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 AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MISSISSIPPI IN SUPPORT OF RESPONDENTS

Katherine Florey
UC DAVIS SCHOOL OF LAW
400 Mrak Hall Drive
Davis, CA 95616

Stephen L. Pevar
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
330 Main Street
Hartford, CT 06106
(860) 570-9830
spevar@aclu.org

Matthew A. Coles
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has participated in numerous cases before this Court, both as direct counsel and as *amicus curiae*. The ACLU of Mississippi is a statewide affiliate of the national ACLU.

SUMMARY OF ARGUMENT

The Court will determine in this case the extent to which Indian tribal courts may exercise civil jurisdiction over the activities of nonmembers on Indian trust land. In our view, the answer to that question lies in the concept of fair notice, for several mutually reinforcing reasons: It provides a unifying explanation of the Court's cases regarding tribal jurisdiction over nonmembers; it is familiar from other jurisdictional contexts; and it strikes an appropriate balance between tribal sovereignty and fairness to nonmembers.

The concept of fair notice is inherent in *Montana*'s consensual relationship exception as the Court has fashioned, discussed, and applied it. *Montana v. United States*, 450 U.S. 544 (1981). By

---

[1] The parties have filed blanket letters of consent to the submission of *amicus curiae* briefs with the Clerk of the Court. No party has authored this brief in whole or in part. No one other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

contrast, Dollar General's assertion that it may not be subject to tribal court jurisdiction absent express consent represents a significant and unwarranted departure from existing law.

As both lower courts found, moreover, there is ample support in the record for the conclusion that Dollar General had fair notice that it might be subject to tribal jurisdiction on these facts. First, the activity in question occurred on tribal trust land, where the tribe's interests are at their highest and nonmembers have reason to be aware that tribal authority may apply. Second, Dollar General voluntarily selected this Indian reservation on which to engage in commercial transactions with tribal members. The Court has repeatedly recognized that nonmembers who make such a choice are presumed to know that such transactions subject them to tribal jurisdiction for suits arising out of their business activities. Third, Dollar General agreed to participate in the Youth Opportunity Program, a decision that led to the incident in question. Fourth, Dollar General signed an underlying lease with the Tribe in which it agreed to certain tribal adjudicatory authority, thus demonstrating that Dollar General is familiar with the Respondent Tribe's courts and was prepared to submit to them. Lastly, Dollar General is a sophisticated, multi-billion dollar corporation that surely could be expected to consider all its options before entering this reservation and agreeing to participate in the Youth Opportunity Program.

ARGUMENT

I. SETTLED PRINCIPLES OF LAW CONTROL THIS APPEAL.

This appeal presents the question whether a federally recognized Indian tribe may adjudicate a case in tribal court based on a claim that a nonmember sexually assaulted a tribal youth on tribal land. Two settled principles of law apply to this appeal: (1) Indian tribes retain certain sovereign powers, and (2) tribal powers over nonmembers are limited. As discussed below, Petitioners and their *amici* urge the Court to adopt a new rule that would deny *all* tribal court civil jurisdiction over *all* nonmember activity in the absence of express consent. Such a rule, however, represents a serious departure from the Court's current doctrine, one that would undermine the Court's support for tribal self-government and create striking inconsistencies with the conventional understanding of notice and fairness to defendants in other civil contexts.

A. Indian Tribes Retain Sovereign Powers.

Indian tribes "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)

(recognizing that "[t]he sovereignty retained by tribes includes 'the power of regulating their internal and social relations,' . . . [as well as the] power to exclude nonmembers entirely or to condition their presence on the reservation") (internal citation omitted); *Plains Commerce Bank v. Long Family Cattle Co., Inc.*, 554 U.S. 316, 327-28 (2008) ("As part of their residual sovereignty, tribes . . . may also exclude nonmembers from entering tribal land.").

The federal government has supported the independence and growth of tribal governments for decades. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.") This federal policy includes a recognition of tribal courts' importance. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, . . . and the Federal Government has consistently encouraged their development."). Reflecting this national commitment, Congress has restored the inherent authority of Indian tribes to exercise criminal jurisdiction over nonmember Indians, *see* 25 U.S.C. § 1301(2), *United States v. Lara*, 541 U.S. 193 (2004), and to exercise certain powers of criminal jurisdiction over nonmembers who commit particular crimes of domestic violence against a member of the tribe. *See* 25 U.S.C. § 1304.

B. This Court Has Limited Tribes' Civil Authority Over Nonmembers.

In *Montana v. United States*, 450 U.S. 544, the Court held that an Indian tribe may regulate the activity of a nonmember on nonmember fee land in

only two situations: (1) the nonmember has entered into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) the nonmember is engaging in an activity that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, 450 U.S. at 565-66. The Court has since held that *Montana* applies equally to questions concerning a tribal court's jurisdiction over claims arising on nonmember land. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (2007).

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court cited *Montana* for the proposition that tribes may lack civil jurisdiction over nonmembers even on tribal trust land in certain circumstances. *Id.*, 533 U.S. at 360. *Hicks*, however, did not alter the overarching principle recognized in *Montana* and confirmed in later cases that when nonmembers engage in activities on tribal trust land, there is a presumption of tribal jurisdiction. *Strate*, 520 U.S. at 453 (reiterating the "unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'") (quoting *Iowa Mut.*, 480 U.S. at 18). *See Hicks*, 533 U.S., at 386 (Ginsberg, J. concurring) (noting that *Hicks* did not involve activity occurring on tribal trust land but, rather, on off-reservation land).

A strong argument can be made, *see* Gov't Cert. Br. at 11, that an exercise of tribal authority over an activity occurring on tribal trust land need not be analyzed under the *Montana* exceptions.

Petitioners, however, assume that the *Montana* exceptions do govern such activities, and Respondents contend that the Court need not reach the question of whether jurisdiction is broader than the exceptions on tribal land because the first exception is clearly satisfied here. We will proceed in the same way. The *Montana* framework, though, recognizes that where the regulated activity is occurring on tribal trust land, tribal authority is presumptive.[2]

Respondents have also relied exclusively on the first "*Montana* exception." Again, we will do likewise, although we believe that sexual molestation of Indian youth by nonmembers significantly impacts tribal health and welfare.

II. THE *MONTANA* FRAMEWORK, INCLUDING THE CONSENSUAL RELATIONSHIPS EXCEPTION, EMBODIES A STANDARD OF FAIR NOTICE.

Both parties agree that the issue in this appeal—that is, whether tribal courts may adjudicate a tort claim filed by tribal members against a nonmember corporation doing business on tribal land—may be resolved consistent with *Montana*'s "consensual relationships" exception. The parties disagree, however, on that exception's application.

---

[2] In most situations, as illustrated in this case, a nonmember engaging in continuous activity on tribal trust land would first have entered into an agreement with the tribe, either oral or written, obtaining the tribe's permission. That agreement would itself be strong evidence of a consensual relationship under *Montana*.

Dollar General has argued that a party must expressly consent to tribal jurisdiction. *See* Pet. Br. at 16 (claiming that tribal courts "lack civil jurisdiction over nonmembers absent congressional authorization (*e.g.*, in a statute or treaty) or the defendant's unambiguous consent (*e.g.*, in a forum selection clause of a contract)."). If accepted, Dollar General's interpretation would render superfluous most of the Court's language in the "consensual relationships" exception. Had the Court intended this exception to mean nothing more than express consent, the Court could easily have said so. Instead, the Court stated, *inter alia*, that "other arrangements" can satisfy this exception, rendering impossible Dollar General's interpretation that only one arrangement—express consent—was intended.

The only construction consistent with the Court's treatment of the consensual relationships exception is to view it as incorporating a standard of fair notice. Under that standard, if nonmembers should reasonably expect that their actions may subject them either to tribal regulation or judicial jurisdiction, then tribes retain regulatory or adjudicative power. On the other hand, if nonmembers could not reasonably predict that their actions would subject them to tribal authority, tribal jurisdiction is lacking.

The fair notice standard is a real-world test that takes into account the reasonable expectations of both the individual and the government. Surely, for instance, an American citizen who travels to France and sexually assaults a French child would know that he/she could be held accountable in a

French court applying French law. Written consent would not be a prerequisite.

Fair notice has been an omnipresent and unifying concern in all of this Court's cases involving tribal jurisdiction over nonmembers. Underlying each case is a consideration of whether the circumstances gave fair notice to the nonmember. *Montana*, for instance, concerned the tribes' ability to enforce a sweeping regulation barring nonmembers from hunting and fishing on land throughout the tribe's reservation, including on lands owned by the state or by nonmembers in fee simple. The land owned by nonmembers had passed into fee status pursuant to the General Allotment Act of 1887, a statute that broke up the tribal land base and opened reservations to non-Indian settlement. Given that the overarching goal of allotment (since thoroughly repudiated) was to eliminate tribal identity, the Court reasoned that nonmembers who acquired fee land pursuant to the allotment statute would have had little reason to expect that their actions on those lands would be subject to tribal regulation. *Montana*, 450 U.S. at 559 n.9.

Strate addressed the question whether a tribal court could exercise jurisdiction over a tort claim involving two non-Indians whose vehicles collided on a state highway running through the Three Affiliated Tribes of the Fort Berthold Reservation. The Court had to make a threshold determination whether the highway, maintained and controlled by the state pursuant to a right-of-way but located on tribal trust land, would be considered for purposes of the *Montana* test as "trust" land or "alienated" land. The Court held that the highway was more akin to

alienated land because the Tribes "retained no gatekeeping right" and "cannot assert a landowner's right to occupy and exclude." *Strate*, 520 U.S. at 456. Implicit in the Court's holding that tribal courts lacked jurisdiction is the fact that the defendant would not reasonably have had fair notice that the activity in question (an accident with another non-Indian on a state right-of-way) could be heard "in an unfamiliar [tribal] court" rather than state court. *Id.* at 459.

In *Nevada v. Hicks*, the Court held that a tribal court could not adjudicate a suit for damages filed by a tribal member against state game wardens who were "executing [state] process related to the violation, off reservation, of state laws," *Hicks*, 533 U.S. at 364, when they searched the plaintiff's reservation home. The Court found that that the plaintiff could not show that the wardens had entered into a consensual relationship with the tribe. *See id.* at 359 n.3. Rather, it found the "official actions at issue" in executing a warrant to be "far removed" from the sort of "private consensual relationship" encompassed by the exception. *Id.* (quotation marks omitted). The Court's clear and overwhelming concern in *Hicks* was that state law enforcement officers executing a state warrant in the course of investigating an off-reservation crime cannot be expected to know that their actions might subject them to tribal jurisdiction for alleged civil rights violations. *See id.* at 364-66 (emphasizing absence of prior authority limiting state jurisdiction over off-reservation crimes), *id.* at 386 (Ginsburg, J., concurring) (stressing that *Hicks*'s holding was limited to state officers performing official duties), and *id.* at 396 (O'Connor, J., concurring) ("Certainly,

state officials should be protected from civil liability for actions undertaken within the scope of their duties.").[3] In *Hicks*, the wardens were carrying out their official duties under state law to investigate a crime over which the state had undisputed jurisdiction. Under such circumstances, they did not receive fair notice that they might be sued in tribal court.

On the other hand, where the facts suggest that a nonmember had adequate notice, the Court has consistently upheld tribal jurisdiction. A finding of fair notice is implicit in *Williams v. Lee,* 358 U.S. 217 (1959). In that case, the Court held that a non-Indian business that had selected an Indian reservation in which to conduct its operations and engaged in direct sales to tribe members was subject to *exclusive* tribal adjudicatory jurisdiction to resolve a contractual dispute with a tribal customer. *See id.* at 223 (finding it "immaterial that the [business owner] is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

Similarly, a non-Indian business in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), was found subject to a tribe's regulatory authority because the corporation had chosen an Indian reservation in which to operate its business, entered into a contract with the tribe, and conducted its venture on tribal land, factors that raised a predictable expectation (for both the tribe and the

[3] Justice O'Connor noted, however, that state officials should not necessarily be immune from tribal jurisdiction if exceeding the scope of their authority. *See id.*

business) that the corporation would be subject to tribal jurisdiction.

Finally, *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989), while resting on the tribe's regulatory authority under the second *Montana* exception, again illustrates the Court's preoccupation with fair notice in delineating the boundaries of tribal authority. In *Brendale*, the Court upheld the tribe's authority to apply its zoning laws to nonmember fee land within a "closed area" consisting predominantly of forested tribal land, but not to an "open area" where land was predominantly owned in fee by nonmembers. *Id.* at 438 (opinion of Stevens, J., announcing the judgment of the Court in part and concurring in part). The tribe severely restricted nonmember access to the closed portion, and the land retained its "essential" and "pristine" wilderness character. *Id.* at 440-41. By contrast, access to the open part was unrestricted, and the tribe had never attempted to regulate land use in the area. *Id.* at 445. *Brendale*'s fractured result can best be understood as reflecting a concern with notice: A purchaser of fee land in a heavily regulated area of distinctively tribal character surely has reason to expect that his or her land use may be restricted, while the same is not true in a mostly non-Indian area with no history of tribal regulation.

The Court's reliance on fair notice as a factor is further apparent in its focus on whether the activity that the tribe seeks to regulate occurred on trust land or alienated land. Although land ownership is "only one factor to consider" in determining the propriety of tribal jurisdiction, *see Hicks*, 533 U.S. at 360, land status has significant

import and "may sometimes be a dispositive factor." *Id*. If the activity in question occurred on tribal land, this factor weighs heavily in favor of the tribe. Indian tribes "retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454. *See also Plains Commerce*, 554 U.S. at 327 ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe") (quoting *Nevada v. Hicks*, 533 U.S. at 392) (O'Connor, J. concurring in part and concurring in judgment); *South Dakota v. Bourland*, 508 U.S. 679, 689 & 689 n.9 (1993) (drawing a sharp contrast for tribal jurisdiction purposes between land the tribe had conveyed to non-Indians in an area "broadly opened to the public" and land that remained under "absolute and exclusive" tribal control); *Montana*, 450 U.S. at 557 (noting that tribes have significantly greater concerns when an activity is occurring on Indian land than non-Indian land). Tribal concerns are at their apex when tribal land is involved.

Nonmembers engaging in activities on tribal lands surely know that the tribe can exclude them from those lands. *See Plains Commerce*, 554 U.S. at 327-28; *Montana*, 450 U.S. at 554 (recognizing that an Indian tribe "implicitly [has] the power to exclude others from" tribal land, as any landowner). Given that tribes have the greater power to exclude, they therefore have the lesser power to regulate access to that land and impose conditions on conduct occurring there. *See Bourland*, 508 U.S. at 688-89; *Brendale*, 492 U.S. at 434-36. Tribes, like all governments, also have a strong interest in protecting the conditions of the land itself. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-38 (1983) (noting that an important and widely acknowledged aspect of tribal

sovereignty is the right to "exercise[] substantial control over the lands and resources of [the] reservation"; *Merrion*, 455 U.S. at 141 (recognizing tribes' legitimate interests in "territorial management").

A second factor that has had significant import in the cases where it is present is whether the party being subjected to tribal jurisdiction voluntarily entered the reservation to engage in economic activity. In *Montana*, 450 U.S. at 565-66, the Court cited four cases to illustrate previous circumstances under which the consensual relationship exception was satisfied. Tellingly, all involved economic activity: *Williams v. Lee* (upholding tribal court jurisdiction to resolve a dispute between a tribe member and a non-Indian storeowner doing business on the Navajo Reservation); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding a tribal permit tax on a non-Indian who had leased tribal land to graze cattle); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (holding that an Indian tribe, as "a fundamental attribute of sovereignty," could impose a sales tax on a non-Indian who purchased goods from a tribal vendor on the reservation); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (upholding a tribal permit tax on non-Indians who wished to conduct commerce on the reservation). This list of cases, the Court explained in *Strate*, "indicates the type of activities the Court [in *Montana*] had in mind" when it fashioned the consensual relationships exception. *Strate*, 520 U.S. at 457.

III. FAIR NOTICE IS A KEY FACTOR IN OTHER JURISDICTIONAL INQUIRIES.

The Court's concern with fair notice in tribal jurisdiction cases finds analogues outside the tribal context in situations involving the fairness of a sovereign's exercise of judicial power. In considering, for example, whether states may assert personal jurisdiction over a given defendant under the minimum contacts framework, the Court has focused on the degree to which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thereby invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).[4]

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the Court stressed the relationship between the minimum contacts standard and fair notice, explaining that when the defendant has engaged in purposeful availment of a given forum, it "has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or . . . severing its connection with the State." *Id.* at 297. The defendant's voluntary and deliberate affiliations with a state thus helps, in

[4] The Court has suggested that the limitation on tribal adjudicative jurisdiction over nonmembers pertains not "merely … [to] … personal jurisdiction" but also to subject matter jurisdiction. *See Hicks*, 533 U.S. at 367. The minimum contacts standard is nonetheless relevant to the tribal context because it reflects "traditional notions of fair play and substantial justice," values that *Montana*'s consensual relationships exception also incorporates. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

cases where such connections are present, to ensure the "reasonable foreseeability" of suit and to render it "presumptively not unreasonable to require [the defendant] to submit to the burdens of litigation in that forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

In *Burger King*, for example, the Court found that a defendant who entered into a "relationship that envisioned continuing and wide-reaching contacts with [the defendant] in Florida," could properly "be called to account there" for foreseeable harm that his actions had caused to the defendant. *Id.* at 480. Likewise, concurring in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2793 (2011), Justice Breyer suggested that a state might appropriately exercise personal jurisdiction over a "large manufacturer which specifically seeks" sales there, but not over a "small manufacturer [such as] an Appalachian potter" that sells a coffee mug that is later resold to a buyer from the forum state. This analysis reflects fair notice considerations: A defendant who deliberately "reach[es] out beyond" its home state to seek valuable opportunities elsewhere, *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 647 (1950), has had the chance to weigh the benefits of such opportunities against the potential burden of litigation in a foreign state.

To be sure, the usual minimum contacts framework does not precisely fit the tribal context because, as a result of the unique nature of tribal sovereignty, tribes and states exercise territorial jurisdiction in different ways and to different extents. *See Montana*, 450 U.S. at 563-64; *Plains Commerce*, 554 U.S. at 327-28. The *Montana* approach reflects

these differences, requiring a higher standard of affiliation with a tribe through the consensual relationships exception than is necessary in the personal jurisdiction context. Yet despite the greater stringency of *Montana*'s standard, *Montana*'s central concerns—fairness to defendants and recognition of sovereign interests—are the same: Can the defendant predict that its actions will subject it to jurisdiction and therefore shape its conduct so as to anticipate, or avoid, jurisdiction? Has the defendant benefitted from the laws and protections of the sovereign? Can the sovereign adequately protect its interests?

A "consensual relationship" test that incorporates fair notice principles addresses these concerns. Such a standard provides defendants who have only "random, fortuitous, or attenuated contacts" with tribes with reasonable assurance that they will not be subject to tribal jurisdiction. *See Burger King*, 471 U.S. at 475 (internal citations and quotation marks omitted). At the same time, it ensures, at the very least, that defendants who deliberately seek out profitable business dealings with tribes on tribal lands are on notice that the tribe presumptively retains its "gatekeeping" authority, both regulatory and adjudicative.

This Court has applied similar logic in the factors it considers in deciding whether to enforce judgments entered by foreign courts against U.S. defendants. These decisions are particularly analogous to the tribal context because state and federal courts may recognize such judgments even where they were obtained in the absence of the

constitutional protections available in U.S. courts.[5] For example, in *Hilton v. Guyot*, 159 U.S. 113 (1895), this Court, in considering whether a French judgment against U.S. defendants was entitled to recognition, rejected the defendants' objections to the rendering court's jurisdiction because the defendants were not merely "traveling through or casually found in a foreign country," but had instead established purposeful long-term contacts there. *Id.* at 204. Although the defendants were citizens and residents of New York, had their principal place of business in New York, and made no sales in France, they nonetheless "had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there." *Id.*[6] *Hilton*, a foundational enforcement case decided decades before the Court established the minimum contacts framework for personal jurisdiction, reflects the more fundamental intuition that, when a defendant has established ongoing commercial relationships in a foreign jurisdiction, it can reasonably anticipate the possibility of litigation in that country's courts.

Hilton's approach to jurisdiction continues to hold sway in the analysis that U.S. state and federal courts conduct in determining the enforceability of a

---

[5] Indeed, because the majority of constitutional protections are statutorily made applicable to tribes through the Indian Civil Rights Act, tribal courts are likely to be *more* similar to state and federal courts in this regard than are the courts of countries with entirely distinct judicial systems.

[6] The Court ultimately concluded that the judgment in *Hilton* was not entitled to conclusive effect, but solely on the grounds that France did not afford reciprocal recognition to U.S. judgments.

foreign judgment. Whether applying federal common law of recognition or similar state recognition acts, most courts have evaluated the foreign court's jurisdiction over the defendant based on whether it conforms to the U.S. constitutional minimum contacts standard. *See Evans Cabinet Corp. v. Kitchen Intern. Inc.*, 593 F.3d 135, 142 n.10 (1st Cir. 2010) (collecting cases). Such analysis necessarily takes account of that standard's concern with fair notice.[7]

[7] Courts' concern with fair notice in enforcement is also important because tribal judgments must often be enforced by state courts, providing an additional chance for judicial consideration of whether notice and other jurisdictional requisites were present. All states grant at least comity to tribal court judgments. Felix Cohen's Handbook of Federal Indian Law at § 7.07[2][b], 664 (2012 ed.). New Mexico, Idaho, Iowa and Michigan go further, recognizing tribal court judgments as a matter of full faith and credit. *See Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975); *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982); Iowa Code ch. 626D; Mich. Ct. R. 2.615. Under either a comity or full faith and credit standard, the state courts enforce tribal court judgments only after ensuring that the decisions comport with due process and that jurisdiction was proper. *See*, *e.g.*, Cal. Civ. Proc. Code § 1737(b) (providing for enforcement of tribal court money judgments unless the court finds that the tribal court lacked jurisdiction or did not provide due process); Wash. Super. Ct. Civ. R. 82.5 (similar).

IV. BECAUSE DOLLAR GENERAL HAD FAIR NOTICE THAT ITS ACTIVITIES MIGHT SUBJECT IT TO TRIBAL JURISDICTION, THE CONSENSUAL RELATIONSHIP EXCEPTION IS SATISFIED.

Every factor employed by the Court in its consensual relationship analysis weighs in favor of the Mississippi Band of Choctaw Indians. The facts show that Dollar General had fair notice, a principle that underlies the first *Montana* exception.

First, the activity-in-suit occurred on tribal land, where tribal interests are at their apex. *See Strate*, 520 U.S. at 454 ("We 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct on tribal land.") (footnote omitted).

Second, Dollar General voluntarily entered the reservation to conduct business there and to make a profit on sales of goods to members of the tribe. This is a classic "consensual relationship" scenario. *See Montana*, 450 U.S. at 565-66. Indeed, this Court, without exception, has repeatedly upheld tribal jurisdiction over a nonmember business engaging in commerce with tribal members on Indian land. In some circumstances, it has made tribal courts the exclusive forum for adjudication of such cases. *See Williams*, 358 U.S. at 222-23.

Third, Dollar General voluntarily agreed to participate in the Youth Opportunity Program, the activity that gave rise to the tort claim.

Fourth, Dollar General entered into a lease agreement with and obtained a business license from

the Respondent Tribe in which the corporation agreed to be subject to tribal court jurisdiction with regard to certain claims arising from the lease. Dollar General can hardly say that appearing in tribal court would force them into an unfamiliar tribunal.[8]

Lastly, Dollar General is a sophisticated, multi-billion dollar corporation whose attorneys surely researched the law prior to signing a lease with the tribe. Dollar General knew or should have known from the four economic-activity cases cited in *Montana* and from *Merrion v. Jicarilla Apache Tribe* that it would likely be held accountable for an employee's tortious conduct on tribal land that injured a member of the tribe. In negotiating its lease with the tribe, Dollar General could have requested an exemption from tribal civil jurisdiction in whole or in part. Instead, it signed a lease explicitly consenting to tribal court jurisdiction and the application of tribal law, and later agreed to participate in the tribe's Youth program. In neither case did it seek any immunity from tribal civil authority.

Given the language of the consensual relationship test, the cases cited in *Montana*

---

[8] For reasons just explained, Dollar General had fair notice that it would be subject to the Tribe's civil authority in this context. Had there not been an underlying lease, fair notice would still be evident. However, the existence of this lease provision is significant because it demonstrates, at a minimum, that Dollar General is familiar with the tribal court forum. The degree of a defendant's familiarity with the tribal court has been referenced in this Court's jurisdictional decisions, *see, e.g., Strate*, 520 U.S. at 459.

illustrating its intended scope, and the Court's subsequent cases, all of which were known to Dollar General, there is ample support here for the conclusion reached by the Fifth Circuit: "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 Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment." *Dolgencorp*, *Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174 (5th Cir. 2014).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

Stephen L. Pevar
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
330 Main Street
Hartford, CT 06106
(860) 570-9830
spevar@aclu.org

Matthew A. Coles
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Katherine Florey
UC DAVIS SCHOOL OF LAW
400 Mrak Hall Drive
Davis, CA 95616

Dated: October 21, 2015