No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

When, if ever, a tribe may subject a nonmember to suit in tribal court is an open question in this Court, with profound and recurring significance. *See Nevada v. Hicks*, 533 U.S. 353 (2001); Pet. 17-18. This Court granted certiorari to decide an important part of that question in *Plains Commerce Bank v. Long Family & Land Cattle Co.*, 554 U.S. 316 (2008). Like respondents, the Government does not dispute that this petition raises the same question upon which the Court granted certiorari, but did not reach, in that case. *See* U.S. Br. 18-19. The stark disagreement within the Fifth Circuit over the meaning of this Court's tribal jurisdiction precedents only reaffirms the continuing need for the Court's intervention. So the question for the Government, as it was for respondents, is why the Court should pass up this square opportunity to resolve the festering question in this case. Like respondents, the Government has no good answer.

I. The Petition Presents An Important And Recurring Question That Warrants Review.

1. The United States does not dispute that if the Court remains interested in deciding the question upon which it granted certiorari in *Plains Commerce Bank*, this case presents an appropriate vehicle to do so.

That is, the Government does not deny that the Fifth Circuit here decided the same fundamental questions resolved by the Eighth Circuit in *Plains*

Commerce Bank.[1] And it does not dispute that the question presented by this petition encompasses the same question the Court granted certiorari to decide in the prior case. *See* Pet. App. i, 13-15.

Nor has the Solicitor General identified any vehicle problems. Although the Government says that petitioners pressed a variety of other arguments below, it does not dispute that the question presented was at least passed upon by the court of appeals and, therefore, is preserved for this Court's review. *See* U.S. Br. 8; *Citizens United v. FEC*, 558 U.S. 310, 330 (2010). And the Government does not contest that the answer to the question is outcome determinative of the litigation in federal court.[2]

2. Instead, like respondent, the Government contends that the question the Court granted certiorari to decide in *Plains Commerce Bank* was not

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[1] Like the court of appeals in this case, the Eighth Circuit held that a business forms the consensual relationship required by the first exception under *Montana v. United States*, 450 U.S. 544 (1981), when it engages in a commercial relationship with tribe members. *Plains Commerce Bank v. Long Family & Land Cattle Co.*, 491 F.3d 878, 886 (8th Cir. 2007). Both courts then held that tribal courts have jurisdiction under the first *Montana* exception over tort claims having "some nexus to th[at] consensual relationship." *Id*. at 886; *see also* Pet. App. 13-14, 17. And both courts expressly held that tort litigation "is an appropriate 'other means' by which a tribe may regulate nonmember conduct." *Plains Commerce Bank*, 491 F.3d at 885; *see also id*. at 887; Pet. App. 13,

[2] The Government does not repeat respondents' meritless objection that the case is interlocutory. *See* BIO § II; Cert. Reply 2.

certworthy then and remains uncerworthy now. *See* U.S. Br. 16-22.

The Government thus repeats respondents' argument that there is no circuit conflict, U.S. Br. 16-19, ignoring that the Court did not grant certiorari in *Plains Commerce Bank* to resolve any circuit split. *See* Cert. Reply 1-2. The Government then suggests that the Court did not really want to address the question upon which it actually granted certiorari, intending all along to decide the narrower issue actually resolved in the Court's eventual decision. U.S. Br. 18. But if the Court had granted review believing that the question the petitioner presented was not certworthy, it presumably would have rewritten the question presented, knowing that if it did not, the briefing and the oral argument would focus unhelpfully on the question actually posed by the petition (which is what happened[3]).

The Government ends by claiming that "the paucity of cases that have needed to get even close to considering such a question in the intervening years strongly suggests that, in the absence of any conflict, the Court's intervention is unnecessary." U.S. Br. 19. But it is a rare case in which a defendant has the resources to challenge tribal jurisdiction by filing a separate federal action that could result in a published opinion. And the Government points to

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[3] *See generally Plains Commerce Bank v. Long Family Land & Cattle*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/plains-commerce-bank-v-long-family-land-cattle (last visited May 16, 2015) (collecting briefs and argument transcript).

nothing to suggest that reported cases were more frequent when the Court granted certiorari in *Plains Commerce Bank*.

More importantly, the Government's argument overlooks the consequences of a federal court of appeals declaring for the first time that tribal courts have jurisdiction over every tort claim with some "logical nexus to some consensual relationship between a business and the tribe or its members." Pet. App. 17. The Government does not deny that this decision "open[s] the door to 'pervasive tort liability against countless business[es] and individuals.'" U.S. Br. 13 (second alteration in original) (quoting Pet. 20). To the contrary, the Government *embraces* that prediction, stating only that "petitioners give no reason to think that the tribal courthouse doors have heretofore been closed to" such claims. U.S. Br. 13-14 & n.6.

Permitting tribal court jurisdiction over tort claims against nonmembers constitutes "a serious step," given the Constitution's premise of "original, and continuing, consent of the governed." *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment). Even though they may be on reservation land, "nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337. When, if ever, a citizen of a state and the United States may be subject to the jurisdiction "of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States," *Lara*, 541 U.S. at 212 (Kennedy, J., concurring in the judgment), is a question that should be resolved by

this Court, not left to the lower federal and tribal courts.

3. Certiorari is further warranted because both the decision below and the Government's defense of it illustrate a continuing, profound confusion and disagreement over the scope of tribal court jurisdiction over nonmembers.

While five judges dissented from the denial of rehearing en banc on the ground that the panel decision went "well beyond anything supported by applicable precedent," Pet. App. 93, the Government argues that the panel did not go *far enough*. It insists that "to the extent that the tortious conduct at issue here occurred at petitioners' store on tribal trust land, the Tribe had jurisdiction to regulate that conduct without regard to *Montana*'s general rule or its exceptions." U.S. Br. 9-10 (footnote omitted). The Government suggests that tribes' right to exclude nonmembers from the reservation provides an independent source of authority to regulate nonmember conduct on tribal lands, including the right to subject them to tort claims in tribal courts for millions of dollars in punitive damages for any incident "aris[ing] out of an ongoing business on tribal trust land." *Id*. 11. While the Fifth Circuit did not embrace that extreme view in this case, the Government points out that the Ninth Circuit has. *See id*. 11 n.4 (citing *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011)).

That the Government, different courts, and individual judges can reach such radically different readings of this Court's tribal jurisdiction precedents shows just how uncertain this area of the law has

become. *See also, e.g.*, *Lara*, 541 U.S. at 214-15 (Thomas, J., concurring in the judgment) (noting the "confusion reflected in our precedent" and calling on the Court "to reexamine the premises and logic of our tribal sovereignty cases"); *Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., concurring) ("Petitioners are certainly correct that 'tribal adjudicatory jurisdiction over nonmembers is . . . ill-defined,' since this Court's own pronouncements on the issue have pointed in seemingly opposite directions." (alteration in original) (citation omitted)); *Winer v. Penny Enters., Inc.*, 674 N.W.2d 9, 18 (N.D. 2004) (Vande Walle, C.J., specially concurring) ("[I]n matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is."); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1720 (2012) (noting that Court's *Montana* exception decisions have left "tribes to wonder as to the scope of tribal civil jurisdiction over nonmembers operating on non-Indian lands within Indian country").

That uncertainty is, in itself, harmful. As petitioners' *amici* have explained, those contemplating doing business on a reservation need to know whose laws will govern their conduct and whose courts will judge their alleged liability in the legal disputes that arise in the operation of any business. *See* Br. for *Amicus Curiae* South Dakota Bankers Ass'n. The United States suggests that tribes can resolve this problem by negotiating "appropriate choice-of-law or forum-selection clauses" in their contracts. U.S. Br. 21. However, it points to no evidence that this is a practical suggestion, much

less one that is employed in the real world. Tort claims frequently arise in the absence of any contractual relationship between the defendant and plaintiff. And while in this particular case the alleged tort occurred on property leased from the Tribe, not every company doing business on a reservation has such a lease (take, for example, the bank in *Plains Commerce Bank*, *see* 554 U.S. at 321). Moreover, this Court has never decided whether, or to what extent, such forum-selection clauses would be enforceable. Allowing tribes to condition entry onto the reservation, or doing business there, on consent to pervasive tribal jurisdiction would substantially erode the established rule that although tribes retain the right to "exclude outsiders from entering tribal land," they do not thereby obtain general "authority over non-Indians who come within their borders." *Id.* at 328. In any event, companies and tribes should not be forced to contract around the courts' failure to establish clear jurisdictional rules.

II. The United States' Defense Of The Fifth Circuit's Decision On The Merits Provides No Basis To Deny Certiorari.

Given the harmful uncertainty in the law, the Government's claim that the Fifth Circuit correctly decided this case is no reason to deny review. But the argument is meritless in any event.

1. Any analysis of tribal court jurisdiction must start from the premise that "the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits except themselves.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*,

554 U.S. 316, 328 (2008) (alterations in original) (citation omitted). Accordingly, "efforts by a tribe to regulate nonmembers" are "presumptively invalid." *Id*. at 330 (internal quotation marks and citation omitted). The *Montana* exceptions to this general rule "are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Id*. (internal quotation marks and citations omitted). Particularly when construing the scope of the first, consent-based exception, courts must avoid the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Id*. at 337. "Consequently, [tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Id*.

The Government's position cannot be reconciled with these principles. The Government insinuates that petitioners consented to tribal tort jurisdiction *expressly* by signing a lease (or perhaps obtaining a business license) that required consent to application of tribal tort law to petitioners' business. *See* U.S. Br. 2-3, 12. Respondents do not make this argument, the district court rejected it, Pet. App. 62-62, and the Fifth Circuit declined to rely on it, *id*. 13-15, for obvious reasons. The lease contains standard terms prohibiting petitioners from using the premises "for any unlawful conduct or purpose," without identifying what law applies. Lease § XXIX (reproduced in App. A). Another provision does mention tribal laws, but only to require that compliance with such regulations as "are applicable and pertain to [petitioners'] *specific use of the demised premises*," *id*. § XXVIII, an obvious reference

to zoning-type regulations, not general tort law obligations to employees and customers. And although the lease *does* have a choice-of-law and venue provision, it is expressly limited to disputes between petitioners and their landlord regarding *the contract itself*, not tort claims between petitioners and their workers. *See id*. § XXVII (establishing law and venue for "[t]his agreement and any related documents").[4]

So the Government is forced to argue as well that tribal jurisdiction "may be fairly imposed on" petitioners because they "consented [to it] by [their] *actions*." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). Specifically, the Government finds consent to tribal court tort jurisdiction in petitioners' decision to do business on a reservation and by their employee's agreement to accept plaintiff Doe as an unpaid intern. U.S. Br. 12-14. But if that argument were accepted, the first *Montana* exception would "swallow the rule" that "the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits except themselves.'" *Plains Commerce Bank*, 554 U.S. at 328, 330 (alterations in original) (internal quotation marks and citations omitted). Indeed, the Government openly admits that on its theory, tribal courts may hear any tort claim "occurring on tribal land and arising out of ongoing consensual commercial relationships with the tribe" or its

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[4] Similarly, the sole condition for a business license is "the payment of tax accruing to the" Tribe. Pet. App. 76-77 n.1 (quoting Tribal Code § 14-1-3(1)).

members. U.S. Br. 14. As a practical matter, that would mean that tribes may treat nonmembers engaged in commercial activity on a reservation in the same way they regulate their own members. If the first *Montana* exception is, indeed, a "'limited' one[]," *Plains Commerce Bank*, 554 U.S. at 330 (citation omitted), the Government's theory must be rejected.

The Court should retain the limited nature of the first *Montana* exception by requiring that the tribal regulation take a form that avoids the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent," as do tax codes, licensing regulations, and written contracts. *Plains Commerce Bank*, 554 U.S. at at 337; *see* Pet. 18-24; Cert. Reply 10-12. The Government argues that tort claims are not "categorically different" from contract claims because "contract law is often equally unwritten." U.S. Br. 14-15. But the substantive obligations enforced in contract actions generally *are* written and, more importantly, are *always* knowingly consented to ex ante.

Moreover, the problem with tort law is not simply that it is unwritten. *Contra* U.S. Br. 14-15. Tort claims also are different in kind because they address virtually every area of human activity, in stark contrast to the delimited "taxation, licensing," and contract claims contemplated by the Court in *Montana*. *See* 450 U.S. at 565-66. To say that tribes have authority to apply their tort law against those who engage in consensual relationships with tribe members is to say that tribes have pervasive authority to regulate nearly every aspect of nonmembers' on-reservation conduct.

Finally, tort law, even when codified, tends to be vague, relying on the judgment of particular juries in individual cases to provide critical content. For that reason, it is particularly concerning that the jurors and judges in tribal courts belong to the same polity as the plaintiff, while the defendant is an outsider who has "no part in tribal government" and "no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337.[5] After all, limitations on tribal jurisdiction are a central part of the "constitutional structure and the consent upon which it rests," intended to protect the "political freedom [that is] guaranteed to citizens by the federal structure." *Lara*, 541 U.S. at 213-14 (Kennedy, J., concurring in the judgment).

Petitioners' position does not "[d]epriv[e] tribes of [a] quintessentially American form of lawmaking authority" or "threaten tribal self-rule." U.S. Br. 16 (internal quotation marks and citation omitted). When engaging in truly "*self*-rule" by regulating their own members, tribes are free to create law by whatever manner they wish. At the same time, petitioners do not contest tribes' authority to apply tort law to conduct that "threatens or has some direct

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[5] The Government says this should cause no concern because any Due Process violation might prevent enforcement of the judgment in state or federal court, and because Congress could provide direct review of tribal judgments in federal court if it so chose. U.S. Br. 20-21. The first solution is expensive and no help for businesses that have on-reservation assets that can be seized without resort to state or federal courts. The second argument could be made against any of this Court's cases recognizing limits on tribes' inherent authority.

effect on the political integrity, the economic security, or the health or welfare of the tribe" under the second *Montana* exception. 450 U.S. at 565-66; *see Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 937-38 (8th Cir. 2010). But when a tribe's assertion of authority over a nonmember is premised on consent rather than the need to protect the tribe, the tribe must provide nonmembers the kind of advance notice of their obligations and potential liabilities afforded by tax laws and licensing schemes but not tort law or tribal tradition.

If broader tribal jurisdiction is warranted, it should be provided by Congress, not the courts. Congress has shown itself more than willing to expand tribal jurisdiction when the need is demonstrated. *See* 25 U.S.C. §§ 1301(2), 1304(a).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, cert. reply brief, and the *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2015

APPENDIX A

Excerpts of Lease Between Choctaw Shopping Center Enterprise And Petitioner Dolgencorp, Inc.

D. Ct. Doc. 1-2

LEASE

PARTIES. THIS LEASE, made and entered into this 7th day of November 2000 by and between Choctaw Shopping Center Enterprise, (hereinafter called "Lessor"), and Dolgencorp, Inc., (hereinafter called "Lessee").

WITNESETH

* * *

XXVIII. COMPLIANCE WITH LAWS. Lessor shall, at Lessor's sole cost and expense, comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to the physical or environmental conditions of the Shopping Center or the demised premises, including without limitations laws and regulations pertaining to disabled persons, asbestos, radon and hazardous substances. In the event asbestos or any other materials deemed hazardous by a governing authority (provided such hazardous material has not been introduced by Lessee) is required by law to be removed from the demised premises, Lessor shall perform such removal at its own cost and expense. Lessee shall, at Lessee's sole cost and expense, comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable

and pertain to Lessee's specific use of the demised premises.

* * *

XXVII. GOVERNING LAW. This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi (pursuant to Section 1-1-4, Choctaw Tribal Code). Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents is subject to the Choctaw Tribal Tort Claims Act. Nothing contained in this agreement or any related document shall be construed or deemed to provide recourse to Silver Star assets.

XXIX. SPECIAL PROVISIONS. The Lessee by the acceptance of this Lease acknowledges that the demised premises and the aforementioned ground lease are upon land held in Trust by the United States of America for the Mississippi Band of Choctaw Indians. Lessee further acknowledges that because said property is held in trust status, the following provisions shall apply:

* * *

C. The Lessee agrees that it will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

* * *