No. 13-1496

IN THE
Supreme Court of the United States

DOLLAR GENERAL CORP., *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 FOR AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS GREGORY ABLAVSKY, BETHANY R. BERGER, NED BLACKHAWK, DANIEL CARPENTER, MATTHEW L.M. FLETCHER, MAGGIE MCKINLEY, AND JOSEPH WILLIAM SINGER IN SUPPORT OF RESPONDENTS

DANIELLE SPINELLI
Counsel of Record
JACQUELINE DE ARMAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TREATIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REGULATIONS

ADMINISTRATIVE AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 13-1496

DOLLAR GENERAL CORP., *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 FOR AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS GREGORY ABLAVSKY, BETHANY R. BERGER, NED BLACKHAWK, DANIEL CARPENTER, MATTHEW L.M. FLETCHER, MAGGIE MCKINLEY, AND JOSEPH WILLIAM SINGER IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici are historians and legal scholars whose scholarship focuses on Indian law and Indian legal history, including the history of tribal sovereignty and jurisdiction. They accordingly have a scholarly interest

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. Each party's consent to the filing of amicus briefs in support of either party is on file with the Clerk of the Court.

and expertise in the question of the historical scope of tribal jurisdiction over nonmembers, which in turn bears significantly on the question presented in this case: whether a tribal court has jurisdiction over a civil tort suit against a nonmember for a sexual assault committed on tribal land and arising out of the nonmember's consensual commercial relationship with the tribe. Amici therefore submit this brief to provide the Court a more complete and accurate picture of the history of tribal jurisdiction over nonmembers.

Gregory Ablavsky is Assistant Professor of Law at Stanford Law School. His scholarship focuses on the legal history of the early American West, particularly the history of federal Indian law. A lawyer and historian, his publications examining the history of Native sovereignty under federal law include *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015) and *The Savage Constitution*, 63 Duke L.J. 999 (2014).

Bethany Berger is the Thomas F. Gallivan, Jr. Professor at the University of Connecticut School of Law. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (Newton et al. eds., 2012), with primary responsibility for the chapter on history. Her articles discussing the legal history of jurisdiction in Indian country include Williams *v.* Lee *and the Debate over Indian Equality*, 109 Mich. L. Rev. 1463 (2011); *Reconciling Equal Protection and Federal Indian Law*, 98 Cal. L. Rev. 1165 (2010); *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047 (2005); and "*Power Over this Unfortunate Race": Race, Politics and Indian Law in* United States *v.* Rogers, 45 Wm. & Mary L. Rev. 1957 (2004).

Ned Blackhawk (Te-Moak Tribe of Western Shoshone Indians of Nevada) is Professor of History and American Studies at Yale, where he teaches courses on American Indian history, law, and policy. He is the author of *Violence over the Land: Indians and Empires in the Early American West* (Harvard Univ. Press 2006), a prize-winning study of the American Great Basin. His current research assesses the many ways that Indian history has revised prevailing interpretations of U.S. history, building upon recent publications including *American Indians and the Study of U.S. History*, *in American History Now* 376 (American Historical Association, Foner & McGirr eds., 2011).

Daniel Carpenter is the Allie S. Freed Professor of Government in the Faculty of Arts and Sciences and Director of the Social Science Academic Ventures Program at the Radcliffe Institute at Harvard University, where he teaches courses on early American political history. His scholarship, including his book *The Forging of Bureaucratic Autonomy* (Princeton 2001), has focused on the development of political institutions and government regulation in the United States and on early American history. He is currently writing *Democracy by Petition: The Mobilizations of North America, 1810-1850*.

Matthew L.M. Fletcher (Grand Traverse Band of Ottawa and Chippewa Indians) is Professor of Law at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. He co-authored the sixth edition of *Cases and Materials on Federal Indian Law* (2011). He has also authored *American Indian Tribal Law* (2011), the first casebook for law students on tribal law; *The Return of the Eagle: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* (2012); *American Indian*

Education: Counternarratives in Racism, Struggle, and the Law (2008); and many articles on Indian law and legal history.

Maggie McKinley (Fond du Lac Band of Lake Superior Ojibwe) is a Climenko Fellow and Lecturer on Law at Harvard Law School. She researches and writes on public law and legal history, with a particular focus on the institutional development of the federal government and the representation of entrenched minorities. Her publications include a historical view of civil jurisdiction in the federal courts, and her most recent article on the history of federal petitioning, including petitioning by tribes and Natives, is forthcoming in the *Stanford Law Review*.

Joseph William Singer is Bussey Professor of Law at Harvard Law School, where his scholarship focuses on property law and federal Indian law. He is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (Newton et al. eds., 2012). His many articles on Indian law include *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 Am. Indian L. Rev. 1 (2014); *Tribal Sovereignty and Human Rights*, 2013 Mich. St. L. Rev. 307; *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (Harvard Univ. working paper 2004); and *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. Rev. 1 (1996).

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court reiterated just two Terms ago, "[u]nless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). That

authority derives not from any grant by Congress, but from tribes' status as sovereigns predating the Constitution. Tribes thus 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). This retained sovereignty includes the right to "exercise some forms of civil jurisdiction over non-Indians on their reservations," including the adjudication of civil disputes stemming from a consensual relationship between the non-Indian and the tribe. *Montana* v. *United States*, 450 U.S. 544, 565 (1981).

Petitioner Dollar General now asks this Court to reject those holdings, contending (at 16) that "tribes … have been divested of the inherent authority to subject nonmembers to *civil* suit in tribal court." For that proposition, Dollar General relies on a highly selective presentation of historical evidence, and mischaracterizes what evidence it does present. Its law office history—stripped of the critical context that informs scholarship in the discipline—seriously distorts the actual historical record.

The outer bounds of tribes' "historic sovereign authority," *Bay Mills*, 134 S. Ct. at 2030, have, of course, been contested at times during the lengthy and hard-fought struggle over the possession and control of originally Indian land. Taken as a whole, however, the historical evidence shows that tribal jurisdiction over nonmembers' activities on tribal land, and over civil disputes stemming from those activities, is a part of tribes' inherent sovereignty that has never been divested, either implicitly through incorporation into the United States or explicitly by treaty or statute. To the contrary, the federal government has repeatedly recognized that tribes possess such jurisdiction. *See infra* Part I.

Early treaties—including the first treaty ever signed between a tribe and the United States—expressly recognized tribes' authority to exercise jurisdiction over non-Indians on their land. Similarly, Indian agents sent by the federal government to serve as liaisons with the tribes assisted them in administering tribal law over non-Indians on tribal land, and understood their authority to do so to derive from the tribes, not the United States. *See infra* Part I.A.

In the early nineteenth century, as the States increasingly agitated to obtain control over Indian land, the Five Civilized Tribes developed written constitutions and separate criminal and civil laws modeled after the Anglo-American legal system. Even during the period of forced removal and the establishment of Indian Territory in the West, the federal government continued to acknowledge that non-Indians who voluntarily resided on tribal land were subject to tribal laws and tribal jurisdiction. And tribes exercised that power by developing and enforcing formal laws regulating non-Indians' entry into and conduct on tribal land. *See infra* Part I.B.

Treaties executed after the Civil War likewise expressly recognized tribes' authority to exercise jurisdiction over nonmembers on tribal land. And during the 1870s and 1880s, the Bureau of Indian Affairs helped to establish Courts of Indian Offenses, staffed by judges who were tribal members, which exercised jurisdiction over a wide range of disputes arising on Indian land. Notwithstanding the BIA's role, these courts in no way "impaired tribal authority in the field of law and order." *Powers of Indian Tribes*, 55 Interior Dec. 14, 64 (Oct. 25, 1934). *See infra* Part I.C.

Summing up this lengthy history, in 1934 the Solicitor of the Interior explained that tribal jurisdiction over non-Indians on tribal land "continues to this day, save as it has been expressly limited by the acts of a superior government," and that "attempts of the States to exercise jurisdiction over offenses … between Indians and whites, committed on an Indian reservation, have been held invalid usurpation[s] of authority." *Powers of Indian Tribes*, 55 Interior Dec. at 57.

Dollar General contends that tribes lack the power to exercise civil jurisdiction over nonmembers unless the federal government expressly confers that power on them. As the Solicitor recognized, however, "[p]erhaps the most basic principle of all Indian law" is that tribes retain their inherent powers unless the federal government has expressly taken those powers away. *Powers of Indian Tribes*, 55 Interior Dec. at 19. Dollar General points to a miscellany of treaty provisions and statutes that it contends reflect a recognition that tribes lack jurisdiction over nonmembers, but it misreads the history it relies on.

For example, Dollar General points to the 1830 Treaty with the Choctaws. But although that treaty made clear that the Choctaw courts lacked *criminal* jurisdiction over non-Indians, the United States recognized that it left the Tribe's *civil* jurisdiction untouched. Dollar General also cites two treaties from the 1850s that apparently withdrew tribal civil jurisdiction over non-Indians. Yet the twenty other treaties entered into at the same time with different tribes contained no such language; and the two treaties at issue were in effect only until the 1860s, when new treaties reaffirmed those tribes' power to exercise civil jurisdiction over nonmembers. Dollar General's remaining authorities are likewise fully consistent with the exercise

of civil jurisdiction over nonmembers. The Indian depredation claims system was essentially a war claims resolution system that did not address ordinary civil torts. Other statutes conferring jurisdiction on federal courts over some disputes arising in Indian country did not make that jurisdiction exclusive, thereby leaving tribal courts' concurrent jurisdiction undisturbed. And as recently as the passage of the Indian Civil Rights Act, Congress evinced a background presumption of tribal jurisdiction over nonmembers. *See infra* Part II.

In short, the historical record refutes Dollar General's contention that tribes have been divested of civil jurisdiction over nonmembers. Tribes therefore retain this important attribute of internal sovereignty.

ARGUMENT

I. INDIAN TRIBES' INHERENT SOVEREIGNTY HAS HISTORICALLY INCLUDED JURISDICTION OVER NON-INDIANS ON TRIBAL LAND

The history of tribal relationships with, and jurisdiction over, non-Indians on tribal land is complex, reflecting the changeable and contested relationships among tribes, settlers, and the United States. But an examination of that history nonetheless reveals that since the earliest encounters between Indian tribes and Europeans, tribes have maintained their inherent authority to govern their lands. As part of that power, tribes have exercised jurisdiction over non-Indians on tribal land, including by establishing and enforcing requirements for entry to and activities on tribal land, as well as by adjudicating disputes involving nonmembers arising out of conduct on tribal land. And the federal government has repeatedly recognized the validity of that jurisdiction, from the time of the Founding to the

present, making clear that tribes' exercise of such jurisdiction is in no way inconsistent with their status as "domestic dependent nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

A. The Colonial And Early National Era

1. To begin with basic principles, Indian tribes originally possessed all the powers of a sovereign nation. As this Court explained in 1832, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). European conquest and the corresponding discovery doctrine terminated Indian tribes' *external* political sovereignty. *Id.* at 543-544; *see* Cohen, *Handbook of Federal Indian Law* 123 (1941); *see also Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). The tribes' later incorporation into the territory of the United States, moreover, restricted their exercise of separate power to the extent that it "conflict[ed] with the interests of the [the United States'] overriding sovereignty." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

But neither conquest nor incorporation abolished the tribes' sovereign powers of self-government. Cohen 1941, *supra*, at 123. Rather, as the Founders recognized, they remained quasi-independent nations, similar in status to foreign sovereigns, though domestic in nature. Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1057-1067 (2015). Although no longer able to convey land to whomever they pleased or engage in political relations with nations outside the United States, *see M'Intosh*, 21 U.S. at 543, tribes otherwise maintained, in the words of Secretary

of State Thomas Jefferson, "full, undivided and independent sovereignty," centered on their inherent right to govern their own land, *Notes on Cabinet Opinions, 26 February 1793*, *in* 25 *Papers of Thomas Jefferson* 271, 272 (Catanzariti ed., 1992).

2. The earliest treaties between the United States and the tribes reflected this expansive, territorial view of tribal sovereignty. Indeed, the very first treaty between the nascent United States and an Indian tribe, the 1778 Treaty with the Delawares, contemplated that the Delawares would have the power to govern the conduct of non-Indians on Delaware land. The treaty prohibited both parties from "proceed[ing] to the infliction of punishments on the citizens of the other" before "a fair and impartial trial [could] be had by judges or juries of both parties, as near as [could] be to the laws, customs and usages of the contracting parties and natural justice." Treaty with the Delawares art. 4, 7 Stat. 13, 14 (1778). Members of Congress were to "fix" the "mode of such tr[i]als," but "with the assistance of such deputies of the Delaware nation" who were "appointed to act in concert with them." *Id.*

Other treaties executed during the early years of the Republic went further still, expressly securing to the tribes the power to exercise jurisdiction over non-Indians on tribal land. Specifically, these treaties authorized tribes to punish "as they please[d]" any "citizen of the United States" who "attempt[ed] to settle on any of the [tribes'] lands." Treaty with Cherokees art. 5, 7 Stat. 18, 19 (1785); Treaty with Chickasaws art. 4, 7 Stat. 24, 25 (1786); Treaty with the Choctaws art. 4, 7 Stat. 21, 22 (1786); Treaty with the Creeks art. 6, 7 Stat. 35, 36 (1790); *see also* Treaty with the Wyandots, Delawares, Shawnees, Ottawas, Chippewas art. 6, 7 Stat. 49, 52 (1795) (similar).

Still other treaties from the era encouraged tribal law enforcement on Indian land to ensure that Indians and non-Indians alike maintained the peace and paid their debts. An 1820 treaty with the Choctaw, for instance, pledged two hundred dollars to enable the Choctaw Nation to assemble a police force "so that good order may be maintained, and that all men, *both white and red*, may be compelled to pay their just debts." Treaty with the Choctaws art. 13, 7 Stat. 210, 213 (1820) (emphasis added).[2]

3. Early federal recognition of tribes' retained sovereignty on tribal land is likewise reflected in the role of Indian agents, federal officers sent to Indian country to liaise with the tribes on behalf of the federal government. Rather than attempting to impose federal law on Indian land, these envoys sometimes assisted the tribes in administering tribal law over non-Indians. For example, early letters from Benjamin Hawkins, the Indian Agent in Creek Country and an early U.S. senator, reported that the Creeks "vested [him] unanimously with the [e]ntire government of white people among them." Letter from Benjamin Hawkins to James Jackson, Governor of Georgia, Aug. 14, 1800, *in* 1 *Letters, Journals and Writings of Benjamin Hawkins: 1796-1801*, at 344 (Grant ed., 1980). Hawkins also regarded the Creek's National Council, consisting of both a legislature and judiciary, as the representative government of a unified Creek Nation. Ethridge, *Creek Country: The Creek Indians and Their World* 107 (2003). The National Council attended to affairs such as land cessions and collective debt, and provided a forum for the

[2] The United States' reliance on tribal police power continued well into the modern, post-treaty era. *See Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of Interior* 92 (1890).

resolution of disputes between Indians and between Indian and non-Indian parties. *Id.* at 106-107.

Importantly, Hawkins's reports to his superiors made clear that he understood his authority to adjudicate disputes on Creek land to derive not from the federal government, but from the Creek Nation's sovereign power. Reporting on his work in an 1806 letter to President Thomas Jefferson, Hawkins wrote: "As the Creeks are an independent nation, I shall go [o]n to dispense justice among white and black people according to the authority vested in me by them as heretofore declared and has been customary for ten years … until I am otherwise directed by our government or that Congress can legislate on the subject." Letter from Benjamin Hawkins to Thomas Jefferson, Sept. 13, 1806, *in* 2 *Letters, Journals and Writings of Benjamin Hawkins: 1802-1816*, at 507-509 (Grant ed., 1980); *see also* Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836*, at 61 (2010) (explaining that "Hawkins understood that he exercised delegated Creek jurisdiction, not federal authority" and outlining Hawkins's account of trials involving non-Indians in the Creek National Council).

B. The Removal Era

1. Indian tribes' formalized exercise of jurisdiction in part reflected their effort to demonstrate tribal "civilization" in the face of increasingly determined State efforts to dispossess tribes of their land. *See, e.g.*, Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* 51-53 (2009). Tribes like the Choctaws, Creeks, and Cherokees created legal systems modeled on the Anglo-American approach, with written constitutions and codes, and formal tribunals including a Supreme

Court. *See, e.g.*, Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* 53-72 (1975); Perdue, *Clan and Court: Another Look at the Early Cherokee Republic*, 24 Am. Indian Q. 562 (2000).

The constitutions of the "Five Civilized Tribes"—the Choctaw, Chickasaw, Seminole, Creek, and Cherokee Nations—closely tracked federal and state constitutions, containing, for example, bills of rights that largely reproduced federal and state provisions. Also like their federal and state counterparts, these constitutions frequently distinguished between criminal and civil jurisdiction. *See, e.g.*, Choctaw Const. art. 5, § 13 (1842) (distinguishing between appeals in "capital and criminal cases" and "all civil cases"); Cherokee Const. art. V, § 6 (1839) ("The Judges of the Supreme Court and of the Circuit Courts shall have complete criminal jurisdiction in such cases, and in such manner as may be pointed out, by law"); *id.* art. V, § 11 (providing accused persons the rights to confront witnesses, avoid self-incrimination, and secure a speedy trial by jury in "criminal prosecutions"); Chickasaw Const. art. 6, § 7 (1856) (granting circuit courts original jurisdiction over "all criminal cases" and original jurisdiction over "civil cases" not cognizable in the county courts).

2. Tribes' efforts to fend off State annexation of Indian land were largely in vain. At the insistence of the States, what began after the War of 1812 as negotiated, voluntary migration from eastern States to the western frontier became, in the 1830s under the Jackson administration, forced removal and resettlement of the tribes. *See generally Cohen's Handbook of Federal Indian Law* 41-51 (Newton et al. eds., 2012). Nonetheless, the United States continued to recognize tribes' right to self-government, including jurisdiction over certain non-Indians. In the House Report on the 1834

Western Territory Act, a bill that proposed to establish an Indian territory with a Native government, Congress explained:

> The right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations. Officers, and persons in the service of the United States, and persons required to reside in Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States.... [But] [a]s to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

H.R. Rep. No. 23-474, at 18 (1834). The report thus recognized that tribes exercised territorial jurisdiction over "persons … within [their] limits," including civil jurisdiction over non-Indians who voluntarily associated with the tribes. Indeed, even with respect to criminal jurisdiction, the report noted that where such authority had not been expressly removed, it was "rather of courtesy than of right that [the United States] undert[ook] to punish crimes committed in [Indian] territory by and against [U.S.] citizens." *Id.* at 13.[3]

---

[3] Congress did not ultimately pass the Western Territory Act, but this Court has relied on the 1834 House Report as an indication of Congress's contemporaneous view of tribal jurisdiction. *See Oliphant*, 435 U.S. at 202 (noting that the bill did not contemplate tribes' exercising "criminal jurisdiction over United States officials and citizens traveling through the area").

Similarly, in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), this Court confirmed tribes' jurisdiction over non-Indians who voluntarily resided in tribal territory. The Court concluded in *M'Intosh* that Indians held a "title of occupancy" in their lands, subject to right of first refusal in the United States. *Id.* at 592. The tribes remained free to create property rights in non-Indians on tribal land through application of tribal law. But as the Court made clear, a non-Indian "who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws." *Id.* at 593. "If [the tribe] annul[s] the grant," the Court explained, "we know of no tribunal which can revise and set aside the proceeding." *Id.*

3. The tribes themselves also acted on this right of self-government by establishing requirements for entry into and conduct on tribal land, and by enforcing those requirements against non-Indians.

For example, tribes frequently imposed licensing requirements for non-Indians seeking employment on tribal land. Beginning in 1836, for instance, the Choctaws required "white citizens of the United States" who "wish[ed] to remain in the Nation under employ of any [Tribe member]" to "procur[e] permission in writing from the Chief or United States Agent."[4] Later Choctaw laws also required non-Indian traders to submit a bond to the Choctaw court and required non-Indian workers to submit an application to the tribal

[4] An Act requiring white men who wish to work in the Nation to obtain a written permit from the Chief or the Agent (1836), *reprinted in Constitution and Laws of the Choctaw Nation, Together with the Treaties of 1855, 1865, and 1866*, at 72 (1869).

court for review.[5] This permitting system persisted for decades. In 1890, the Report of the Commissioner of Indian Affairs explained that "[e]ach of the five [civilized] nations has its distinct permit system," requiring "[a]ll noncitizens who labor in the Territory" to pay "a permit tax varying from $2.60 to $12 per annum." *Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of Interior* 91 (1890).

Non-Indians were also required to secure permits before being allowed to marry tribal members. Providing that "jurisdiction of [its] civil laws should be exercised over all persons whatever," the Osage Nation, for example, required any U.S. citizen seeking to marry an Osage woman to "apply[] for a license" from the National Council, and upon receipt of such license, to pay the clerk of the Council "the sum of twenty dollars" and to swear "an oath to support the Constitution and abide by the laws of the Osage Nation." Osage Nation Const. art. IX, § 1, *reprinted in Treaties and Laws of the Osage Nation, as passed to November 26, 1890*, at 51, 90 (1895).

Other tribal regulations either prohibited non-Indians from engaging in particular activities or subjected certain activities to steep tariffs. The Choctaws, for instance, prohibited any "white man who ha[d] not

---

[5] An Act regulating the granting of permits to trade, expose goods, wares or merchandise, for sale within the Choctaw Nation, and to reside within the same, and for other purposes (1867), *reprinted in Reports of Committees of the Senate of the United States for the First Session of the Forty-Ninth Congress 1885-'86*, at 595 (1886); *see also* An Act to amend An Act in relation to hiring White Men (1868), in *General Laws of the Legislature of the Chickasaw Nation (1867, 1868, 1869 & 1870)*, ch. XLIX, at 28 (1871) ("[T]he clerk shall receive from the white man, registered, one dollar, for which the clerk shall give his certificate to the white man so registered, which receipt shall be good evidence to the officers that said white man has been registered according to law.").

married a native of [the Choctaw] Nation" from ever "rais[ing] any stock within the limits of th[e] Nation." An act prohibiting white men to raise any stock in the Nation (1849), *reprinted in Constitution and Laws of the Choctaw Nation*, *supra* n.4, at 103. And the Muskokee tribe demanded that all non-Indian traders "pay a tax of one hundred dollars ($100) for each and every trading house." Muskokee Nation Civil Code § 10 (1867), *reprinted in Constitution and Civil and Criminal Code of the Muskokee Nation* 11 (1868).

These regulatory regimes reflect tribes' power, even at its nineteenth-century nadir, to enforce their laws against non-Indians on tribal land. *See Crabtree* v. *Madden*, 54 F. 426, 429 (8th Cir. 1893) (recognizing that where Creek tribe had "lawful authority to impose [a permit tax], it had equal power to prescribe the remedies and designate the officers to collect it"); *Hamilton* v. *United States*, 42 Ct. Cl. 282, 287 (1907) ("The claimant by applying for and accepting a license to trade with the Chickasaw Indians, and subsequently acquiring property within the limits of their reservation, subjected the same to the jurisdiction of their laws."); *cf. Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997) ("[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." (internal quotation marks and brackets omitted)).

C. The Post-Civil War Era

1. Reconstruction-era treaties between the United States and Indian tribes demonstrate the same respect for tribal jurisdiction on tribal land. An 1866 treaty with the Cherokees, for example, expressly confirmed Cherokee jurisdiction over civil disputes arising on tribal land and involving nonmembers. It provided

that "the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, *or where the cause of action shall arise in the Cherokee nation*." Treaty with the Cherokee Indians art. 13, 14 Stat. 799, 803 (1866) (emphasis added).

Similarly, 1866 treaties with the Choctaws, Chickasaws, and Seminoles endorsed the establishment of a multi-nation Indian government for Indian territory with judicial power extending to "persons other than Indians." Treaty with the Choctaws and Chickasaws, art. 4, 14 Stat. 769, 772 (1866); Treaty with the Seminole Indians art. 7, 14 Stat. 755, 758-759 (1866). Both treaties recognized a "council, consisting of delegates elected by each nation" with "power to legislate upon all … subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in the said territory, the arrest and extradition of criminals … escaping from one tribe to another, the administration of justice between members of the several tribes of the said territory, and *persons other than Indians and members of said tribes or nations*." *Id.* (emphasis added); *see also Hamilton*, 42 Ct. Cl. at 285-286 (recognizing that pursuant to 1866 Treaty with Choctaws and Chickasaws, Chickasaw Tribe had authority to enact eminent domain legislation taking non-Indian property within the reservation for tribal purposes).

2. In the 1870s and 1880s, an assimilationist ideology, which aimed to "civilize" Indians, began to dominate federal Indian policy. During that time, the Bureau of Indian Affairs helped to create a tribal law enforcement regime for certain reservations, including tribal police forces and judicial tribunals known as the Courts of Indian Offenses. In part, the BIA's purpose

was to integrate Indians into the dominant American culture. *See* Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* 107-110 (1966).

In practice, however, the courts—which were staffed by tribal members appointed by Indian agents—applied a blend of customary tribal law and federal regulation. *See, e.g.*, Institute for Government Research, *The Problem of Indian Administration* 769-772 (Merriam ed., 1928) (noting that proceedings were largely in Native languages and decisions relied "upon that subtle quality of the mind called common sense and upon an understanding of the current native ideas of property and justice"); Hagan, *supra*, at 42-44, 109-110, 118-120. Indeed, although the source of authority for the Court of Indian Offenses was debated, the Solicitor of the Interior concluded that the "better" view was that the courts "derive their authority from the tribe[s], rather than from Washington." *Powers of Indian Tribes*, 55 Interior Dec. 14, 64 (1934) (citation omitted); *see also id.* (noting that the BIA's role in establishing these courts "cannot be held to have impaired tribal authority in the field of law and order").[6] While most of the courts' docket consisted of criminal prosecutions of tribal members, Department of Interior regulations provided that these courts would also have jurisdiction over "civil suits where Indians are parties

[6] Contrary to Dollar General's assertion (at 51 n.34), then, these courts were not merely federal instrumentalities that have no relevance to the jurisdiction of tribal courts. Indeed, in *Williams*, holding that exclusive jurisdiction over a collection action by a non-Indian who ran a store on the Navajo Reservation lay in the Navajo Courts of Indian Offenses, this Court reasoned that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs *and hence would infringe on the right of the Indians to govern themselves*." 358 U.S. at 223 (emphasis added).

thereto," without conditioning civil jurisdiction over nonmembers on consent. Dep't of Interior, Office of Indian Affairs, *Rules Governing the Court of Indian Offenses* 7 (1883). The regulations further provided, "The civil jurisdiction of such court shall be the same as that of a Justice of the Peace in the State or Territory where such a court is located." *Id.*[7]

Throughout the nineteenth century, then, tribal police, councils, and courts asserted jurisdiction over non-Indians. Reflecting on this established practice, the Solicitor for the Department of the Interior explained in 1934 that "[s]uch jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government." *Powers of Indian Tribes*, 55 Interior Dec. at 57. Indeed, the Solicitor noted, "attempts of the States to exercise jurisdiction over offenses between Indians, *or between Indians and whites, committed on an Indian reservation*, have been held invalid usurpation[s] of authority." *Id.* (emphasis added).

II. TRIBES HAVE NEVER BEEN DIVESTED OF CIVIL JURISDICTION OVER NON-INDIANS ON TRIBAL LAND

As the Solicitor explained in 1934, "[p]erhaps the most basic principle of all Indian law" is that the powers of an Indian tribe "are not, in general, delegated powers granted by express acts of Congress, but rather

[7] These courts' jurisdiction over nonmembers was later limited to cases in which the nonmembers consented, but in 2008, recognizing that the consent requirement "unnecessarily diminished civil jurisdiction of [the Court of Indian Offenses]," the BIA reversed course, making clear that the limitation was not inherent in tribal jurisdiction. *See* 73 Fed. Reg. 39,857 (July 11, 2008). Today the Courts of Indian Offenses have jurisdiction over any civil controversy arising on tribal land in which "[t]he defendant is an Indian" or "*at least one party is an Indian.*" 25 C.F.R. § 11.116(a) (emphasis added).

inherent powers of a limited sovereignty which has never been extinguished." *Powers of Indian Tribes*, 55 Interior Dec. at 19; *see also Talton* v. *Mayes*, 163 U.S. 376, 383-385 (1896) (the Cherokees' "powers of local government" are not "federal powers arising from and created by the Constitution," but existed "prior to … the Constitution"). "[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority," *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014), so "the proper inference from silence … is that the sovereign power … remains intact." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982). As discussed above, and as this Court has already recognized, that retained sovereignty has long included jurisdiction over non-Indians in civil disputes arising on tribal land, and stemming from consensual relationships between tribal members and nonmembers. *See supra* Part I; *see also*, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Strate*, 520 U.S. at 449, 453; *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers Union Ins. Co.* v. *Crow Tribe of Indians*, 471 U.S. 845, 855-857 (1985); *Williams* v. *Lee*, 358 U.S. 217, 223 (1959).

Dollar General contends that the federal government has never expressly *granted* tribes the power to exercise civil jurisdiction over nonmembers, and points to a handful of treaty and statutory provisions that it claims reflect a recognition that tribes lack such authority. But the relevant question is whether the federal government has *withdrawn* such power, *see*, *e.g.*, *Bay Mills*, 134 S. Ct. at 2030, and the historical record shows that it has not.

1. Dollar General's reliance on the 1830 Treaty with the Choctaws is misplaced. To be sure, while otherwise guaranteeing the tribe broad powers of self-

government, the Treaty indicates that the Choctaw tribal courts had no *criminal* jurisdiction over non-Indians. *See Oliphant*, 435 U.S. at 197 (noting that "at the conclusion of th[e] treaty[, the Choctaws] '*express*[*ed*] *a wish* that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations'" (quoting Treaty of Dancing Rabbit Creek art. 4, 7 Stat. 333, 333-334 (1830) ("1830 Treaty") (emphasis added)).

But as the United States recognized, the 1830 Treaty did *not* limit the Choctaws' *civil* jurisdiction over nonmembers. Analyzing the 1830 Treaty in an 1855 opinion, Attorney General Cushing noted that "among the provisions … are several of a very significant character having *exclusive* reference to the question of criminal jurisdiction." 7 Op. Att'y Gen. 174, 178 (1855) (emphasis added).[8] The United States, Cushing explained, had "retained the criminal jurisdiction as relates to citizens of the United States, and by act of Congress have provided for its exercise within the Choctaw nation; *but they did not reserve by treaty the*

[8] Although the particular dispute at issue in this opinion concerned a white man who had married into the Choctaw tribe, Cushing's analysis was not, contrary to Dollar General's suggestion (at 27 n.26), so limited. *See* 7 Op. Att'y Gen. at 178-184; *National Farmers*, 471 U.S. at 854 (recognizing that Cushing's opinion distinguished "between civil and criminal jurisdiction" generally). Nor—and again contrary to Dollar General's characterization—did Cushing conclude that tribal courts lacked civil jurisdiction over non-Indians "trading with the Indians, or sojourning among them." *See* Pet. Br. 27 n.26 (quoting 7 Op. Att'y Gen at 186). Rather, Cushing merely clarified that his opinion was "not intended … to impair the jurisdiction of Indian agents," a regulatory authority mandated by federal statute, "in regard to" such persons. 7 Op. Att'y Gen. at 186.

civil jurisdiction, nor have they assumed it by act of Congress." *Id.* at 184 (emphasis added). Indeed, he asked, "[c]an there be anything more explicit?" *Id.* at 180. Congress "has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters." *Id.*; *see also National Farmers*, 471 U.S. at 854 ("[T]here is no … legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."); Cohen, *Handbook of Federal Indian Law* 254 (1982) ("Congress's failure to regulate civil jurisdiction in Indian country suggests both that there was no jurisdictional vacuum to fill and that Congress was less concerned with tribal civil, non-penal jurisdiction over non-Indians than with tribal jurisdiction over the personal liberty of non-Indians.").[9]

2. Indeed, the only authorities Dollar General cites that seemingly did withdraw tribal civil jurisdiction over non-Indians, two treaties from the 1850s, constituted the exception rather than the rule. *See* Pet. Br. 26-27 (citing Treaty with the Choctaws and Chickasaws art. 7, 11 Stat. 611, 612-613 (1855) ("1855 Treaty") (excepting from tribal jurisdiction "all white persons, with their property, who are not, by adoption or otherwise, members" of the tribe, without distinguishing between criminal and civil jurisdiction); Treaty with the

[9] An 1834 opinion by Attorney General Butler likewise concluded that the Choctaws "ha[d] neither jurisdiction nor authority to pronounce and execute a sentence of death upon a slave of a white man residing among them." 2 Op. Att'y Gen. 693 (1834). Again, however, Cushing's later opinion noted that the 1834 case concerned only the *criminal* jurisdiction—not the civil jurisdiction—of the Choctaw nation. "Nothing in the premises of this [earlier] opinion, nor in its conclusion," Cushing recognized, speaks to the authority of tribal courts to adjudicate *civil* disputes involving non-Indians. 7 Op. Att'y Gen. at 184.

Creeks and Seminoles art. 15, 11 Stat. 699, 703-704 (1856) (same)).[10] In 1855 and 1856 alone—a time when both state and federal authorities sought to undermine tribal sovereignty in an effort to annex Indian land—the federal government negotiated twenty-two treaties with Indian tribes. Only the two that Dollar General cites include jurisdiction-stripping language.[11] Moreover, later treaties with the Choctaws, Chickasaws, and Seminoles—the same tribes subject to the earlier jurisdiction-stripping provisions—not only abandoned this language, but also affirmed the Tribes' power to exer-

---

[10] Contrary to Dollar General's suggestion (at 26), the 1855 Treaty was not a treaty with the Mississippi Choctaw, but with the Oklahoma Choctaw, a distinct group. Although both nations trace their origin to the pre-removal Choctaws, they separated after much of the Tribe was forcibly relocated to the Indian Territory in Oklahoma. After removal, the two nations maintained separate governments and separate relations with the United States. *See United States* v. *John*, 437 U.S. 634, 640-647 (1978); Osburn, *Choctaw Resurgence in Mississippi: Race, Class, and Nation Building in the Jim Crow South, 1830-1977*, at 10-11, 206-208 (2014).

[11] *See* Treaty with the Willamette Indians, 10 Stat. 1143 (1855); Treaty with the Dwámish Indians, 12 Stat. 927 (1855); Treaty with the S'Klallams, 12 Stat. 933 (1855); Treaty with the Wyandotts, 10 Stat. 1159 (1855); Treaty with the Makah Tribe, 12 Stat. 939 (1855); Treaty with the Chippewas, 10 Stat. 1165 (1855); Treaty with the Winnebagoes, 10 Stat. 1172 (1855); Treaty with the Walla-Wallas, 12 Stat. 945 (1855); Treaty with the Yakamas, 12 Stat. 951 (1855); Treaty with the Nez Percés, 12 Stat. 957 (1855); Treaty with Indians in Middle Oregon, 12 Stat. 963 (1855); Treaty with the Qui-nai-elts, 12 Stat. 971 (1856); Treaty with the Flatheads, 12 Stat. 975 (1855); Treaty with the Ottowas and Chippewas, 11 Stat. 621 (1855); Treaty with the Chippewas of Sault Ste. Marie, 11 Stat. 631 (1855); Treaty with the Chippewas, 11 Stat. 633 (1855); Treaty with the Blackfoot Indians, 11 Stat. 657 (1855); Treaty with the Molels, 12 Stat. 981 (1855); Treaty with the Stockbridges and Munsees, 11 Stat. 663 (1856); Treaty with the Menomonees, 11 Stat. 679 (1856).

cise jurisdiction over non-Indians. The 1866 Treaty with the Choctaws and Chickasaws, as well as the 1866 Treaty with the Seminoles, expressly secured to the Indian Council the power to administer justice "between members of the several tribes … *and persons other than Indians and members of said tribes or nations*." Treaty with the Choctaws and Chickasaws art. 8, 14 Stat. 769, 772 (1866) (emphasis added); Treaty with the Seminoles art. 7, 14 Stat. 755, 758-759 (1866).[12]

3. Nor does legislation providing federal compensation for depredations by or against Indians demonstrate any withdrawal of tribes' civil jurisdiction over non-Indians. *See* Pet. Br. 32. The Indian depredation claims system grew out of the Trade and Intercourse Acts, which, beginning in 1790, sought to regulate trade and maintain peace with the Indians. *See* Act of July 20, 1790, 1 Stat. 137. Those Acts sought to prevent in-

---

[12] It is worth noting that the two treaties from 1855 and 1856 that temporarily withdrew tribal jurisdiction over "white persons" did explicitly recognize tribes' "full jurisdiction" over all "members" of the Choctaw and Creek nations. 1855 Treaty art. 7, 11 Stat. at 612-613; Treaty with the Creeks art. 15, 11 Stat. at 703-704. Under nineteenth-century federal law, many of these "members" were individuals who would today be classified as non-Indians, and who would be ineligible for tribal membership, such as Euro- and African-Americans without any Native ancestry who had nonetheless affiliated with the tribe. *Compare* 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe") *with Lucas* v. *United States*, 163 U.S. 612, 616 (1896) (non-Indians "found within the Indian Territory, associating with the Indians" are presumptively considered "member[s] of the tribe" for jurisdictional purposes). They were, as this Court stated, "Indians in a jurisdictional sense" only. *Lucas*, 163 U.S. at 615. And tribes not only possessed jurisdiction over these ethnic non-Indians; they possessed *exclusive* jurisdiction, as evidenced in later federal statutes. *See* Act of May 20, 1890, § 30, 26 Stat. 90, 94.

stances of private revenge between Indians and non-Indians residing along the borders established in the wake of the Indian wars. To this end, the federal government pledged to compensate victims—whether Indian or white—for losses and harms caused by the other, but only where the injured party had declined to take justice into his own hands. Compensation was expressly unavailable in the event that a victim had "sought private revenge, or attempted to obtain satisfaction by any force or violence." Act of May 19, 1796, §§ 4, 14, 1 Stat. 469, 470, 472-473.

Similar indemnification provisions, pursuant to which the federal government was to indemnify Indians for certain harms caused by U.S. citizens, were written into treaties between the United States and several tribes in the mid-nineteenth century. *See* Pet. Br. 28 (citing Treaty with the Choctaws and Chickasaws art. 14, 11 Stat. 611, 614 (1855); Treaty with the Creeks and Seminoles art. 18, 11 Stat. at 704). Indians were indemnified "according to the same rules upon which white persons [were] entitled to indemnity for injuries or aggressions upon them committed by Indians." *Id.*

The Indian depredation claims system thus began as a pragmatic, administrative response to frontier violence. *See generally* Skogen, *Indian Depredation Claims, 1796-1920* (1996). It did not displace judicial resolution of disputes. Indeed, even though the federal government provided compensation for wrongs by and against Indians, state courts expressly retained jurisdiction when those wrongs were committed outside Indian country. *See* Act of May 19, 1796, § 14, 1 Stat. at 472-473; Act of June 30, 1834, § 17, 4 Stat. 729, 731-732. Nothing in the historical record indicates that the depredation claims provisions displaced tribal courts' jurisdiction over civil wrongs within Indian country.

Moreover, as explained by the Court of Claims—the court responsible for adjudicating depredation claims against the United States beginning in 1891, *see* Act of March 3, 1891, § 1, 26 Stat. 851, 851—the depredation system was limited to "wrongs having the element of a depredation," meaning an act of "[f]orce, trespass, violence, [or] a physical taking by force … or destruction." *Ayres* v. *United States*, 35 Ct. Cl. 26, 27, 28 (1899). In other words, the system "excluded from [the indemnification] policy all liability growing out of what might be called commercial or business relations between the citizen and the Indian." *Id.* at 29. Although a petitioner "may be guilty of a tortious act," the Court of Claims thus explained, such an act "is not within the purview of the Indian Depredation Act." *Id.* at 26. The Indian depredation claims system therefore had no bearing on civil torts stemming from consensual commercial relationships between tribes and non-Indians—like that at issue here.

4. Other statutes on which Dollar General relies conferred jurisdiction of civil disputes involving non-members on federal courts, but they did not grant the federal courts *exclusive* jurisdiction, and thus did nothing to strip tribal courts of the power they possessed. The Act of May 2, 1890, for example, simply granted federal courts "jurisdiction" over disputes arising in the newly created "Territory of Oklahoma," while reserving "exclusive jurisdiction" to the tribes over "all civil and criminal cases … in which members of the nation … [are] the only parties." *Id.* §§ 29, 30, 26 Stat. 81, 93-94; *see also Crabtree*, 54 F. at 429 (recognizing that neither this act, nor other applicable treaty or statutory provisions, stripped the Creek Tribe of jurisdiction over non-Indians on tribal land).

Similarly, nothing in Public Law 280 suggests that Congress divested tribal courts of civil jurisdiction. Although the law permits States to assume concurrent jurisdiction over civil disputes arising on tribal land, since 1968 Congress has expressly conditioned that assumption of jurisdiction on tribal consent. *See McClanahan* v. *Ariz. State Tax Comm'n*, 411 U.S. 164, 177 (1973) ("[T]he Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country.'" (quoting 25 U.S.C. § 1322(a), which instructs that States may act only "with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption")); *see also* Cohen 2012, *supra*, at 555 ("The nearly unanimous view … is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched," merely making tribal and state jurisdiction concurrent). If anything, then, Public Law 280 reflects Congress's "policy of deference to tribal courts." *Iowa Mut.*, 480 U.S. at 17-18.

5. Finally, the Indian Civil Rights Act is no help to Dollar General. ICRA is "silen[t] regarding tribal courts' civil jurisdiction" (Pet. Br. 35), and so cannot be read to curtail such courts' civil jurisdiction, *see Powers of Indian Tribes*, 55 Interior Dec. at 19 ("The statutes of Congress … must be examined to determine the *limitations* of tribal sovereignty rather than to determine its sources or its positive content." (emphasis added)). In any event, Dollar General misconstrues ICRA's reach and thus Congress's view of tribal court jurisdiction more generally.

ICRA does not establish protections in tribal courts solely for "tribes' *own members*." Pet. Br. 34 (emphasis in original). Rather, the guarantees of ICRA are worded generally to apply to all "people" or "any

person." 25 U.S.C. §§ 1302-1303. Although an early version of ICRA extended its guarantees only to "American Indians," the legislation was modified to extend its protections to "all persons who may be subject to the jurisdiction of tribal governments, *whether Indians or non-Indians*." *Summary Report on Constitutional Rights of the American Indian: Hearings and Investigations Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 10 (1966) (emphasis added); *see also* Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1158-1159 & n.132 (1990) (reviewing legislative history of ICRA); Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 602 n.239 (1972) (same). In other words, far from reflecting "Congress's understanding that tribal courts generally lacked jurisdiction over nonmembers" (Pet. Br. 35), ICRA confirms the well-established understanding that tribal courts retain jurisdiction over nonmembers in civil controversies that arise on tribal land. That understanding is strongly supported by the historical record, and this Court should reaffirm it here.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

DANIELLE SPINELLI
Counsel of Record
JACQUELINE DE ARMAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

OCTOBER 2015