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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The parties agree the decision below exposes every employer on an Indian reservation to suit in tribal court for any claim arising from the employment relationship, including claims for millions of dollars in punitive damages. *See* BIO 2, 8-9. Respondents acknowledge that the Fifth Circuit's decision thus squarely presents the same question this Court granted certiorari to decide, but did not reach, in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008). *See* BIO 1. Moreover, respondents do not dispute that in asking whether tribal courts may adjudicate tort claims against nonmembers pursuant to their authority under the first *Montana* exception,[1] this case presents a subset of the broader question left open in *Nevada v. Hicks*, 533 U.S. 353 (2001) – namely, whether tribal courts may *ever* adjudicate claims against nonmember defendants. *See* BIO 20. So the burden on respondents is to show why this Court, having *already* decided that the Question Presented warrants review, should nonetheless deny certiorari. Respondents' brief in opposition fails to provide a convincing answer.

Respondents say there is no circuit conflict (BIO § I), but there was no circuit conflict alleged in *Plains Commerce Bank* either; rather, the question raises a foundational and recurring issue regarding the relationship between Indian tribes and the state and federal governments – highlighted in the sharp

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[1] *See Montana v. United States*, 450 U.S. 544, 565 (1981).

dissent from rehearing en banc. *See* Pet. App. 93-95. Respondents argue that the case is interlocutory (BIO § II), but that is not true (there will be no further federal proceedings in this case) and this Court regularly grants certiorari to resolve questions of tribal jurisdiction in cases in the same posture.[2] Respondents suggest that the Court has already decided, for some unidentifiable reason, to leave the *Plains Commerce Bank* question open, having "declined an invitation to rule on the question" in a petition from 2011. BIO 1. But that case did not present the *Plains Commerce Bank* question – having been resolved under the second *Montana* exception, not the first[3] – and the petitioners failed to preserve any broader *Hicks*-related argument.[4]

Instead, respondents' principal claim is that the Court should never have granted certiorari on the

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[2] *See, e.g.*, *Hicks*, 533 U.S. at 357; *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 478-79 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438, 444-45 (1997).

[3] *See Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 937-41 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011).

[4] The petition there complained, in a single paragraph, that the court of appeals failed to consider the *Hicks*-related question of whether the tribal courts' adjudicative authority extended as far as the tribe's legislative power under the second *Montana* exception. *See* Petition 29, *Attorney's Process*, 131 S. Ct. 1003 (2011) (No. 10-613). But the respondents pointed out that this was because the petitioners had failed to make any relevant argument on the point below, *see* BIO 36, *Attorney's Process*, 131 S. Ct. 1003 (2011) (No. 10-613), a point the petitioners did not contest in their reply brief, *see* Reply 4-6, 11, *Attorney's Process*, 131 S. Ct. 1003 (2011) (No. 10-613).

Question Presented in *Plains Commerce Bank*, and that the Court did not know what it was talking about in *Hicks*, because this Court had already decided that that tribes may subject nonmembers to tribal court suit for any tort arising out of a consensual relationship and, more generally, that tribal courts' adjudicative jurisdiction is coextensive with their legislative authority. BIO § III. That would be surprising if true, and it is not. In fact, the question presented in *Plains Commerce Bank* and this case remains undecided and calls out for resolution by this Court.

I. The Petition Presents A Question This Court Correctly Has Deemed Open Under Its Precedents And In Need Of Review.

Respondents assert that, despite having said in *Hicks* that there was an open question whether tribal courts may *ever* exercise adjudicative jurisdiction over nonmembers, in fact "the plain import of this Court's post-*Montana* cases is that the exercise of tribal jurisdiction" is "appropriate" with respect to *any* "civil claims filed by a tribe or its members" arising from "voluntary consensual relationships" on tribal land, so long as there is a sufficient "nexus" between the claim and the relationship. BIO 21. For this proposition they simply list – without explanation, or even pincites – a handful of case names. Respondents' apparent belief that these cases support their claim is wishful thinking.

For example, respondents cite *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), presumably on the

ground that both cases involved tort claims asserted in tribal court. BIO 9-10, 21. But as this Court has explained, all either case held was that objections to colorable tribal court jurisdiction must be exhausted through the tribal system before coming to federal court. *See Strate*, 520 U.S. at 448. Accordingly, "neither [case] establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases." *Id*.; *see also* BIO 9.

Respondents then rely on *Strate* itself, plucking out a quote describing *National Farmers Union* and *Iowa Mutual* as "stand[ing] for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 453 (altered). But as *Hicks* explained, the actual holding in *Strate* is simply that "'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,'" 533 U.S. at 357-58 (quoting *Strate*, 520 U.S. at 453), a holding that "leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction." *Id.* at 358.[5]

Respondents do no better in relying on *Hick*s's off-hand description of a footnote in *Neztsosie*, 526 U.S. at 482 n.4. BIO 18-19. They say *Hicks*

[5] Moreover, even if tribal court jurisdiction "presumptively" follows regulatory authority, that does not resolve the Question Presented, which is whether tribes possess that regulatory authority in the first place when the only basis for regulation is a consensual relationship and the mode of regulation is tort law.

recognized that the tribal court in *Neztsosie* would have had jurisdiction over the tort claims in that case, but for the special preemptive effect of the Price-Anderson Act. BIO 18-19. But *Hicks* clearly was not saying that tribal courts generally have jurisdiction to hear tort claims over nonmembers; a few pages earlier, the Court had gone out of its way to note that there was an "open question" whether tribal courts *ever* have jurisdiction over nonmembers. *See* 533 U.S. at 358. Instead, *Hicks* simply noted that the claims in *Neztsosie* arose under tribal law and therefore were distinguishable from the Section 1983 claims at issue in *Hicks*, which fell outside the scope of tribal court jurisdiction because they are federal claims. *See id*. at 368-69.

II. Respondents' Description Of Lower Court Precedents Is Irrelevant And Incorrect.

Respondents also say that certiorari should be denied because the Fifth Circuit's decision in this case is in accord with uniform circuit precedent recognizing that "tribal courts can exercise civil jurisdiction over tort claims" satisfying the "consensual relation and nexus test." BIO 17-18. That is both irrelevant and untrue.

It is irrelevant because, as respondents themselves emphasize, other than the decision in this case, nothing of relevance has changed the state of circuit precedent since the Court granted certiorari in *Plains Commerce Bank*. BIO 21-22. The Court presumably granted certiorari in that case not because there was a circuit conflict (none was alleged), but because the Eighth Circuit's ruling addressed a foundational question of law and exposed

companies that do business with tribe members on or near reservations to tort suits in tribal court "in vastly expanded circumstances." Petition 9, *Plains Commerce Bank v. Long Family & Cattle Co., Inc.* (No. 07-411) (capitalization altered); *see also id.* 4-15 (alleging no circuit conflict).

The same is true here. As Judge Smith explained, prior to the decision in this case "no circuit court has upheld Indian court jurisdiction, under *Montana*'s first exception, over a tort claim against a nonmember defendant." Pet. App. 28. Respondents' attempts to show otherwise (BIO 17-18) again badly miss the mark.

The first case respondents cite, *Attorney's Process and Investigation Services*, was resolved under the *second* exception in *Montana*, for conduct threatening a tribes political integrity, not the first exception for consensual relationships. *See* 609 F.3d at 937, 941. To be sure, the court stated that it made no difference *under the second exception* whether the claims were brought under "precisely tailored regulations or through tort claims." *Id.* at 938. But that was because jurisdiction was founded on the tribe's right to protect itself (in that case, from a violent attack on its own offices by armed private security agents) rather than on the consent of the defendant sued in tribal court (in which case foreseeability is the critical consideration, *see* Pet. 20-22). *See* 609 F.3d at 938.

The Ninth Circuit's decision in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), likewise had nothing to do with the first *Montana* exception. Instead, the Ninth Circuit held that a tribe had the power to sue a

delinquent commercial tenant of tribal property in tribal court without having to satisfy either of the *Montana* exceptions under its authority to condition entry on tribal lands. *Id*. at 810-12.[6]

Respondents are also wrong in attempting to imply that the lower courts have resolved the question this Court held open in *Hicks* by permitting tribal court jurisdiction whenever the tribe has legislative authority under *Montana*. *See* BIO 10. To the contrary, none of the cases they cite consider the question, much less permit tort claims against nonmembers in tribal court. *See TTEA v. Ysleta del Sur*, 181 F.3d 676, 684 (5th Cir. 1999) (pre-*Hicks* decision considering suit for declaration that contract was void under federal law, with no discussion of *Hicks* question); *Burrell v. Armijo*, 456 F.3d 1159, 1168-70 (10th Cir. 2006) (contract dispute in which only objection to tribal court jurisdiction was meritless claim of right to arbitrate); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (pre-*Hicks* case resolving contract and ordinance-based claims, with no discussion of *Hicks* question).

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[6] The additional citations following respondents' "accord" signal actually "accord" with the above cases only in the sense that they, too, are completely unsupportive of respondents' claim. *See* BIO 18 (citing the decision this Court reversed in *Plains Commerce Bank,* a prior Fifth Circuit exhaustion decision in which tribal court jurisdiction was not challenged, and an unpublished district court decision).

III. The Question Presented Is Important.

The Court's failure to resolve the questions left open in *Hicks* and *Plains Commerce Bank* has left the law in a state of unpredictable flux, as illustrated by the fissure within the Fifth Circuit exposed by the petition for rehearing. *See* Pet. App. 92-95. That uncertainty has had harmful effects throughout the nation, from Mississippi to South Dakota, in industries ranging from retail to banking. *See* Br. for *Amicus Curiae* South Dakota Bankers Association (SDBA Br.). The longer this Court delays providing guidance, the longer that damaging uncertainty will persist – even a circuit decision directly contrary to the Fifth Circuit's holding in this case will be seen as, at best, a temporary way station for a question everyone expects this Court ultimately to resolve. Meanwhile, the uncertain scope of tribal court tort jurisdiction stands as a deterrent to nonmember participation in the economic life of many tribes. *See id*.

Respondents attempt to diminish the practical significance of the decision below by claiming that it *only* exposes employers to tort suits by their employees. BIO 30. But they offer no explanation why a customer's relationship with a business is any less of a "consensual relationship" than a firm's relationship with its employees. And they do not even attempt to show why the nexus in this case (in which the plaintiff alleges liability for failure to properly hire and train a supervisor, who then allegedly injured a coworker) is materially more direct than the nexus between a customer relationship and all manner of torts, including

accidents that occur while a customer is visiting a store.[7] *See* Pet. 16-17; SDBA Br. 5.

But even if the decision below applied only to employment-related claims, that would be more than sufficient reason to grant review, given the tens of thousands of employment relationships that could give rise to suit, and the broad range of claims (including punitive damages claims) that could be brought in tribal court.

Respondents say this is wrong because state workers compensation laws will somehow preempt tribal law claims in a different sovereign's courts. BIO 30-31. But the cases they cite provide no such guarantee of immunity to tribal jurisdiction.[8] Moreover, even if state law preempts tribal law in

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[7] Indeed, this case itself does not involve a typical employment relationship, as respondent John Doe was a participant in a short-term internship through the Youth Opportunity Program. *See* Pet. App. 3.

[8] *Begay v. Kerr-McGee Corp*., 682 F.2d 1311, 1319 (9th Cir. 1982), simply held that federal Indian law principles did not preempt a provision of *state* worker's compensation law that eliminated tribal members' *state law* tort claims (filed in *federal*, not tribal, court). It said nothing about whether the state law preempted any tribal law claims the members could have brought in tribal court. *Swenson v. Nickaboine*, 793 N.W.2d 738, 741-45 (Minn. 2011), held that as a matter of state law, workers injured on tribal land can apply for state workers compensation benefits; it said nothing about whether tribal members are precluded by state law from bringing tribal law claims in tribal court instead. And *Hamby v. Cherokee Nation Casinos*, 231 P.3d 700, 702 (Okla. 2010), simply held that tribes themselves retain sovereign immunity from suit under state workers compensation laws.

this context, state law ordinarily precludes only lawsuits for accidental injuries or death occurring in the workplace.[9] An employee therefore retains the right to bring a broad range of common employment claims in court, including, for example, intentional torts, discrimination, defamation, intentional infliction of emotion distress, or wrongful termination. *See generally* WEST WORKERS' COMP. GUIDE § 1:4 (2014).[10] The prospect of having to defend even that more limited subset of claims in the home court of tribal employees will inevitably deter some nonmembers employers from participating in the commercial life of many reservations. *See* SDBA Br. 5-6.

IV. Respondents' Arguments On The Merits Provide No Basis To Deny Review.

Finally, given the need for clarity from this Court, respondents' defense of the decision below on the merits would provide no reason to deny review even if convincing. But the arguments are unconvincing in any event.

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[9] *See, e.g.*, Miss. Code Ann. §§ 71-3-3(b), 71-3-7(1); Tex. Lab. Code §§ 401.011(26), 406.031; La. Rev. Stat. §§ 23:1021(8)(a), 23:1031(A).

[10] In addition, some states, including Texas in the Fifth Circuit, make employers' participation in workers compensation optional. *See generally* 1 MODERN WORKERS COMP. § 101:1 (2014); Tex. Lab. Code § 406.002(a). In addition, Texas and other states allow workers to opt-out of the workers compensation regime. *See* 1 MODERN WORKERS COMP. § 101:1 (2014); Tex. Lab. Code § 406.034(b); *Begay*, 682 F.2d at 1318 n.2 (same for Arizona).

Respondents say, for example, that this Court has "recognized that private party tort suits for damages . . . amount to a form of government regulation." BIO 28. Petitioners do not dispute that. The question is whether tort suits are the kind of regulation this Court contemplated when it established the "consensual relation" exception in *Montana*. As explained, regulation by tort litigation cannot be reconciled by the theory underlying the exception. *See* Pet. 20-22.

Respondents argue that tort litigation is not materially different from regulation under a contract or statute because a statute can be amended and statutory changes can have "bearing on contract disputes." BIO 25. But the point is that foreseeability of tort law is even worse because in addition to being subject to change, it is difficult to discern even in its current form when a nonmember decides whether to engage in a commercial relationship with tribe members. This also belies respondents' assertion (BIO 29) that all of their claims arise under Mississippi law; in fact, the section of the Choctaw Tribal Code cited by respondents provides that state law shall only apply if neither federal law nor the "ordinances, customs, and usages of the Tribe" govern – but it is far from clear that such is the case here. *See* Choctaw Tribal Code § 1-4-4, *reproduced at* BIO 3 n.6.

Lastly, respondents' emphasis on the safeguards in place in the Choctaw tribal court system (BIO 31-32) misses the point. Petitioners' argument is *not* that tribal courts pervasively violate litigants' constitutional rights, any more than diversity jurisdiction is premised on a fundamental disrespect

for state courts. Instead, the presumption is that when a defendant is sued in the courts of sovereign to which the plaintiff belongs and the defendant does not, the defendant should have the opportunity to require that the litigation be conducted in the courts of a sovereign to which both parties belong. In the case of diversity jurisdiction, that means litigation in the courts of the United States. In a case like this, that means the state court if both parties are citizens of the state, or federal court if the parties' citizenship is diverse. Congress remains free to adopt a different rule, but until it does, petitioners are entitled to avoid tort suit in the courts of the plaintiff's tribe.

CONCLUSION

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

Respectfully submitted,

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