No. 13-1496

In The Supreme Court of the United States

DOLLAR GENERAL CORPORATION, et al.,

Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF THE STATES OF OKLAHOMA, WYOMING, UTAH, MICHIGAN, ARIZONA, AND ALABAMA IN SUPPORT OF PETITIONERS

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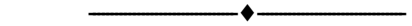
STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICI TO FILE[1]

The States of Oklahoma, Wyoming, Utah, Michigan, Arizona, and Alabama as amici curiae have an interest in the outcome of this case because they are home to dozens of federally recognized Indian tribes that engage in commercial enterprises doing business with non-tribal members on Indian land. The States thus submit this brief to offer their unique perspective as states with robust, and in some instances multi-billion dollar, tribal economies. If the decision below is affirmed, the States will become a patchwork of jurisdictions adjudicating tort claims in a disparate manner.



STATEMENT

Today's Indian tribes engage in a remarkably diverse array of commercial activities: tribal enterprises include casinos, convenience stores, hotels, restaurants, grocery stores, and more. These businesses are open to the non-tribal member public, and in most instances are specifically geared to attracting non-tribal member customers. In some states, these businesses are located within the confines of a

[1] Pursuant to Rule 37.6, the State of Oklahoma affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the State of Oklahoma or its counsel made such a monetary contribution.

reservation. In others – like Oklahoma, which has 38 federally-recognized Indian tribes but no reservations – the businesses are located on small, scattered parcels of tribal trust land, often immediately adjacent to and interspersed with non-tribal businesses.

For example, a motorist southbound on United States Highway 69/75 in Atoka, Oklahoma, will have several options for food and fuel. One of those options is the Choctaw Travel Center. Across the highway and slightly further south is another option, the Love's Travel Stop. Both offer food and fuel, but with one indiscernible difference. The Choctaw Travel Center is a business enterprise of the Choctaw Nation of Oklahoma situated on a tiny, isolated parcel of Indian land.[2] The Love's Travel Stop, on the other hand, is a privately owned business on land fully subject to the sovereign jurisdiction of the State of Oklahoma.

The decision to pull into the Choctaw Travel Center rather than the Love's Travel Stop should not have major legal ramifications. But according to the Fifth Circuit, the decision might well amount to engaging in a consensual commercial relationship with the tribe, thus rendering the traveler subject to being haled into tribal court to answer a tort claim.

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[2] Atoka County consists of 624,332 acres. Only about 133 of those acres (scattered across approximately 44 small parcels) are Indian land. This is typical of the nature of Indian lands in Oklahoma.

Once sued, the nonmember will face a number of difficulties in ascertaining how to defend the claim. For instance, about half of Oklahoma's tribes have a court system, and less than that have a full, written legal code. But as might be expected, tribal tort law is a product of common law, made up of traditions passed down by tribal elders.[3] So even if the tribal court issued published opinions that might offer guidance as to what that common law is (few, if any, do), one cannot simply do a Westlaw search for those opinions. In short, the nonmember, even after they have hired an attorney, will be walking into a tribal court with none of the jurisprudential certainty that they would have in state or federal court, unaware of the elements of the claims they are defending against, and unaware of what defenses might be available to them.

These situations do not only arise in Oklahoma. For example, the State of Wyoming contains one Indian reservation with two tribes – the Northern Arapaho Tribe and the Eastern Shoshone Tribe each reside in the Wind River Reservation in west-central Wyoming. While the tribes traditionally cooperated to provide services on the reservation, in the last few years the tribes have begun to exercise their

[3] Qualifiers like "some" and "about" are used here with a purpose. Even for State's attorneys experienced in Indian law, it is all but impossible to ascertain the precise contours of each tribe's legal systems. Some tribes have websites providing information about their court systems and links to their legal codes, while others do not.

government powers independently of one another with separate tribal codes and, in the future, perhaps even separate court systems.[4] Nonmembers who interact with tribal members or tribal enterprises on Indian lands – for example, nonmembers leaving Riverton on the edge of the reservation on the way to other parts of Wyoming – would not know *which* set of laws would bind them even if they know they are dealing with a tribal enterprise or are located on some kind of tribal land in an Indian reservation.

And to the extent there are concerns about local biases, those concerns can be alleviated for state court litigation through either (1) diversity jurisdiction, which allows a non-citizen litigant to remove the case to the neutral tribunal of a federal court, or (2) alternative venues and geographically removed appellate courts, which are available when both litigants are citizens. A nonmember haled into a local tribal court is afforded neither of these safeguards. The nonmember cannot remove the case to a neutral forum, cannot request transfer to an alternative forum (most tribal courts offer only a single venue), and cannot appeal to a separate and removed appellate court system – to the extent that a tribe has an appellate court system (many do not), those appellate

[4] Gregory Nickerson, *Northern Arapaho dissolve joint council in bid for sovereignty*, WyoFile (Sept. 10, 2014), www.wyofile.com/specialreport/northern-arapaho-dissolve-joint-business-council-in-bid-for-sovereignty; Northern Arapaho Code tit. 17, §§ 302, 303, 401 (authorizing creation of new courts, recognizing joint court with Eastern Shoshone, and creating separate magistrate court).

courts are typically housed in the same location as the trial court, often sharing a single courtroom.[5]

The Fifth Circuit – and the United States – find nothing particularly troubling about all this. During certiorari briefing, the United States accepted that the decision below will allow "'pervasive tort liability against countless business[es] and individuals'" in consensual relationships with tribes or tribal members. U.S. Br. 13 (quoting Pet. 20). The purpose of this brief is to explain why this Court should in fact be deeply troubled by the implications of the decision below, and should thus narrowly construe the reach of the first *Montana* exception.

SUMMARY OF THE ARGUMENT

I. As a general matter, "regulation" through tort lawsuits brought by private parties should not be considered a valid "other means" of regulation by tribes. While tort law may be a valid means of regulation in jurisdictions with established and accessible bodies of common law, tort law is far too opaque to provide the fair notice and clarity needed to operate as a valid regulatory scheme in tribal jurisdictions. And because of that lack of clarity, it is all

[5] See, *e.g.*, *Cherokee Nation Judicial Branch*, www.cherokeecourts.org (noting location of entire Cherokee court system in one Cherokee Nation Judicial Building).

but impossible for a nonmember to ever knowingly consent to tribal tort law.

II. Nor can an Indian tribe's authority to exclude nonmembers from tribal lands provide an independent basis for the exercise of tort jurisdiction over nonmembers. A tribe's authority to "exclude outsiders from entering tribal land" has never been understood to equate to a general "authority over non-Indians who come within their borders," and this case provides no compelling justification for abandoning that longstanding rule.

III. Even if exercise of tort jurisdiction were a valid means of "other regulation," 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." Thus, the burden should be placed on the tribe or tribal member to establish as a threshold matter that the tribal court's exercise of tort jurisdiction is necessary to further those core sovereign interests. Given that tort claims against nonmembers have historically been adjudicated in state and federal courts, it is unlikely that a tribe could successfully argue that exercise of such jurisdiction is newly necessary to its preservation of self-government and control of its internal relations.

IV. Even when a tribe has established that exercise of tort jurisdiction is necessary to safeguard core sovereign interests, the *Montana* exception allowing the exercise of such jurisdiction should be

narrowly construed to avoid the possibility that nonmembers who do nothing more than frequent tribal businesses will be subjected to tribal court jurisdiction. A nonmember should only be haled into tribal court to answer a tort claim where (1) the nonmember has engaged in commercial dealings with the tribe and has expressly and unambiguously consented to tribal court jurisdiction for tort claims (such as in a forum selection clause of a contract), and (2) the tort claim has a close nexus to the commercial dealing.

V. State and federal courts have always provided an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not. The decision below upends that longstanding framework, and will result in significant legal uncertainty in states with Indian tribes. Additionally, the decision undermines Congress's policy – embodied in 28 U.S.C. § 1441 – of favoring adjudication in neutral tribunals by allowing a defendant sued in the courts of a sovereign to which the plaintiff belongs and the defendant does not to remove the case to a court of a sovereign to which both parties belong.

ARGUMENT

I. "Regulation" through tort lawsuits brought by private parties is not a valid "other means" of tribal regulation.

In *Montana*, this Court held 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, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 565 (1981) (emphasis added).

As a general matter, "regulation" through tort lawsuits brought by private parties should not be considered an "other means" of regulation by tribes. The "other means" exception – an exception built entirely on the idea of nonmember consent – "envisages discrete regulations consented to *ex ante*." *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 182 (5th Cir. 2014) (Smith, J., dissenting). Tribal tort law is far too opaque to provide the fair notice and clarity necessary for that consent. Indeed, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends * * * is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' which differ from traditional American courts in a number of significant respects." *Nevada* v. *Hicks*, 533 U.S. 353, 383-84 (2001) (Souter, J., concurring) (citations omitted). Tribal courts in fact exhibit a diverse array of characteristics as to "their structure, in the substantive law they apply,

and in the independence of their judges." *Id.* at 384 (Souter, J., concurring).

To the extent written tribal codes could be located for Oklahoma's tribes, many of those codes contemplate tribal customary law as providing key rules for decision. The statutes of the Seminole Nation of Oklahoma, for instance, direct that the Nation's "Constitution, Statutes, and Common Law" shall be applied in civil actions. Seminole Nation of Oklahoma Code tit. 3, § 11(a)(1). However, "[t]he customs and traditions of the Nation" are what constitute the "Common Law." *Id.* § 6. And to enable the tribal court to ascertain those customs and traditions, the court is given the power to "subpoena and request the advice of elders and councilors familiar with [tribal] customs and usages." *Id.* § 11(c). In other words, in some instances there will quite literally be no way for a nonmember litigant to know in advance what Seminole tort law encompasses.

This is a common construct in tribal law,[6] and it illustrates what Justice Souter recognized in his concurrence in *Hicks* – tribal court systems vary wildly from tribe to tribe, and that tribal law can be

[6] See, *e.g.*, Sac & Fox Nation Code tit. 6, §§ 4, 11; Osage Nation Code tit. 3, § 1-101; Muscogee Nation Code Ann. tit. 27, §§ 1-103(A), 1-104; Kickapoo Tribe of Oklahoma Rules of Civil Procedure §§ 4, 11(a), (c); Iowa Tribe of Oklahoma Code tit. 2, §§ 4, 11(a), (c); Choctaw Nation of Oklahoma Code of Civil Procedure § 2; Chickasaw Nation Code tit. 5, § 5-102.7.

"unusually difficult for an outsider to sort out." *Hicks*, 533 U.S. at 385 (Souter, J., concurring).

First, each Native American tribe has its own customs and traditions, meaning that a different point of substantive law may be applied based on the customs of a particular tribe. Absent a statute on point (which is almost always the case with tort law), tribal courts apply tribal customs to decide cases. And where those customs are not known to the court, the court asks important members of the community to provide their opinion. There is no general code governing tort with clear articulations of tribal government views on negligence, products liability, battery, or otherwise. Nor is there an established body of tribal case law delineating the contours of tribal common law. Without those customs being written down or communicated before interactions giving rise to a dispute, the imposition of tort liability on nonmembers is problematic. The issue is not just whether some norm of tribal law will be applied to a dispute; the question is what norm of, say, Seminole Nation law will be applied.

Second, tribal courts may consult with elders or councilors in different quantities, with different frequencies, and with little opportunity for advocates to argue or be informed about how such elders decide what customs should apply in a given case.

Finally, the same dynamic draws into question the independence of tribal judicial systems. Where important rules of decision reside in tribal customs as

communicated by tribal elders, even if judges are independent, the really important decisions on tribal law may be made by tribal elders with no obligations of independence. These features of tribal law may be vital for maintaining the unique cultures and traditions of Native American tribes, but they do not make an appropriate means to broadly regulate nonmembers.

The Seminole Nation has one of the best-developed tribal codes in Oklahoma,[7] yet even its legal system implicates many of these concerns and fails to provide any foresight to nonmembers in the area of general tort law. The tribe is capable of many things in its government, but its courts are simply not set up to handle general tort regulation with any level of predictability or normalcy. This is not the kind of "other means" of regulation the *Montana* court could have contemplated for jurisdiction exercised because of the existence of a *consensual* relationship.

This Court should not impose a one-size-fits-all rule that results in a sudden expansion of tribal

[7] Only around 11 of Oklahoma's 38 federally recognized tribes appear to have a tribal code dealing with a range of issues, and the Seminole Nation's code appears to have one of the widest breadths. Many other tribes have a small number of ordinances such as a gaming ordinance (necessary to conduct gaming under the Indian Gaming Regulatory Act), an elections ordinance, and perhaps a tax ordinance to cover sales tax and cigarette excise taxes. For some tribes, no codification of law could be located whatsoever.

jurisdiction where tribal courts are not prepared or set up to handle general tort regulation and where ordinary nonmembers may be haled into courts where legal norms are not well-established. The problems with such an approach would be particularly acute in jurisdictions like Oklahoma where tribes have no reservations but instead have jurisdiction on parcels of land – often commercially developed – interspersed with non-tribal land in a mutually dependent economy.

II. An Indian tribe's authority to exclude nonmembers from tribal lands does not provide a basis for the exercise of tort jurisdiction over nonmembers.

Respondents have suggested in passing that regardless of the applicability of *Montana*'s "other means" exception, their right to exclude nonmembers from tribal lands could provide "an alternative ground supporting the Fifth Circuit's ruling." Br. in Opp. 7 n.12. The United States has correctly pointed out during certiorari briefing that this argument was neither pressed nor passed upon in the court of appeals, U.S. Br. 11-12, and should not be considered here.

In any event, Respondents' position on this point is untenable. The right to exclude is nothing more than its name suggests: the power to deny nonmembers access to tribal land, including the power to remove a nonmember from tribal land and to set

conditions on entry. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). This Court has never suggested that the right includes the power to impose on nonmembers any and all conditions the tribe wishes to impose as a precondition to admittance to a tribal business.

To the contrary, the Court has explicitly held that the right to exclude has no effect on the general rule against tribal authority over nonmembers. *Plains Commerce Bank* v. *Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328 (2008) (explaining that while a tribe "may * * * exclude outsiders from entering tribal land * * * tribes do not, as a general matter, possess authority over non-Indians who come within their borders." (citations omitted)).

Likewise, the Court has held that tribes lack "inherent sovereign authority to exercise criminal jurisdiction over non-Indians," a holding that makes no sense if the right to exclude gives tribes carte blanche to impose sweeping conditions on admittance to tribal lands. See *Montana*, 450 U.S. at 565 (citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

So too for the Court's admonition that "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*, 450 U.S. at 564. That holding too would be nonsensical if rather than

awaiting congressional delegation, a tribe could simply turn to its right to exclude whenever it wished to exercise jurisdiction over nonmembers.

Given all this, the right to exclude cannot be a standalone source of power untethered from the general rule against tribal jurisdiction over nonmembers and *Montana*'s narrow exceptions to that rule. Rather, the right to exclude nonmembers is simply one of several baseline sources for tribal power over nonmembers. See *Plains Commerce Bank*, 554 U.S. at 330 (describing all such exercises "as stem[ming] from [a] tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."). In other words, it forms one of the bases for the *Montana* exceptions; it is not a separate, standalone power tribes can deploy to exercise jurisdiction outside the scope of those narrow exceptions.

III. The burden should be placed on the tribe or tribal member to establish the necessity of tort jurisdiction.

Indian tribes have lost any "right of governing every person within their limits except themselves," *Oliphant*, 435 U.S. at 209, such 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. As a result, this Court has emphasized that a tribe can only exercise tribal jurisdiction to the extent strictly "necessary to protect tribal

self-government or to control internal relations" and that anything more "is inconsistent with the dependent status of the tribes." *Id.* at 564.

Because any exercise of jurisdiction over a nonmember must be an exception to the general rule against such jurisdiction, the initial burden in cases like these should be on the tribe or tribal member to establish as a threshold matter that the tribal court's exercise of tort jurisdiction is necessary to protect tribal self-government or to control internal relations. See, *e.g.*, *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (describing "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

Given that adjudication of tort claims involving nonmembers has traditionally occurred in state and federal courts, it is difficult to conceive how a tribe could now establish that the exercise of such jurisdiction is newly necessary to safeguard core sovereign prerogatives. In fact, the explosion in the size and diversity of tribal commercial enterprises and revenues – an explosion driven by commerce with nonmembers – has occurred in the absence of any widespread attempt to exercise tribal jurisdiction over nonmember defendants in civil matters.

IV. Nonmembers engaged in commercial dealings on tribal land must expressly consent to tribal court jurisdiction.

Even where a tribe or tribal member has established that exercise of tort jurisdiction is necessary, the first *Montana* exception should be limited to instances where (1) the nonmember engaging in commercial dealing with the tribe expressly consents to being subject to tribal court jurisdiction for tort claims, and (2) the tort claim has a close nexus to the commercial dealing.

Express consent is critical for all the reasons described in Part I above. Given the opaqueness of tribal tort law, it is all but impossible for a nonmember to impliedly give knowing consent to such law. Consent should thus be limited to instances where the nonmember has been afforded an opportunity to give considered, explicit consent – instances such as agreement to a forum selection clause in a contract.

The exception should not encompass instances where a nonmember is alleged to have impliedly consented to tribal court jurisdiction merely by doing business with a tribe or one of its members. This Court has in fact repeatedly rejected the argument that "any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him," *Duro* v. *Reina*, 495 U.S. 676, 695 (1990), and should extend that principle to tribal civil jurisdiction.

Recognition of implied consent would be particularly problematic in a jurisdiction like Oklahoma, where innumerable tribal businesses do business with nonmembers on innumerable scattered parcels of tribal land. If just buying coffee and gas at a tribal convenience store counts as implied consent, citizens of a state like Oklahoma will find themselves suddenly subject to a dizzying array of tribal laws in a dizzying array of tribal courts.

V. State courts provide an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not.

State and federal courts have always provided an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not. The decision below upends that longstanding framework and will result in significant legal uncertainty in states like Oklahoma.

It is hard to conceive of any other jurisdiction in the developed world where a citizen of one sovereign could be potentially subject to tort liability in the courts of nearly 40 different sovereigns, applying 40 different bodies of law – but that could be the case in Oklahoma if the decision below is not reversed. Thus, as a matter of policy, the decision below injects uncertainty that is all but certain to stifle the impressive growth of tribal economies as nonmembers wrestle

with how to protect themselves from lawsuits in tribal courts.

Additionally, the decision undermines Congress's policy – embodied in 28 U.S.C. § 1441 – of favoring adjudication in neutral tribunals by allowing a defendant sued in the courts of a sovereign to which the plaintiff belongs and the defendant does not to remove the case to a court of a sovereign to which both parties belong. It is difficult to conceive of how a tribal member could be prejudiced by having to litigate their tort claim in a tribunal of a sovereign of which he or she is a citizen – that is, state or federal court. Diversity jurisdiction is not built on the notion that state courts are inherently biased against non-citizens (they are not). Rather, diversity jurisdiction simply recognizes that there is something to be said for eliminating any questions about the fairness of the local forum. The same is true in the tribal context.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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