonmember defendant," Pet. App. 11 n.3, the panel majority held that a "tribe's regulation of nonmember conduct through tort law is analyzed under the *Montana* framework," *id*. 10. 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.[3]

The panel further held that because of that consensual relationship, petitioners were subject to tribal court jurisdiction for tort claims for harm Doe suffered "in the course of his employment." Pet. App. 13-14. The panel held that the tribe had *legislative* authority over the conditions of employment in petitioners' stores, concluding that the tribe could legitimately "regulate the safety of [Doe's] workplace." *Id*. 13. The panel further rejected any suggestion that the tribe lacked the power to enforce that regulatory interest by extending tribal *adjudicatory* jurisdiction to this case. "The fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court," the court held, "makes no difference." *Id*. "Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for

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[3] Respondents did not claim that the second *Montana* exception applied. *See* Pet. App. 10 n.2.

[petitioners] to have to answer in tribal court for harm caused to the child in the course of his employment." *Id*. 13-14.

Nothing more is required, the panel held. Pet. App. 16. The court acknowledged that in *Plains Commerce Bank*, this Court had held that it was not enough that a dispute arise out of a consensual relationship because "[e]ven then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id*. 15-16 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)). But the majority concluded that the "ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government." *Id.* 16.

Accordingly, the panel held, all that is required in order 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." Pet. App. 17.

b. Judge Smith wrote a scathing dissent. He described the opinion as an "alarming and unprecedented holding [that] far outpaces the Supreme Court, which has never upheld Indian jurisdiction over a nonmember defendant." Pet. App. 22. He noted, for example, 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 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 relationships, it could never 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 (ellipses 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.

Judge Smith further emphasized the breadth of the court's ruling, noting that while the majority opinion focused on the particularly odious sexual assault claim in this case, there was no principled reason why its rationale would not also extend to any other tort injury – including, for example, slip-and-fall claims – suffered on the job. *Id*. 33.

2. Five judges dissented from denial of rehearing en banc. In addition to being wrong, for the reasons stated in Judge Smith's opinion, the dissenters explained that the ruling "profoundly upsets the delicate balance" this Court's decision have struck on "a question of exceptional importance." Pet. App. 94 (citations and omitted internal quotation marks). "Until now, no circuit court of appeals had upheld Indian-court jurisdiction, under the so-called 'first exception' announced in [*Montana*] over a tort claim against a non-Indian defendant." *Id*. The dissenters believed that if "this court is to work such a change in established precedent, it should be the careful work of the full court and not just a two-judge majority." *Id*.

REASONS FOR GRANTING THE WRIT

Respondent Doe, like any citizen of the State of Mississippi, was entitled to litigate his claims against petitioners in the courts of that State. *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). His family turned instead to the courts of an Indian tribe to which they belong and petitioners are strangers. It is undisputed that those courts lack jurisdiction over the individual who allegedly assaulted Doe. The question is whether the tribal courts may nonetheless exercise jurisdiction over the nonmember corporation that employed the alleged perpetrator.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court highlighted that it has "never held that a tribal court had jurisdiction over a nonmember defendant" and that it was an "open question" whether tribal courts may ever exercise civil jurisdiction over

nonmembers. *Id*. at 358 & n.2. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), this Court granted certiorari to resolve that question for an important subset of civil cases – tort suits against nonmember defendants for injuries arising in the course of commercial, employment, or other consensual relationships with tribe members. But the Court ultimately resolved the case on other grounds, leaving the uncertainty in its precedents unresolved.

This case presents the Court a chance to complete the critically important, unfinished business of defining the scope of tribal authority to adjudicate tort claims against nonmembers. In the absence of guidance from this Court, the Fifth Circuit has decided that tribal courts in fact enjoy broad jurisdiction to adjudicate tort claims against nonmember defendants whenever the tort has any "logical nexus" with a consensual relationship (for example, an employment relationship) between the plaintiff and nonmember defendant. This Court has repeatedly recognized the gravity of such a decision, explaining that subjecting nonmembers to tribal court jurisdiction risks serious intrusions on individual liberty, given the incomplete guarantee of Due Process protections in that forum. The facts of this case – in which respondent seeks millions of dollars in damages, including punitive damages, against a nonmember employer on a theory of vicarious liability – illustrate what is at stake for tens of thousands of nonmember corporations and individuals who do business on tribal reservations. Even more so than when the Court granted certiorari

to resolve this issue in *Plains Commerce Bank*, this Court's review is required.

I. This Case Squarely Presents The Issue Left Open In *Hicks* And The Question The Court Granted Certiorari To Decide But Left Unresolved In *Plains Commerce Bank*.

This case presents the Court an opportunity to resolve the question it granted certiorari to answer, but did not reach, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). In so doing, the Court would also begin to resolve the open question noted in *Nevada v. Hicks*, 533 U.S. 353 (2001), by deciding whether tribal courts have jurisdiction over one of the most important and recurring classes of civil litigation. Given the profound and immediate impact of the Fifth Circuit's decision on thousands of nonmember individuals and companies doing business on reservations, that important guidance should not be delayed.

1. In *Plains Commerce Bank*, tribal members attempted to sue a nonmember bank in tribal court, alleging torts arising from the bank's sale of non-Indian land. The Eighth Circuit concluded that the defendant had entered into a consensual relationship with the tribe members within the meaning of the first *Montana* exception. *Plains Commerce Bank v. Long Family Land & Cattle* Co., 491 F.3d 878, 886 (8th Cir. 2007), rev'd, 554 U.S. 316 (2008). But, the court explained, the "existence of a consensual relationship is not alone sufficient to support tribal jurisdiction." *Id*. "The tribal exercise of authority must also take the form of taxation, licensing, or 'other means' of regulating the activities of the

nonmember. . . . " *Id*. (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). The question was whether subjecting nonmembers to tort adjudication in tribal court counted as a permissible "other means" of regulating nonmember conduct under *Montana*. *Id*. The court of appeals held that it was. *Id*. at 887 (reasoning that the "fact that we are dealing with the common law of torts rather than a licensing requirement or other statutory provision makes no substantive difference here").

This Court granted certiorari to review that conclusion. Specifically, the Court granted certiorari to decide the question:

> Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation?

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However, the Court never answered that question because it resolved the case on other grounds. Specifically, the Court held that tribes lack the inherent authority to regulate the sale of non-Indian land, regardless of the form of regulation. 554 U.S. at 340. Accordingly, the Court left unresolved whether *Montana* permits tribes to regulate other aspects of consensual relationships by subjecting nonmembers to tort suit in tribal court.

This case directly presents that question. Over a vigorous dissent, the Fifth Circuit majority squarely held that the first *Montana* exception authorizes tribal regulation of consensual relationships by means of tort suits in tribal court. The panel held that a "tribe's regulation of nonmember conduct through tort law is analyzed under the *Montana* framework" and insisted that the "fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference." Pet. App. 10, 13. The majority thus rejected Judge Smith's objection that consensual relation cannot subject a defendant "to the entire – and largely undefined – body of Indian tribal tort law," *id*. 30, because "*Montana*'s first exception envisages discrete regulations consented to *ex ante*" rather than "after-the-fact imposition of an entire body of tort law," *id.* 32.

2. Having previously decided that the question presented by this petition warrants review, there is no reason for the Court to delay providing an answer. Indeed, the breadth and dramatic consequences of the ruling below require this Court's immediate attention.

Although this Court has "never held that a tribal court had jurisdiction over a nonmember defendant," *Hicks*, 533 U.S. at 358 n.2, the decision below foreordains that non-Indian businesses and individuals will be forced to litigate all manner of tort claims in tribal courts that are neither subject to the Bill of Rights nor endowed with the independence required for fair treatment of outsiders. *See Duro v. Reina*, 495 U.S. 676, 693 (1990); *infra* 19-20. Under the decision in this case, all that is required before a

tribal court may exercise tort jurisdiction over a nonmember is that: (1) the defendant have entered into a consensual relationship with the plaintiff, and (2) there be a "logical nexus" between that relationship and the tort. Pet. App. 17.

As applied to this case, that means that an employer is subject to tort claims for any "harm caused to the [employee] in the course of his employment." Pet. App. 13-14.[4] The breadth of that application is dramatic enough, given the tens of thousands of tribal members employed by nonmember businesses (including merchants like petitioners, health care providers, mining and energy companies, and casino contractors). At the same time, if tribes may use tort law to regulate employment relationships, there would seem no basis for excluding torts arising in other similarly consensual commercial relationships, including a business's relationship with its customers.

Moreover, as Judge Smith demonstrated, there is no principled basis for restricting the decision in this case to heinous offenses like sexual assaults.[5] *See* Pet. App. 33. The panel majority premised the Tribe's authority on its right to "regulate the working conditions" of employees, and its interest in protecting members' "health and safety." *Id*. 16.

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[4] The panel recognized that Doe was a short-term intern but treated him, for purposes of its analysis, as the equivalent of an ordinary employee. *See* Pet. App. 2-3, 12, 16.

[5] Notably, petitioners are charged not with assault but with, at best, negligence in hiring, training, and supervising the perpetrator. Pet. App. 3.

Those interests surely are furthered by imposing tort liability for accidents (*e.g.*, an employee "slipp[ing] on a poorly-maintained floor at the store") or other forms of injurious intentional misconduct. *Id*. 33 (Smith, J., dissenting).

This is no small matter. The Fifth Circuit's decision opens the tribal courthouse doors wide for members to file lawsuits against non-members for individual tort claims that – until now – had to be brought in state or federal court where nonmembers enjoy constitutional protections. Now, nonmembers can be hauled into tribal courts for tort claims arising out of any type of consensual conduct on the reservations, such as gambling at an Indian casino, playing golf, eating at an on-reservation restaurant, etc. Once in tribal court, the nonmember is subject to an unwritten set of laws and customs to be determined and applied by the Tribe. *See* Pet. App. 30-31 (Smith, J., dissenting). This matters because nonmembers have no say, directly or through legislative representation, in the laws, regulations, or court system of the Tribe. *Id*. Adjudication without representation for nonmembers is now the rule, not the exception.

Uncertainty in this area is particularly harmful. Faced with the prospect of exposure to potential liability (including for punitive damages) that may far outstrip the benefit of doing business on a reservation, some businesses may simply withdraw from communities in which unemployment is already high and access to commercial services (like low-cost merchandise stores) is low. *See, e.g.*, *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing*

Before the S. Comm. on Indian Affairs, 111th Cong. (2010).

At the same time, the "lack of certainty regarding the applicable law or applicable forum can add transaction costs to already expensive economic disputes." *See* Paul A. Banker & Christopher Grgurich, *The* Plains Commerce Bank *Decision and Its Further Narrowing of the* Montana *Exceptions as Applied to Tribal Court Jurisdiction over Non-Member Defendants*, 36 WM. MITCHELL L. REV. 565, 566 (2009-2010). In this case, for example, litigation over the appropriate forum has already taken nearly ten years.

II. Absent Congressional Authorization, Tribal Courts Have No Jurisdiction To Adjudicate Tort Claims Against Nonmembers.

Certiorari is further warranted because the court of appeals' decision is wrong. Tribal courts lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress.

1. This Court has rightly questioned whether tribal courts should ever be deemed to have jurisdiction over nonmembers without Congress's authorization. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). The "special nature of the tribunals at issue," *Duro v. Reina*, 495 U.S. 676, 693 (1990), gives rise to unique concerns. After all, "Indian courts differ from traditional American courts in a number of significant respects." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citation omitted). The "Bill of Rights does not apply to Indian tribal governments," and although the "Indian Civil Rights Act of 1968

provides some statutory guarantees of fair procedure," those "guarantees are not equivalent to their constitutional counterparts." *Duro,* 495 U.S. at 693. Moreover, "there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law," such as compliance with the Indian Civil Rights Act, "since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts." *Hicks*, 533 U.S. at 385 (Souter, J., concurring). At the same time, "[t]ribal courts are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms." *Duro*, 495 U.S. at 693 (citation and internal quotation marks omitted). And, of course, "nonmembers have no part in tribal government. . . ." *Plains Commerce Bank*, 554 U.S. at 337.

These considerations have led this Court to preclude tribal court criminal jurisdiction over nonmembers without congressional authorization. *See Duro*, 495 U.S. at 693-94. The same basic concerns apply in the civil context as well. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Hicks*, 533 U.S. at 383-85 (Souter, J., concurring). Indeed, permitting tribal courts to exercise tort jurisdiction over nonmembers would lead to the anomaly that although deprived of inherent authority to criminally punish nonmembers for injuring tribal members, even by imposing a fine, tribal courts could nonetheless impose ruinous punitive damages awards that have the same purpose and effect. One need not conclude that punitive damages are a form of criminal punishment, *see* Pet. App. 21, to recognize

that considerations that led this Court to hold criminal jurisdiction over nonmembers presumptively unavailable to tribal courts likewise support limiting tribal jurisdiction over tort claims.

2. Against this backdrop, *Montana*'s first exception cannot reasonably be construed to permit a tribe to subject nonmembers to tort litigation in tribal court simply because the tort bears a "logical nexus" to an employment or other consensual relationship. Pet. App. 17.

This Court has admonished that the *Montana* exceptions are "limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (citations and internal quotation marks omitted). But as discussed, the panel's interpretation of the first exception would allow pervasive tort liability against countless business and individuals who interact with tribe members in business, employment, or other consensual relationships.

As this Court has "emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 554 U.S. at 338 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (internal quotation marks omitted)). There must be a nexus. *Id*. Critically, this Court's decisions make clear that the nexus required is not simply a "logical" one, as the panel wrongly held. *See* Pet. App. 17. The first *Montana* exception must be construed to avoid "the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Plains Commerce Bank*, 554 U.S. at 337. And a nonmember can effectively consent only to exercises

of tribal authority that are reasonably foreseeable. *Id*. at 337-338.

Accordingly, when the Court in *Montana* spoke of a tribe regulating nonmembers "through taxation, licensing, or other means," it had in mind modes of regulation that permit nonmembers to ascertain, *ex ante*, the scope of their exposure to tribal authority and litigation. *See* Pet. App. 32 (Smith, J., dissenting). For example, a business can determine the tribe's general tax rules and licensing requirements prior to deciding whether to do business with a tribe or its members.[6]

But tort claims are vitally different. Tort law is generally unwritten and often vague, its rules given specific content by juries in particular cases only after the fact. *See Plains Commerce Bank*, 554 U.S. at 338 (noting that the "novel" tort claim in that case "arose directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom, including the Lakota sense of justice, fair play and decency to others") (citation and internal quotation marks omitted). In the American common law system, tort principles can be given greater specificity in the course of case-by-case adjudication

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[6] It is thus no coincidence that three of the four cases the Court cited in *Montana* as examples of this exception involved tribes imposing "taxes on economic activity by non-members." *Plains Commerce Bank*, 554 U.S. at 332. The fourth example, *Williams v. Lee*, 358 U.S. 217 (1959), involved a contract claim brought *by* a nonmember merchant against a tribe member for failing to pay for goods provided on credit (and, therefore, raised no question of submitting an unwilling nonmember to tribal court jurisdiction, much less on the basis of unwritten tort law).

over time. But tribes are not required to follow those traditions. *See id*. Tribal law instead is often based on customs that that are unfamiliar (and even inaccessible) to nonmembers. *See Hicks*, 533 U.S. at 384-85 (Souter, J., concurring); Pet. App. 30 (Smith, J., dissenting). And tribal courts need not (and some do not) codify their tort law or collect their decisions in published reporters, relying instead on the oral testimony from tribal elders in each case regarding their understanding of what tribal customs require. Pet. App. 30-31 (Smith, J., dissenting).

In short, there can be no confidence that by entering into a consensual relationship with a tribe member, businesses like petitioners have consented, in any meaningful sense, to be bound by tort rules they may be unable even to discern, or agreed to have those rules applied to them in an unfamiliar court.

Thus, while tribal court jurisdiction over nonmembers is troublesome in *any* case, it is particularly unwarranted in tort cases and should not be allowed absent authorization from Congress.

3. To be sure, as the panel observed, tribes have an interest in the health and welfare of their members. Pet. App. 16. But this Court has made clear that such an interest is not, as a general matter, a sufficient justification for exercising tribal jurisdiction over nonmembers. The Court thus has been clear that tribes do not retain authority to regulate even very harmful conduct by nonmembers simply by virtue of their voluntary decision to enter tribal lands. *See, e.g.*, *Duro*, 495 U.S. at 685-86. Indeed, the Court's clearest rule in this area is that tribes retain no inherent authority to subject nonmembers to punishment in tribal courts, even for

the murder of tribal members. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). While a tribe may exclude nonmembers from its territory (as it did the alleged perpetrator in this case, *see* Pet. App. 77-78), it must rely on the courts of the states and the United States to mete out punishment and recompense.

The tribal interest in redirecting such litigation to its own courts is particularly attenuated in a case like this. Here, the lower court held (and respondent did not challenge on appeal) that the tribal courts lacked jurisdiction over the actual perpetrator of the alleged assaults (reasoning that Townsend had no consensual relationship with the Tribe or Doe). Pet. App. 72-73. The only basis for liability alleged against petitioners is indirect – vicarious liability or, at worst, negligence in hiring, training, and supervising Townsend. *Id*. 3.

As in the criminal context, depriving tribal courts of jurisdiction does not mean that tribes have no recourse for nonmember conduct that injures tribe members. *See generally Duro*, 495 U.S. at 696-97. The courts of the states (and, in a case like this, with diverse parties, the United States), remain open to provide relief for members who suffer injuries at the hands of outsiders. Pet. App. 27 (Smith, J., dissenting).

Moreover, it may be that when tortious conduct poses a grave and direct threat to tribal self-government (*i.e.*, when it satisfies the requirements of the second *Montana* exception), assertion of tribal court jurisdiction is justified. In such cases, it could be that an extraordinary threat to tribal self-rule warrants an extraordinary exception to the general

rule that tribes may exercise power only over their own members. But the mere fact that a defendant has employed a tribal member, or engaged in a business transaction with a tribe, does not justify subjecting nonmembers to suit in tribal court for ordinary tort claims without Congress's approval.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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