

1 IN THE SUPREME COURT OF THE UNITED STATES

3 DOLLAR GENERAL :  
4 CORPORATION, ET AL., :  
5 Petitioners : No. 13-1496

7 MISSISSIPPI BAND OF :

9 - - - - - x

11 Monday, December 7, 2015

13                   The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States  
15   at 10:03 a.m.

17 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf  
18 of Petitioners.

21 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
22 Department of Justice, Washington, D.C.; for United  
23 States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 13-1496, Dollar General  
5 Corporation v. The Mississippi Band of Choctaw Indians.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONERS

9 MR. GOLDSTEIN: Mr. Chief Justice, may it  
10 please the Court:

11 Our narrowest argument assumes that, in  
12 circumstances like this case, Indian tribes do have the  
13 legislative jurisdiction to subject nonmembers to tribal  
14 tort law duties.

15 Respondents argue that the same facts also  
16 give Indian tribes the mandatory adjudicatory  
17 jurisdiction to decide private tort lawsuits against  
18 non-Indians. Respondents' theory is that, when the  
19 Tribes entered the United States and were incorporated  
20 into this country, their power to adjudicate cases in  
21 this fashion was understood to be an element of their  
22 sovereignty. That is not correct.

23 In -- I want to identify the three separate  
24 respects in which the overriding sovereignty of the  
25 United States and our Constitution --

1 JUSTICE GINSBURG: Could you -- could you  
2 please explain your opening statement? You -- you say  
3 there is legislative authority but not judicial  
4 authority. I don't know of any other instance in which  
5 a jurisdiction has authority to legislate, to regulate  
6 the conduct in question, but does not have authority to  
7 back up that legislative authority by adjudicatory  
8 authority.

9 Can you give me an example of --

10 MR. GOLDSTEIN: I can give you several,  
11 Justice Ginsburg.

12 JUSTICE GINSBURG: Yes.

13 MR. GOLDSTEIN: The first is removal.  
14 Remember, our point is not that the Tribes lack any  
15 adjudicatory jurisdiction. It is that they lack  
16 mandatory adjudicatory jurisdiction so that we do not  
17 have access to a neutral judicial forum. A State has  
18 the power to pass State tort law, for example, but it  
19 does not have the sovereign authority to insist that the  
20 case be litigated in its own courts.

21 JUSTICE GINSBURG: It has the authority,  
22 but -- but an out-of-State defendant can be moved to  
23 Federal court, but it has the adjudicatory authority.

24 MR. GOLDSTEIN: Justice Ginsburg, everyone  
25 agrees that the Tribes have a form of adjudicatory

1 authority upon consent. They don't have it inherently.  
2 The question is going to be: What qualifies as consent?

3 Our point is that, in three separate  
4 respects, the national tradition of the United States  
5 and our Constitution does not contemplate that a  
6 sovereign would adjudicate cases in this fashion. And I  
7 want to briefly identify the three, if I could.

8 First, the Constitution contemplates the  
9 availability of a neutral forum for suits against  
10 noncitizens, and by analogy, noncitizens as you say,  
11 Justice Ginsburg, have always been able to remove a case  
12 from State to Federal court.

13 The United States at the time of  
14 incorporation could not have accepted that non-Indians  
15 would not be able to remove to a neutral forum.

16 Second, the Constitution contemplates that  
17 this Court will be the one Supreme Court, and State  
18 court rulings on questions of Federal law have, of  
19 course, always been reviewable in this Court.

20 JUSTICE KENNEDY: Well, I -- I don't -- this  
21 is an important part of the dialogue, but let me just go  
22 back to the first part of -- of -- of your response.

23 Is -- is it black-letter law given the  
24 Tribes have complete legislative authority over  
25 non-Tribe members on -- for -- for regulatory purposes?

1 I -- I -- I take it that as a black-letter law given?

2 MR. GOLDSTEIN: Justice Kennedy, if we say  
3 it -- in those terms, regulatory authority without  
4 getting into the question of all forms of legislation,  
5 for example, tort law, then the first exception to  
6 Montana says that, although there is a presumption  
7 against jurisdiction, the Tribes do have their  
8 regulatory authority.

9 We have the argument that tort law, because  
10 it is so broad and would swallow the rule, that the  
11 Tribes lack legislative authority over nonmembers. We  
12 have the argument that that is not within the  
13 legislative jurisdiction.

14 What I had said at the beginning --

15 JUSTICE GINSBURG: But doesn't that clash  
16 with what the Court said in Strate? I mean, Strate --  
17 I'll read you the sentence. It says, "It's an  
18 unremarkable proposition that where tribes possess  
19 authority to regulate the activity of nonmembers, civil  
20 jurisdiction over disputes arising out of such  
21 activities presumptively lies in tribal courts."

22 MR. GOLDSTEIN: Okay. Justice Ginsburg, I  
23 need to just separate two questions:

24 Justice Kennedy I understood to be asking me  
25 was: Do the Tribes have the antecedent legislative

1 authority? And I was explaining that we have the  
2 argument that in the tort context they do not.

3 You then point out that if --

4 JUSTICE GINSBURG: If this is a tort case.  
5 It was a --

6 JUSTICE KENNEDY: So then I don't understand  
7 why you opened your -- your -- are -- I -- I thought you  
8 said --

9 MR. GOLDSTEIN: We assumed.

10 JUSTICE KENNEDY: -- I -- I -- you  
11 assumed --

12 MR. GOLDSTEIN: Yes. We --

13 JUSTICE KENNEDY: -- that this could be --  
14 well, I --

15 MR. GOLDSTEIN: Well, Justice --

16 JUSTICE KENNEDY: -- I don't know why you  
17 make that assumption.

18 MR. GOLDSTEIN: Okay.

19 JUSTICE KENNEDY: I -- I -- I just --

20 MR. GOLDSTEIN: I apologize.

21 JUSTICE KENNEDY: -- can't get off square  
22 one.

23 MR. GOLDSTEIN: Sure.

24 I do not intend, Justice Kennedy, to give up  
25 a good argument in our favor. I was just attempting to

1 identify the narrowest ground for reversal.

2 I'm very pleased to discuss the threshold  
3 point, and that is that, with respect to nonmembers, the  
4 Tribes do not have the authority to subject us to such  
5 sweeping tort law duties. It's not that there aren't  
6 tort law duties. The plaintiff here is a citizen of the  
7 State of Mississippi. Mississippi's tort -- State tort  
8 law does apply to the case. And the plaintiff has a  
9 remedy in State court.

10 JUSTICE GINSBURG: But will you then go back  
11 to my question --

12 MR. GOLDSTEIN: Yes.

13 JUSTICE GINSBURG: -- about Strate? Because  
14 if what you're arguing now is correct, Strate would have  
15 been a one-line decision: No tort jurisdiction over a  
16 non-Indian.

17 MR. GOLDSTEIN: Well, Justice Ginsburg, it's  
18 true that this Court's decisions can often be resolved  
19 in different ways. What Nevada v. Hicks in the footnote  
20 addressing this question explains is that what the Court  
21 has done is narrowly identify the legislative  
22 jurisdiction of the Tribe in the cases before it. And  
23 so in Strate and in other cases, it has held that the  
24 Tribe lacked that antecedent legislative authority. And  
25 on that basis, concluded that, well, then because the



1 adjudicatory authority can't be broader than the  
2 legislative authority, there's no adjudicatory authority  
3 either.

4 So the second point that I was going to make  
5 is that it's true that --

6 JUSTICE GINSBURG: But are -- are you saying  
7 then this sentence that I just read to you from the  
8 opinion of the Court was just wrong?

9 MR. GOLDSTEIN: Justice Ginsburg, what the  
10 Court has said in Nevada v. Hicks, addressing the  
11 various times that there is dictum in the Court's  
12 opinions that has assumed the parallel between  
13 legislative and adjudicatory jurisdiction is that that  
14 question had not been fully considered by the Court and  
15 it remained open. And we assume that that's one of the  
16 reasons the Court granted review in this case. To  
17 decide, assuming that there is legislative jurisdiction,  
18 whether there also is adjudicatory jurisdiction.

19 And I'm pleased to explain why it is. And  
20 what I -- my introduction was trying to do was, assuming  
21 the antecedent legislative jurisdiction, here's why you  
22 don't have jurisdiction to decide a court case in this  
23 fashion.

24 So the first one that I gave you was the  
25 availability of a neutral forum as anticipated by the

1 Constitution.

2 JUSTICE SOTOMAYOR: Can I address that for a  
3 moment?

4 States appoint judges. Sometimes they're  
5 elected, but often they're appointed. We don't think it  
6 lacks being a neutral forum because the State can sue a  
7 citizen there. We think of it as neutral because the  
8 judges are neutral.

9 You're just assuming that these judges are  
10 not neutral.

11 MR. GOLDSTEIN: Oh, Justice Sotomayor, I  
12 think actually that your hypothetical is a good one for  
13 us.

14 In Article III of the Constitution, we  
15 contemplate the availability of a neutral forum when a  
16 noncitizen is a defendant in the case, including when  
17 we, you know, ordinarily respect the neutrality of State  
18 court judges. Right? If a noncitizen is sued in State  
19 court, like we are a noncitizen of the Tribe, is sued in  
20 the Tribe --

21 JUSTICE SOTOMAYOR: But that's out of comity  
22 or our sense of comity between the States. But it  
23 doesn't have anything to do with the fairness of a  
24 judicial forum.

25 MR. GOLDSTEIN: Oh, I -- I just simply

1 disagree, Your Honor. My understanding of the premise  
2 of removal jurisdiction is that there was a concern or  
3 at least a belief that respect for rule of law is  
4 enhanced by the availability of a neutral forum.

5 But I did want --

6 JUSTICE BREYER: What's wrong with the  
7 tribal courts?

8 MR. GOLDSTEIN: What's wrong with the tribal  
9 courts? It depends.

10 First of all, let me say that there are  
11 modern tribal judiciaries like this one that deserve  
12 genuine respect. That are -- have developed real  
13 principles in attempt to identify law that can be known  
14 ex ante and the availability of a neutral forum.

15 There are, however, many tribes, everyone  
16 agrees, that don't have anything like that. They  
17 instead deserve respect in a different --

18 JUSTICE BREYER: All right. Fine. So -- so  
19 we've seen lots of tribal courts, which I can't  
20 distinguish them in the fairness and procedure and so  
21 forth from every other court in the country, and maybe  
22 there's some where that isn't true.

23 MR. GOLDSTEIN: Right.

24 JUSTICE BREYER: So what -- what you do is  
25 you go and complain, we didn't get due process of law.

1 MR. GOLDSTEIN: Two things --

2 JUSTICE BREYER: If you're in one of the  
3 ones that has some unusual thing about it.

4 But if you're in a normal thing, you say,  
5 it's normal.

6 So what's wrong with saying just that?

7 MR. GOLDSTEIN: Right.

8 JUSTICE BREYER: Like a State court which  
9 has terrible procedures, terribly unfair, or a foreign  
10 court. You complain you didn't get proper process.

11 But that has nothing to do with this case.

12 MR. GOLDSTEIN: All right. I --

13 JUSTICE BREYER: Or little.

14 JUSTICE SCALIA: You -- you can remove from  
15 State court, can't you?

16 MR. GOLDSTEIN: Yes. That's right.

17 JUSTICE SCALIA: And when -- and -- and when  
18 removal is asked for, we don't ask the question, what's  
19 the matter with State courts? Do we?

20 MR. GOLDSTEIN: That's right. Our  
21 Constitution --

22 JUSTICE SCALIA: We -- we just say that the  
23 Constitution says you have a -- a choice of having your  
24 case adjudicated in a Federal court.

25 MR. GOLDSTEIN: Justice Breyer, I'm -- I'm

1 not going to lose sight of your question, but just on  
2 this point, our Constitution says we anticipate a  
3 neutral forum that this Court will -- the Supreme  
4 Court --

5 JUSTICE GINSBURG: Well, the Constitution  
6 says the removal of statute is a statute. It's not  
7 constitutional.

8 MR. GOLDSTEIN: Justice Ginsburg, I  
9 understand that. My -- what -- and, Justice Breyer, I'm  
10 not losing sight of your question -- what the -- what  
11 Oliphant and other precedents of this Court say is that  
12 the Tribes have the sovereign authority that is  
13 consistent with the overriding sovereignty of the United  
14 States. And the point I was trying to make is that our  
15 legal tradition understands that there will be certain  
16 basic protections.

17 And remember, two of the things I'm  
18 identifying in the Constitution are not specific to the  
19 States: The supremacy of the Constitution -- but the  
20 Constitution does not apply in tribal courts -- and also  
21 the supremacy of this Court as the one Supreme Court,  
22 which is not available.

23 Now, Justice Scalia, those are features of  
24 our national legal tradition, and those features existed  
25 at the time of incorporation of the Tribes into the

1 United States. And my point is that Congress could not  
2 have believed that, if State courts couldn't do these  
3 things, that the tribal courts would be superior.

4 Now, Justice Breyer, you said, well, what's  
5 wrong? Two things. I want to say that there are some  
6 things wrong even in the context of a tribe like this  
7 one.

8 For example, we have a Federal claim against  
9 the due process -- a due process claim against the  
10 putative damage award in -- that's asked for in this  
11 case, and that would be entirely unreviewable in this  
12 case.

13 Now, you contemplate the prospect that we  
14 would collaterally attack the judgment. A few things  
15 about that.

16 The first is, if that's going to be serious,  
17 if we are really going to have a serious regime of  
18 collateral attacks where you would just assess whether  
19 or not the tribal court ruling is consistent with due  
20 process. That is hardly treating the tribal courts as  
21 sovereigns. Imagine a Federal district court ruling  
22 could be overturned by a circuit court in Mississippi.  
23 We wouldn't say that that was an actual sovereign  
24 ruling.

25 And the second is that that review system is

1 extremely rare. The Respondents identify a single case,  
2 one Ninth Circuit case in which a tribal ruling was  
3 overturned.

4               What the Federal courts have done is afford  
5 enormous respect and only overturned rulings of tribal  
6 courts or foreign courts that are way out of bounds. My  
7 point is that the rule that's contemplated by the  
8 Constitution is not one of being way out of bounds, it  
9 is simply that we have a right to due process; that this  
10 Court will be the Supreme Court, that the Constitution  
11 is the supreme law of the land. And when that is not  
12 true in the courts that we are talking about, even the  
13 best-managed, most modern courts, when those rules  
14 simply don't apply, that is not consistent --

15               JUSTICE GINSBURG: But doesn't the Indian  
16 Civil Rights Act -- I mean, it's not the Bill of Rights,  
17 but Indian Civil Rights Act is pretty close.

18               MR. GOLDSTEIN: Well, Justice Ginsburg, the  
19 rule of the Constitution is not "close is good enough,"  
20 but I will say that I think the Indian Civil Rights Act  
21 is a point in our favor. Because when you talk about  
22 the regulatory matters discussed in the first Montana  
23 exception like taxation and licensing, those are things  
24 that Congress has left to the Tribes. But the Indian  
25 Civil Rights Act, like Public Law 280, like the Courts

1 of Indian Offenses, like the Indian deprivation system  
2 shows that the United States has actually been deeply  
3 involved in the tribal judiciary. It has not treated  
4 tribal adjudication of civil claims as something that  
5 belongs to the Tribes. It's quite different.

6 The United States obviously did not regard  
7 the Tribes' judiciary as something that is purely a part  
8 of their government, because time and again, it has  
9 micromanaged them.

10 And, Justice Breyer, I do want to point out  
11 another example of that, and that is the Violence  
12 Against Women Act. There, we see the right way of doing  
13 this, and that Congress has developed systems that say  
14 if this tribal judiciary is a good one which affords due  
15 process, then it has jurisdiction over cases.

16 And we think that's the right approach here.  
17 Congress has the institutional capacity to develop rules  
18 like the one you were talking about. It's a much  
19 more --

20 JUSTICE BREYER: You can do it both ways.  
21 And there are books, some of which I have at least  
22 looked through, and certainly articles that suggest that  
23 the tribal courts function perfectly well, certainly in  
24 many places.

25 Now, I take it your argument is that there



1 are some places they don't function well, and in respect  
2 to matters that are not matters of Federal law, there  
3 won't be review from those courts unless you  
4 collaterally attack them. Is that your point?

5 MR. GOLDSTEIN: Justice Breyer, as I  
6 mentioned, we have real concerns, even with respect to a  
7 system like this one. For just an example --

8 JUSTICE BREYER: I just want to know, have I  
9 got your point right?

10 MR. GOLDSTEIN: No, I -- our point is  
11 broader. You had suggested, Justice Breyer, that I was  
12 concerned about another set of tribal judiciaries. I  
13 just don't want to lose sight of the fact that there are  
14 concerns, even when you have the most modern tribal  
15 judiciary.

16 An example is that the -- we are a  
17 noncitizen, a nonmember of the Tribe, and the tribal  
18 jury may be composed only of members of the Tribe, and  
19 there's no inherent rule that stops the jury members  
20 from being people who know the plaintiff.

21 Now with respect to other judiciaries, it is  
22 the case that we do recognize, and the United States has  
23 recognized, a wide swath of tribes that use more  
24 traditional dispute-resolution mechanisms that also  
25 deserve respect because that's the tribal tradition.

1 But it is not the tradition of due process.

2 And the question you've got to figure --

3 JUSTICE BREYER: The nontribal member goes  
4 to the tribal land and signs an agreement that says  
5 tribal law would apply, and then commits a tort on the  
6 tribal lands, and even under those circumstances, and  
7 even if the court is functioning well, the tribal court  
8 cannot take jurisdiction over his claim. That's your  
9 position. And then to that I say, if I haven't got it  
10 already, why not?

11 MR. GOLDSTEIN: Okay. Justice Breyer, I do  
12 think your hypothetical of a contract is a really good  
13 one for us, because we do believe that the Respondents  
14 are most concerned, and their best facts are a business  
15 like this one, to be honest, that's operating on tribal  
16 land, in the Reservation on an ongoing basis, and they  
17 say, look, you have to have anticipated the  
18 applicability of tribal tort law. We disagree, but we  
19 understand the argument.

20 My point is that in these circumstances,  
21 what the Tribes do is, as a condition of operating on  
22 the Reservation, they call for not just what you  
23 describe, which is the application of tribal law, but a  
24 consent to the forum. And remember, in this case, there  
25 is a consent to the forum, but the -- which the Tribe

1 wrote, but they limited it to disputes arising from the  
2 lease.

3                   So we say, going forward, we have two  
4 solutions. One I've described: That's the prospect of  
5 congressional action. You say it could work the other  
6 way, and I'll come back to that.

7                   But the second is just the contract.  
8 Obviously, in the cases that they are concerned about,  
9 what the tribe can do and will do is require as a  
10 condition of coming onto the Reservation that you  
11 accede, knowingly and actually, to the jurisdiction of  
12 the tribal courts, and --

13                   JUSTICE KAGAN: Well, Mr. Goldstein, you  
14 could have done that, too. The contract can go either  
15 way. The question is what's the default rule when the  
16 contract doesn't say anything.

17                   MR. GOLDSTEIN: Actually, it wouldn't work  
18 the other way, Justice Kagan, with all due respect.  
19 Remember, this is a private tort suit by a member of the  
20 Tribe.

21                   JUSTICE KAGAN: No, but remember, this is --  
22 there's -- this is an exception for consent. The -- the  
23 company would have -- the store would have an extremely  
24 good argument that it didn't consent if it had signed a  
25 contract with anybody, with the Tribe, not just with the

1 individual person. If it had signed a contract with the  
2 Tribe, saying we insist on a State forum, they clearly  
3 haven't consented.

4 MR. GOLDSTEIN: Well, Justice Kagan, I just  
5 don't understand how it is the case -- I disagree, let  
6 me just explain why. I understand that you take the --  
7 you have the opposite view.

8 If a private person sues us, the fact that  
9 we have a contract with that -- that individual State  
10 government does not strip a State court of jurisdiction  
11 over their private suit. So that's our view of it.  
12 But --

13 JUSTICE KAGAN: Well, it does when the  
14 Montana exception relies upon a consensual relationship.

15 MR. GOLDSTEIN: But Justice Kagan, for the  
16 other side to win, what they have -- their premise is  
17 that the consensual relationship exists in simply the  
18 activity with the individual tribal member, not the  
19 contract. Remember, their point is that a contract is  
20 irrelevant. So the consent would exist simply by  
21 operating the business.

22 But in all events, it is the case that we  
23 could insist on a contract; they can insist on a  
24 contract. My point to Justice Breyer was simply that  
25 the upshot of our position still leaves enormous room

1 for the exercise of tribal sovereignty. They do have  
2 this power. Remember that the data before you from the  
3 United States indicates that this is a very small  
4 proportion of cases that the tribal courts adjudicate.  
5 The data from this Tribe indicates that it's 1 percent  
6 of cases.

7 JUSTICE KAGAN: All of these arguments, your  
8 arguments -- let me figure out whether this is right.  
9 Your arguments about it's -- it's a nonneutral forum,  
10 it's an unfair forum, we don't know whether they have  
11 the same procedures that -- that are commonly -- that  
12 commonly exist in Federal and State courts. Those  
13 arguments have nothing to do with tort claims versus  
14 other claims; is that right?

15 MR. GOLDSTEIN: They do have a lot to do  
16 with the fact that it's a private claim. Let me  
17 distinguish, importantly, actions by the Tribe itself.

18 And the analogy here is that when a State  
19 sues a noncitizen, that is an act of the sovereign and  
20 it is not removable, because what Montana is concerned  
21 with, what this Court's precedents are concerned with,  
22 is the exercise of sovereign authority in the pursuit of  
23 self-governance.

24 This is not a sovereign action. This is a  
25 private suit between two individuals, and so it is

1     important that if the Tribe is exercising its sovereign  
2     authority, bringing a civil enforcement action against  
3     us, for example, that would have presented -- present a  
4     very different question, because it would be  
5     sovereignty. It has never been understood that --

6                 JUSTICE GINSBURG: So if the Tribe brought  
7     this suit, instead of the parents of the boy who was  
8     molested, if -- if it -- then it would be okay?

9                 MR. GOLDSTEIN: Well, we think that's an  
10    impossibility. Remember that the other side's  
11    explanation -- although there aren't any citations; it's  
12    hard to know what the tort law is -- the other side's  
13    explanation is that tort law of the Tribe tracks  
14    Mississippi tort law, and there isn't a situation in  
15    which the Tribe could bring such an action. And I think  
16    if it was a parens patriae action, we would still regard  
17    it as in the interest of the individual.

18                I'm thinking instead, Justice Ginsburg, of  
19    take the follow-on to what Montana describes, that is, a  
20    licensing regulation or a taxation regulation. We  
21    believe that if the Tribe went into tribal court to  
22    enforce those measures, that would be a sovereign action  
23    and it would be susceptible of the Montana exception.

24                The difference is when the Tribe is not a  
25    party here. We don't deny that there is some sovereign

1 interest. Okay. There is some sovereign interest in  
2 this adjudication.

3 JUSTICE KAGAN: It's a bit of an odd  
4 argument, isn't it, Mr. Goldstein, that there's less of  
5 a sovereign interest in protecting your own citizens  
6 than in enforcing your licensing laws?

7 MR. GOLDSTEIN: If that were our argument,  
8 it would be an odd one. What we say is that you have a  
9 very different regime. If you have a legal regime that  
10 said here is a duty towards our noncitizen, our -- our  
11 tribal members or just individuals on the Reservation,  
12 and if you violate that, here are a set of fines, you  
13 will be excluded from the Reservation, then that would  
14 be an act of the sovereign.

15 So our point isn't just it's the nature of  
16 this -- you know, this is a very serious allegation that  
17 we take very seriously about a minor child, a member of  
18 the Tribe. I am not demeaning that in any way and  
19 saying, well, that's less important than taxation or a  
20 hunting license. Not at all.

21 My point is that you are being asked that at  
22 the time the Tribes came into the United States, was a  
23 private suit against a nonmember regarded as an  
24 incidence of sovereignty, could the Congress of the  
25 United States, when the States didn't have this

1 authority, when the Constitution didn't contemplate they  
2 would, have really believed that the Tribes could?

3 JUSTICE KENNEDY: Your -- your -- your brief  
4 consistently, let me say, suggests --

5 MR. GOLDSTEIN: Yes.

6 JUSTICE KENNEDY: -- that Congress could  
7 authorize this jurisdiction.

8 MR. GOLDSTEIN: Yes.

9 JUSTICE KENNEDY: Could Congress pass a law  
10 saying that all 500-plus Indian Tribes in the  
11 United States have unlimited criminal authority, could  
12 impose life sentences on nontribal members, American  
13 citizens?

14 MR. GOLDSTEIN: We think not, and let me  
15 explain the reason. That would be State action. You  
16 know, the Federal government would be passing a law  
17 essentially shunting the jurisdiction over an  
18 individual's matter into another adjudicative system.

19 JUSTICE KENNEDY: Well, why can they do --  
20 if -- if there's a limit on that, why isn't is there a  
21 limit on what Congress could do with reference to tort  
22 law? Because you get unlimited power -- 500 tribes have  
23 unlimited power to impose punitive damages for civil  
24 torts if it happens within the boundaries of the  
25 Reservation.



1                   MR. GOLDSTEIN: Justice Kennedy, if I have  
2 suggested that Congress could do that, I apologize. It  
3 wasn't my intention.

4                   JUSTICE KENNEDY: My question is: What are  
5 the limits?

6                   MR. GOLDSTEIN: The limits are due process,  
7 and that is that if you -- and the reason that due  
8 process applies here is that the tribe of judgment --  
9 we've switched to the civil context now in your newest  
10 hypothetical.

11                   If the Tribe's judgment would presumably be  
12 enforceable in the courts of the United States or of a  
13 State, there would be State action then, and it would  
14 violate the principle of due process.

15                   It also --

16                   JUSTICE KENNEDY: My -- my hypothetical is  
17 that the Congress gives Indian powers -- Indian tribes  
18 complete powers, both civil and criminal, over all  
19 persons on tribal Reservations. No Federal review,  
20 nothing.

21                   MR. GOLDSTEIN: That's unconstitutional  
22 because Congress is subject to the Constitution. It  
23 would violate the Supremacy Clause; it would violate  
24 Article III, which contemplate -- sorry.

25                   JUSTICE KENNEDY: Then why -- why doesn't --

1     why don't you make that argument here?  How -- how can  
2     they -- how can they allow a tort suit?

3                     MR. GOLDSTEIN:  Justice Kennedy, we agree  
4     with you that there's --

5                     JUSTICE KENNEDY:  We could say --

6                     MR. GOLDSTEIN:  I'm sorry.

7                     JUSTICE KENNEDY:  -- the Montana First  
8     exception.  We could say the Montana First exception  
9     doesn't apply to this case.

10                    MR. GOLDSTEIN:  We do -- okay.  Justice  
11    Kennedy, we do make the argument you're describing.  I  
12    apologize.  I misunderstood your point.  It's my fault.

13                    We say that there is a significant  
14    constitutional avoidance argument -- that's how we  
15    describe it -- in concluding to -- for concluding that  
16    Montana does not apply here because of the very serious  
17    prospects that there would be a loss of property without  
18    due process of laws because the tribes would have just  
19    what you've described.

20                    This plaintiff has sued us for multiple  
21    millions of dollars in punitive damages.  We do not have  
22    the guarantees provided by the Constitution, and we do  
23    not have review in this Court.

24                    JUSTICE KENNEDY:  Well, if the -- Congress  
25    of the United States give the UN authority --

1 MR. GOLDSTEIN: I agree.

2 JUSTICE KENNEDY: -- over our -- our  
3 citizens --

4 MR. GOLDSTEIN: Or the Triple A.

5 JUSTICE KENNEDY: -- just so long as it says  
6 there has to be due process, they're not a  
7 constitutional entity?

8 MR. GOLDSTEIN: That's the second point I  
9 made, Justice Kennedy. We have the procedural due  
10 process question, but also the Article III question, and  
11 that is this is the Supreme Court of the land.

12 The Supremacy Clause says that the  
13 Constitution will be the supreme law throughout the  
14 land, and Congress could not take cases in the  
15 United States and assign them to the UN or the Triple A  
16 or anybody else. We absolutely agree with that.

17 JUSTICE GINSBURG: Well, what civil -- what  
18 civil cases can be brought? What -- let's assume that  
19 the incident occurs on the Reservation, and the  
20 wrongdoer is not a member of the Tribe. What civil  
21 claims can be brought against nonmembers in tribal  
22 court?

23 MR. GOLDSTEIN: The following. The first is  
24 -- and this case is an illustration of it -- those  
25 claims that are subject to the contract that allow the

1 individual or the business to come on to the  
2 Reservation. We acceded, quite expressly, to  
3 jurisdiction over disputes arising from the lease.

4 The second is when the Tribe itself, in the  
5 exercise of its sovereign authority, brings the action,  
6 so long as it's consistent with principles of due  
7 process, we think that would be much more consistent  
8 with Montana --

9 JUSTICE GINSBURG: For example? What would  
10 fit into that category?

11 MR. GOLDSTEIN: The examples that I gave  
12 before are that enforcing a taxation rule, enforcing a  
13 licensing rule. Also importantly, the Tribe has the  
14 self-help remedy of exclusion from the Reservation.

15 If I could reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Mr. Katyal.

18 ORAL ARGUMENT OF NEAL K. KATYAL

19 ON BEHALF OF THE RESPONDENTS

20 MR. KATYAL: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 The facts of this tragic case place it  
23 squarely in the heartland of the sovereign tribal  
24 jurisdiction that this Court has recognized for decades.

25 Dollar General set up shop on tribally-owned

1 land with a lease and license from a tribe and agreed to  
2 participate in a tribal internship program. Then the --  
3 then the Tribe placed a Choctaw child at the store and  
4 paid his wages.

5 In the course of that consented-to  
6 employment of that child, in that store, on that tribal  
7 land, Dollar General's manager allegedly assaulted him.

8 CHIEF JUSTICE ROBERTS: You say this is in  
9 the heartland? We have never before recognized Indian  
10 court -- court jurisdiction over a nonmember, have we?

11 MR. KATYAL: Well, I think that you haven't  
12 applied the rule. But as Justice Ginsburg was saying,  
13 this Court unanimously, in *Strate*, said that when tribes  
14 possess authority to regulate activities of nonmembers,  
15 civil jurisdiction over disputes --

16 CHIEF JUSTICE ROBERTS: Right. Right. But  
17 I guess I want to make sure I understand what's at issue  
18 here.

19 There has never been a case in which a  
20 nonmember has been haled into Indian tribal court for --  
21 on the basis of tort, has there?

22 MR. KATYAL: Well, I think that there have  
23 been many cases, Your Honor. Four of them have come  
24 before this Court in which they have been haled before.  
25 So *Strate* is an example. *Iowa Mutual* is an example.

1 CHIEF JUSTICE ROBERTS: And held -- held  
2 liable in tort?

3 MR. KATYAL: So this Court decided those  
4 questions on antecedent grounds --

5 CHIEF JUSTICE ROBERTS: I guess I don't know  
6 that we need to -- there has never been a case where a  
7 nonmember has been held liable in tort in an Indian --  
8 Indian court.

9 MR. KATYAL: Mr. Chief Justice, that's  
10 exactly right in terms of describing --

11 CHIEF JUSTICE ROBERTS: I think it's a  
12 little odd to say this is in the heartland of Indian  
13 jurisdiction.

14 MR. KATYAL: I don't think it's odd at all.  
15 That's the rule that this Court laid down. That's the  
16 language in Strate. And my friend, Mr. Goldstein's,  
17 best argument on the other side is your language in --  
18 this Court's language in --

19 JUSTICE SCALIA: That's dictum. Dictum is  
20 dictum. Dictum doesn't make something a heartland.

21 MR. KATYAL: Well, I think that --

22 JUSTICE SCALIA: Cases make it. Judgments  
23 make it heartland.

24 MR. KATYAL: Well, Justice -- Justice  
25 Scalia, I think everything about this Court's precedents

1 in this area, which are all tort cases, lead to that  
2 conclusion.

3 Mr. Goldstein's best argument is Hicks. But  
4 remember in Hicks, the Court went out of its way to say  
5 that the claims in El Paso, which were very similar to  
6 the claims here -- it was a nonmember business doing  
7 business on tribal land. It was a tort lawsuit -- what  
8 did this Court say, citing to footnote 4 of El Paso?  
9 There is little doubt there was jurisdiction in that  
10 case.

11 So yes, I understand that they are dicta,  
12 but it is dicta of the most persuasive sort. It is the  
13 unbroken rule of this Court, frankly, that in all of  
14 these cases, this Court has said there is presumptively  
15 jurisdiction.

16 And indeed, the exhaustion cases would make  
17 no sense otherwise because twice this Court said, in  
18 tort cases, in Iowa Mutual and National Farmers Union,  
19 this Court said you've got to go to tribal court and  
20 exhaust your remedies.

21 And Justice Scalia, if the rule in those  
22 cases was, hey, tribal courts don't have jurisdiction,  
23 they would have done what you did in your opinion in  
24 Hicks, because at page 369 you said, quote, "Since it's  
25 clear tribal courts lack jurisdiction over State

1 officials, adherence to the tribal exhaustion  
2 requirement would serve no purpose."

3 JUSTICE ALITO: Does your argument apply  
4 whenever a nonmember enters into a commercial  
5 transaction with a member?

6 MR. KATYAL: No, it doesn't apply --

7 JUSTICE ALITO: On tribal land?

8 MR. KATYAL: Well, on tribal land we do  
9 think -- we don't think you have to go as far as the  
10 Solicitor General to say it's absolutely 100 percent  
11 dispositive, but we do think this Court has recognized  
12 in Merrion and El Paso that when you're on tribal lands,  
13 the tribe's powers are at their zenith.

14 JUSTICE ALITO: Well, I'm trying to  
15 understand the limits of your -- of your argument.

16 So what would happen in this situation? A  
17 tribe -- a member of the Tribe purchases a product  
18 online from a nonmember company, and the product is  
19 delivered to the Tribal member on tribal land. The  
20 delivery person gets involved in a traffic accident or  
21 some other dispute in the course of delivering the  
22 product, and the product itself injures the person who  
23 purchased it.

24 So could the -- the person who got into --  
25 who was in the accident with the delivery person sue in



1 tribal courts?

2           Could the person who -- the tribal member  
3 who purchased the product bring a products liability  
4 action against the manufacturer in tribal court?

5           MR. KATYAL: It depends a little bit more on  
6 the facts. In general, what this Court has said is that  
7 you need a consensual relationship with someone on the  
8 Tribe -- on tribal land. And so, you know, to the  
9 extent that that delivery service was operated by, you  
10 know, by the nonmember and that they're actually doing  
11 the delivery, absolutely. There's a nexus between the  
12 delivery and the injury.

13           Now, if it was some exotic tort, so for  
14 example it's the delivery truck comes onto tribal land,  
15 and unbeknownst to them there's some unusual tradition  
16 that says delivery trucks have to be painted, you know,  
17 some other color or something like that that they don't  
18 know about, I think this Court's decision in Plains  
19 Commerce Bank says that's not what you're reasonably  
20 anticipating.

21           So this is a very limited rule, really  
22 tailored -- it's circumstances like this in which  
23 every -- the law of every jurisdiction --

24           JUSTICE ALITO: All right. What about the  
25 -- what about the products liability action?

1                   MR. KATYAL: So again, if -- if a business  
2 is sending -- intentionally, knowingly sending goods  
3 onto tribal land, and those turn out to be defective,  
4 then they're liable for that, for that tort. That is  
5 something that's a reasonably -- reasonably to be  
6 anticipated --

7                   JUSTICE KENNEDY: And that could be for  
8 punitive damages, millions of dollars?

9                   MR. KATYAL: If -- if that's what they have  
10 consented to. So for --

11                  JUSTICE KENNEDY: No. No. There's no  
12 consent. It's just what Justice Alito said, that they  
13 send their products to 50 different States --

14                  MR. KATYAL: If -- if there's --

15                  JUSTICE KENNEDY: -- and all of the tribes.

16                  MR. KATYAL: If -- if they do so knowingly,  
17 and there is that kind of long-term relationship, then  
18 yes, unless they themselves disclaim that -- and of  
19 course it's very easy --

20                  JUSTICE KENNEDY: Well, number one, that's  
21 not explicit consent. We can get into that later.

22                  MR. KATYAL: Well -- well, I --

23                  JUSTICE KENNEDY: But the --

24                  MR. KATYAL: -- I certainly --

25                  JUSTICE KENNEDY: There's no -- so punitive

1 damages, millions of dollars?

2 MR. KATYAL: Right, as long as they haven't  
3 affirmatively disclaimed it. And I think that is,  
4 Justice Kennedy, the proper rule.

5 CHIEF JUSTICE ROBERTS: I don't know what  
6 authority --

7 JUSTICE KENNEDY: Again, what about limiting  
8 --

9 CHIEF JUSTICE ROBERTS: I'm sorry, Justice  
10 Kennedy.

11 JUSTICE KENNEDY: I don't know what  
12 authority Congress has to subject citizens of the  
13 United States to that nonconstitutional forum.

14 MR. KATYAL: It's exactly what this Court --  
15 and Justice Kennedy joined this in Plains Commerce  
16 Bank -- because what this Court said is that, yes, there  
17 are these constitutional concerns that -- or that tribes  
18 are -- you know, tribes are outside the constitutional  
19 system and so on.

20 But when someone consents through their  
21 words or their actions, not express consent, then that  
22 takes it out of that circumstance.

23 And so Dollar General had a remedy available  
24 to it right away. It -- it didn't have -- nobody forced  
25 Dollar General to show up on the tribal lands. Nobody

1     forced Dollar General to sell to these customers.  
2     Nobody forced Dollar General to have this Youth  
3     Opportunity Program. And yes, like every employer in  
4     this country, Justice Kennedy, when you do those things,  
5     you open yourselves up to the reasonable liability that  
6     follows. This --

7                     JUSTICE ALITO: Well, let me give you  
8     another -- another hypothetical: Somebody goes to an  
9     Indian casino and loses a lot of money, and then when  
10    the person goes home, the person goes online and says  
11    that, they -- they cheated me. The game was rigged.  
12    The -- the Blackjack dealer was doing something. And  
13    they -- and so then the -- the -- the Tribe -- could the  
14    Tribe sue that person for defamation in tribal court?

15                    MR. KATYAL: Well, I think -- I -- I think  
16    that that that's not something that would be permissible  
17    under this Court's Atkinson Trading nexus test. I think  
18    it's got to be something that's got to be reasonably  
19    anticipated, and I'm not really sure that that kind of  
20    thing is.

21                    All we're saying here is that this is a  
22    circumstance in which, as the Solicitor General's brief  
23    at Page 32 says, the law of every jurisdiction treats  
24    this kind of thing as something that is a reasonably  
25    anticipatory thing when someone's running a shop --

1 someone's running a store and having a Youth Opportunity  
2 Program.

3 Yes, there --

4 JUSTICE GINSBURG: And so how do you deal  
5 with -- I think it is a stronger point on the other  
6 side, is the absence of removal, and --

7 MR. KATYAL: Yes. That -- that -- that I do  
8 think is something that -- you know, that my friend on  
9 the other side has said. But of course, as you were  
10 saying, Justice Ginsburg, removal is not  
11 constitutionally compelled. So it would require a  
12 statute.

13 Here the removal statute requires diversity,  
14 full diversity between the parties, and \$75,000 is the  
15 limit. And I don't think that we would say anything  
16 that doesn't fall within that is somehow not an incident  
17 of sovereignty.

18 And I also would point to this Court's  
19 language in Iowa Mutual about the diversity statute,  
20 because what this Court said with respect to the  
21 diversity statute is, you know, it does require a  
22 statute.

23 That statute doesn't really tell us  
24 anything, one way or the other, about tribal  
25 jurisdiction. And what this Court went on to say is

1     that civil tribal tort jurisdiction is an incident to  
2     sovereignty. It's Williams v. Lee. It's about the  
3     right of the people to govern themselves.

4                     And, you know, to treat this,  
5     Justice Kennedy, like express consent is to treat a  
6     tribe the way you're treating the American Arbitration  
7     Association or JAMS, and that has never been what this  
8     Court has said. When you're dealing with the Montana I  
9     exception, which is a limited exception, it requires  
10    really -- you know, it requires a true relationship, an  
11    open and honest consent of the kind that existed here,  
12    in which they knew they were coming onto tribal lands  
13    and subjecting themselves to tribal law.

14                    JUSTICE BREYER: Do --

15                    CHIEF JUSTICE ROBERTS: Why was the  
16    contractual provision acquiescence in the application of  
17    tribal law limited in the way that it was if they were,  
18    in fact, subjecting themselves to tribal jurisdiction  
19    across the board?

20                    MR. KATYAL: I -- I -- I don't think it was  
21    limited at all. This is the language at Joint Appendix  
22    page 45: "This agreement and any related documents  
23    shall be construed" -- excuse me -- "Dollar General  
24    shall comply with all codes and requirements of all  
25    Tribal and Federal Laws and regulations now enforced or

1    which may hereafter be enforced which are applicable and  
2    pertain to Dollar General's specific use of the demised  
3    premises."

4                   That is not limited language.

5                   CHIEF JUSTICE ROBERTS:  Is there any reason  
6    that the issue that we're arguing about couldn't be  
7    dealt with through particular contractual provisions, as  
8    they are in some cases where you either suggest  
9    yourselves to the jurisdiction of the tribal court or  
10   not?

11                  MR. KATYAL:  Sure.  I think that they could,  
12   on -- on either side.  I think that's -- that's  
13   possible.  But I think what this Court has said, time  
14   and again, is that that is not necessary.

15                  Your language, Mr. Chief Justice, in Plains  
16   Commerce Bank, is that you can consent by your words or  
17   your actions.  This Court's earlier language in the  
18   path-marking Montana case is not that it requires  
19   express consent, but rather through commercial dealing,  
20   contracts, leases or other arrangements.

21                  For you to go further than that and adopt my  
22   friend's argument is to radically depart from that  
23   path-marking decision, and change the rules and put  
24   tribes on no greater a footing than the American  
25   Arbitration Association.

1 JUSTICE BREYER: So what -- what would -- do  
2 we have to reach in this case the question of products,  
3 liability for products sent into the tribal area?

4 I would have thought you could say this does  
5 not involve that, if you're willing to read -- and I  
6 don't know if you are -- nonmembers who enter into this  
7 kind of explicit consensual relationship growing out  
8 of -- in relation to a contract to which relationship  
9 the tort is directly related.

10 MR. KATYAL: Exactly.

11 JUSTICE BREYER: Now, is there any -- and --  
12 and what is the word in Cherokee? I forget. It's  
13 "something dependent nation." What kind of -- it was --  
14 there are two words --

15 MR. KATYAL: Domestic dependent --

16 JUSTICE BREYER: What?

17 MR. KATYAL: Domestic dependent nation?

18 JUSTICE BREYER: Domestic? All right.

19 So if, in fact, Tasmania had this kind of  
20 situation, and an American went to Tasmania and got a  
21 reasonable judgment, I take it our courts would enforce  
22 that.

23 MR. KATYAL: Correct.

24 JUSTICE BREYER: And, of course you're going  
25 to agree with this, but if I -- but if I -- if I want --



1 if I wanted -- I wanted the limitation, and I wanted to  
2 know if you wanted me to read one thing that you have  
3 cited in respect to what is only impressionistic, that  
4 the vast number of tribal courts are indistinguishable  
5 in terms of fairness, et cetera, from the courts of --  
6 other courts in the United States, what would I read?

7 MR. KATYAL: Well, I -- I -- I think, you  
8 know, we've cited to, you know, some large --

9 JUSTICE BREYER: Which of those do you want  
10 me to read?

11 MR. KATYAL: Well, I -- I think that maybe  
12 Justice O'Connor's article is a good place to start.

13 And so I -- I think what I would say there,  
14 Justice Breyer, is that fairness concerns have never  
15 been relevant to the jurisdictional inquiry. I think  
16 that's what this Court's decision in Iowa -- Iowa Mutual  
17 said.

18 With respect to your product-liability  
19 hypothetical, we think there are four limits on the rule  
20 we have, which is why -- you know, look, this has been  
21 going on for a long time, tribal court jurisdiction.  
22 Congress hasn't seen fit to modify it, you know, if they  
23 were concerned about the concerns Justice Kennedy had.

24 And the reason is because this is a limited  
25 thing. It requires a very tight nexus -- that's, you

1 know, this Court's decisions in Plains Commerce Bank and  
2 Atkinson's Trading. It requires knowledge. It's got to  
3 be -- you got to know what you're doing. You can't just  
4 wander on to the Reservation the way the Oklahoma --

5 CHIEF JUSTICE ROBERTS: If we're -- if we're  
6 going to evaluate the due process concerns on a  
7 case-by-case basis, as a general matter, it -- does it  
8 violate due process for a nonmember to be subjected to a  
9 jury verdict where the jury consists solely of tribal  
10 members?

11 MR. KATYAL: Well -- well, first of all, you  
12 know, that's not necessarily what's going on here.  
13 There's no jury trial in this case. But --

14 CHIEF JUSTICE ROBERTS: I understand that.  
15 But it's kind of a yes-or-no question. Does it -- does  
16 it violate due process as a general matter for a  
17 nonmember to be subjected to a jury trial with the jury  
18 composed solely of members of the Tribe?

19 MR. KATYAL: I -- I could see it violating  
20 ICRA. It wouldn't violate, formally, the Constitution.  
21 It would violate, you know, the due -- it arguably could  
22 violate the Due Process Clauses incorporated into ICRA.  
23 That would be something --

24 JUSTICE KENNEDY: That's because tribes are  
25 not governed by the Due Process Clause.

1 MR. KATYAL: Yes. But they are governed --

2 JUSTICE KENNEDY: They're nonconstitutional  
3 entities.

4 MR. KATYAL: Correct. But Congress has  
5 brought the Due Process Clause to tribes in the form of  
6 ICRA. And of course, Justice Kennedy, if they were more  
7 concerned and said, look, we don't even like the way,  
8 tribes, you're interpreting ICRA or something like that,  
9 tribal courts, they could go further. They could do  
10 all --

11 JUSTICE KENNEDY: I guess they could --

12 MR. KATYAL: They could ban those juries.  
13 They have plenary jurisdiction in this area. That's why  
14 the ball game is in Congress's court, Congress's shoes.  
15 It's not in this Court's.

16 JUSTICE BREYER: I -- is it right? I'm  
17 thinking that there are \$50,000 at stake in many cases.  
18 And many citizens of New York who want to feel -- sue  
19 citizens of Massachusetts, do have to go before juries  
20 to obtain the \$50,000 in a Massachusetts court. And  
21 suppose the plaintiff is a Yankee fan?

22 (Laughter.)

23 MR. KATYAL: That's -- that's absolutely  
24 right. And -- and -- that's absolutely right, and I --  
25 and so in -- in that sort of --

1 CHIEF JUSTICE ROBERTS: So you think that --  
2 you think the concerns are on the same level: Forcing  
3 somebody in a State court to be subjected -- a  
4 New Yorker to be subject to jurisdiction where  
5 everyone's from Massachusetts because it's Massachusetts  
6 court. You think that's the same as subjecting a  
7 nonmember accused of a terrible assault on an Indian to  
8 jurisdiction before a jury consisting solely of members  
9 of the Tribe.

10 MR. KATYAL: I don't think it's the same,  
11 Mr. Chief Justice, but I think there are two things  
12 which make them similar. One is that they themselves,  
13 that nonmember, is consenting to that by going to --  
14 like the store here, setting up shop and running the  
15 Tribal Opportunities Program and serving its members.

16 And number two, the big difference is that  
17 Congress has full control over there. If they are  
18 concerned about all tribal member juries or something  
19 like that, they can regulate those.

20 Civil jurisdiction and tribal courts have  
21 been going on for decades, and we haven't seen Congress  
22 doing that. And indeed much -- and very interesting  
23 here, you've got the sovereigns of every relevant  
24 entities, you've got the United States, as well as the  
25 State of Mississippi itself, saying we're not concerned

1 about those things. Actually, this is an incident of --

2 JUSTICE KENNEDY: The Constitution runs to  
3 the people. The people have a right to insist on the  
4 Constitution even if Mississippi or the Federal  
5 government doesn't care.

6 MR. KATYAL: I completely agree with that,  
7 Justice Kennedy. My only point is to say that, here,  
8 Dollar General has themselves, by opening -- they --  
9 they have the keys to avoiding this by not showing up at  
10 the Reservation --

11 JUSTICE KENNEDY: This -- this gets into  
12 implied consent, express consent, you know, all the  
13 hypotheticals. You consent to have your luggage  
14 searched, you go through this, I don't consent, I don't  
15 consent -- it's implied. Everybody knows that.

16 But this is -- this is quite -- it seems to  
17 me that the first exception in Montana is quite  
18 different. It talks about contracts, and the Tribe  
19 could certainly have put this in a contract if they  
20 wanted just like an arbitration clause.

21 MR. KATYAL: Well, Justice Kennedy, we do  
22 think -- the argument doesn't depend on it, but we do  
23 think that they did put it in the contract. That's the  
24 language that I was just reading to the Chief Justice.

25 But just to be clear, the language of

1 Montana I is broader than what you're saying it is,  
2 again, through commercial dealing, contracts, leases or  
3 other arrangements. And my friend, Mr. Goldstein,  
4 clever as he may be, doesn't have an argument that this  
5 isn't commercial dealing. This is -- this is, you know,  
6 as good as -- this is the heart -- as I was saying, this  
7 is the heartland of what Montana I is about. This is a  
8 circumstance in which a tribe is entering into a long --  
9 store is entering into a long-term relationship. And  
10 any business in America doing this, whether they -- they  
11 set up shop in France or in the city of San Francisco,  
12 knows they're opening themselves up to a -- to the local  
13 regulation that may follow.

14 JUSTICE ALITO: If there were a forum  
15 selection clause in this contract selecting State court,  
16 would that bind Tribe member -- members?

17 MR. KATYAL: I do think it would.

18 JUSTICE ALITO: If so, on what theory?

19 MR. KATYAL: I think that the Tribe itself  
20 has the ability to, just as they can decide to use the  
21 American Arbitration Association or whatever, they can  
22 buy into some other area of law. I don't think that my  
23 friend, Mr. Goldstein, is disagreeing. He said  
24 sometimes it's hard to do, in response to Justice Kagan.  
25 I don't think it's hard to do at all because the whole

1 question is are you reasonably anticipating a certain  
2 amount of jurisdiction, and you are.

3 And of course there's other solutions.  
4 Indemnity provisions; if you're worried about the due  
5 process -- lack of due process, you can have indemnity  
6 arrangements, as many leases do, including Dollar  
7 General's current lease. There's lots of different ways  
8 to deal with this concern about, you know, lack of  
9 constitutional concerns.

10 But this Court --

11 JUSTICE GINSBURG: Mr. Katyal, so why would  
12 these plaintiffs want to bring the case in tribal court  
13 where they can get, in your argument, they can get  
14 Dollar General but they can't get Townsend? If they  
15 sued in State court, they could sue both defendants.

16 MR. KATYAL: Mm-hmm. So because going after  
17 Dollar General effectively does provide them all the  
18 remedy they need, that's why they never appealed that  
19 piece -- piece of it.

20 And, you know, and the other thing is this  
21 is really important as a matter of tribal sovereignty  
22 that is -- Williams v. Lee says it's about the right of  
23 the people to govern themselves. The Domestic Violence  
24 brief gives other reasons why in general people want to  
25 bring suits in tribal courts because it's a more

1 familiar process and one closer, geographically, to  
2 them. Many times State courthouses are hours and hours  
3 away. So that's -- that's another reason.

4 But the bottom line here is this Court said  
5 in Williams v. Lee this is about the right of the people  
6 to govern themselves. I appreciate the constitutional  
7 concerns, but Plains Commerce Bank baked those into its  
8 consent rule. It said yes, there are those  
9 constitutional concerns. They would apply to some  
10 wandering entity or something like that, but not to  
11 someone who consents either through their words or their  
12 actions.

13 JUSTICE KENNEDY: Just so you know, it  
14 seemed to me a reading of the first Montana exception,  
15 which is what we're talking about here, talking about  
16 taxation, licensing, then it talks about consensual  
17 relationships and we have this whole question: Is it  
18 explicit or is it implied?

19 And then it talks about commercial dealing  
20 contracts, leases, or other arrangements. That doesn't  
21 sound like torts to me. And it seems to me that since  
22 there's a Reservation in mind, you might you want to  
23 address it.

24 MR. KATYAL: Sure. So I think this Court in  
25 Regal already said that torts are a form of regulation.



1 I think there's no reason to think of torts any  
2 differently because they -- they impact bodies' behavior  
3 and precedent, stare decisis. You've said this many  
4 times in the cases I've mentioned.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
8 FOR UNITED STATES, AS AMICUS CURIAE,  
9 SUPPORTING THE RESPONDENTS

10 MR. KNEEDLER: Mr. Chief Justice, and may it  
11 please the Court:

12 I'd like at the outset to respond to the  
13 argument that tribal court jurisdiction over tort claims  
14 is somehow inconsistent with the superior sovereignty of  
15 the United States.

16 That argument was flatly rejected, I think,  
17 in both National Farmers Union and Iowa Mutual where  
18 this Court was asked to apply the rule of Oliphant to  
19 civil jurisdiction. And this Court, in an unanimous  
20 decision joined by Justice Rehnquist, who was the author  
21 of Oliphant, said that those principles do not apply to  
22 civil jurisdiction. Iowa Mutual and National Farmers  
23 Union enforced the rule of exhaustion on that premise.

24 Then, importantly, not too long after that,  
25 Congress undertook a thorough review of tribal courts in

1 connection with the passage in 1993, as we explain in  
2 our brief, of the Tribal Justice Improvements Act --  
3 Tribal Justice Act. It held hearings, and in that -- in  
4 that statute, Congress made two specific findings:  
5 Tribal justice systems are an essential part of tribal  
6 government and serve important forums for ensuring  
7 public health and safety and political integrity of the  
8 Tribe, and Congress in Federal courts --

9 JUSTICE SCALIA: Nobody denies that here.

10 MR. KNEEDLER: Well, no, but if I could --

11 JUSTICE SCALIA: It is essential for -- for  
12 disputes between tribal members.

13 MR. KNEEDLER: If I could finish, what  
14 Congress's -- Congress's judgment, the next finding,  
15 Congress and Federal courts have repeatedly recognized  
16 tribal justice systems as the appropriate forums for the  
17 adjudication of disputes affecting personal and property  
18 rights.

19 The committee reports on that statute made  
20 clear that they -- that those provisions were enacted in  
21 light of Iowa Mutual and National Farmers Union, and in  
22 fact, one of the -- one of the committee reports says  
23 that that second provision was added in recognition of  
24 the jurisdiction that tribal courts have over  
25 non-Indian --

1 JUSTICE SCALIA: If it said personal and  
2 property rights of non-Tribal members.

3 MR. KNEEDLER: Well --

4 JUSTICE SCALIA: Or against non-Tribal  
5 members. It makes no reference to that at all.

6 MR. KNEEDLER: No. The -- what I'm saying,  
7 it was enacted in the wake of National Farmers Union and  
8 Iowa Mutual, which both concerned tort claims against  
9 non-Indians. And the legislative history makes clear  
10 that Congress was implementing that, and it provided  
11 funding for tribal courts.

12 Another point --

13 JUSTICE SCALIA: Do you think everybody who  
14 voted for that statute was aware of that, right?

15 MR. KNEEDLER: There were --

16 JUSTICE SCALIA: They were aware of those  
17 cases, I'm sure. Everybody who voted for that  
18 language --

19 MR. KNEEDLER: I -- I --

20 JUSTICE SCALIA: -- were aware that it -- it  
21 stemmed from those cases because that's what the  
22 committee report says.

23 MR. KNEEDLER: This -- this was a statute  
24 against the backdrop of two decisions of this Court  
25 saying that the rule of Oliphant does not apply to civil

1 jurisdiction over non-Indians in tort cases  
2 specifically.

3 And importantly also, in Iowa Mutual the  
4 argument was made about, specifically in connection with  
5 the diversity point, which Mr. Katyal has responded to,  
6 but the argument that the policies of the deferred city  
7 statute, such as concerns about perhaps competence of  
8 tribal courts or bias, that they should at least inform  
9 the analysis. And the Court said that would be  
10 inconsistent -- and this is before the 1993 statute --  
11 that would be inconsistent with Congress's judgment  
12 about encouraging tribal courts as an important  
13 expression of tribal sovereignty.

14 And then Congress comes along and provides  
15 funding and training, statutes that -- that provide for  
16 training of tribal judges, money to support the payment  
17 of tribal judges and to support tribes in publication of  
18 their tribal codes. Congress thoroughly examined this  
19 and then again in the year 2000 enacted a statute with a  
20 similar finding.

21 So what we have here is not congressional  
22 silence but congressional approval of that, here in  
23 particular.

24 JUSTICE SOTOMAYOR: Mr. Kneedler, I don't  
25 know that you've answered -- I'm going to assume

1 everything you said and accept it. I think it was very  
 2 clear from the committee report here, every word you've  
 3 said, and some of us do believe that since a bill is  
 4 sent with the committee report and Congress is voting on  
 5 both, if a member hasn't read it, they've abused their  
 6 official responsibility.

7 JUSTICE SCALIA: Does Congress vote on the  
 8 committee report, Mr. Kneedler?

9 MR. KNEEDLER: Sometimes.

10 JUSTICE SOTOMAYOR: Sometimes.

11 MR. KNEEDLER: It does not.

12 JUSTICE SCALIA: It does not, not normally.

13 JUSTICE BREYER: If they vote on the  
 14 committee report in any instance where there is a  
 15 reconciliation between the two houses because it comes  
 16 back in the form a vote, do you accept the report of the  
 17 joint committee.

18 JUSTICE SCALIA: Which was not here.

19 CHIEF JUSTICE ROBERTS: Yeah, did they vote  
 20 on the bill -- on the committee reports here?

21 MR. KNEEDLER: My -- my point is that this  
 22 was a --

23 CHIEF JUSTICE ROBERTS: I'm sorry about your  
 24 point.

25 Did they vote on the committee reports --

1 MR. KNEEDLER: No, they did not vote.

2 JUSTICE BREYER: If we're getting into this,  
3 I'm sort of interested because I bet it could be true  
4 that the president of IBM, for example, does not himself  
5 read everything that the entire million-man staff or  
6 million-person staff at the -- at IBM in fact prepares  
7 for the public. So if you want to answer questions like  
8 that, go ahead, but if you don't want to answer them,  
9 forget it.

10 JUSTICE SOTOMAYOR: So --

11 JUSTICE SCALIA: He's an executive, isn't  
12 he? Isn't the chairman of IBM an executive? And  
13 executives can delegate authority. They -- they can  
14 tell a committee to -- to do it in his name --

15 MR. KNEEDLER: I didn't --

16 JUSTICE SCALIA: -- what this Court alleges,  
17 but it cannot do that, can it?

18 CHIEF JUSTICE ROBERTS: I -- I think Justice  
19 Sotomayor had a question on the floor.

20 JUSTICE SOTOMAYOR: We've gotten off on a  
21 side trip.

22 Mr. Kneedler, some of my colleagues have  
23 been expressing a question that I am sure you haven't  
24 answered, which is how can, or how does the  
25 Constitution, particularly Article III, which gives

1 every citizen the right to have their claims adjudicated  
2 before an Article III Court, how does Congress have the  
3 power to let -- to place adjudicatory powers over a  
4 nonmember, non-Tribe member in a tribal court?

5 MR. KNEEDLER: Congress -- the answer is  
6 Congress has not placed it as part of the inherent  
7 sovereignty of a -- of a tribe that -- that predates the  
8 Constitution as -- and was not displaced, as this Court  
9 made quite clear in the National Farmers Union decision,  
10 unlike in criminal cases where, from the start, from  
11 1790 -- and this was an important part of the Court's  
12 analysis -- in -- in Oliphant.

13 From the very beginning, Congress placed  
14 criminal jurisdiction over crimes by non-Indians against  
15 Indians in Federal courts in order to assure that they  
16 would have the full protection of the Due Process Clause  
17 in courts. Congress has never done that with respect to  
18 civil jurisdiction.

19 JUSTICE GINSBURG: And it's not right that  
20 everybody has the -- the right to an Article III  
21 tribunal.

22 MR. KNEEDLER: No. That was going to be --  
23 that was going to be my second point. State courts over  
24 issues of State law does not have the authority -- or do  
25 not have the ability to go to Federal court. And -- and

1 the same thing with respect to tribal law.

2 JUSTICE SCALIA: No, but out-of-Staters do,  
3 at least where there's an adequate amount in  
4 controversy, right?

5 MR. KNEEDLER: Right. The Constitution does  
6 not require that. It provides for it, but does not  
7 provide -- does not require it. There's an  
8 amount-in-controversy requirement, and also a  
9 complete-diversity requirement.

10 And if Dollar General was a Mississippi  
11 corporation, there would be no -- no ability to remove  
12 it.

13 CHIEF JUSTICE ROBERTS: Is it consistent  
14 with your concept of due process, as a general matter,  
15 to have a nonmember tried by a jury consisting solely of  
16 tribal members?

17 MR. KNEEDLER: I -- I think there's a very  
18 strong argument that it is because the -- the tribal  
19 members are the citizens of the jurisdiction whose  
20 courts are being held. Just like when someone goes from  
21 Alabama to Mississippi, they may be tried before a jury  
22 of Mississippians who are not -- of which that plaintiff  
23 is not a member. But if there is a problem with that,  
24 that is why the Indian Civil Rights Act is there. If  
25 that is a due process problem, that is something that



1 can be raised.

2 And Justice Kennedy, in response to your  
3 concern, Congress has fulfilled its obligation with  
4 respect to the jurisdiction of tribal courts over  
5 nonmembers by the Indian Civil Rights Act to assure that  
6 the protections that are equivalent to the Due Process  
7 Clause are -- are afforded people.

8 There may be -- may be some --

9 JUSTICE KENNEDY: Do the same thing with the  
10 American Arbitration Association?

11 MR. KNEEDLER: No, it could not. The Tribes  
12 have inherent sovereignty; the American Arbitration  
13 Association does not.

14 The last thing I wanted to point out is --

15 JUSTICE KENNEDY: But -- but I do think, on  
16 your earlier point, there -- there was not a general  
17 practice before, say, 1900 at least, of trying nontribal  
18 members before Indian civil tribal courts.

19 MR. KNEEDLER: The courts --

20 JUSTICE KENNEDY: Or -- or is that  
21 incorrect?

22 MR. KNEEDLER: But -- but -- no. There was  
23 some with the five tribes in Oklahoma. The Tribes did  
24 not have developed judicial systems, but that does not  
25 mean that they weren't resolving disputes in some

1 manner, however it may be. They have now given  
2 expression to dispute resolution through tribal court  
3 systems, for which they should be commended, I think,  
4 not -- not undermined.

5 And again, the Court made that point in Iowa  
6 Mutual, recognizing that tribes did not have courts at  
7 the time, but that did not deprive them of jurisdiction  
8 today.

9 And with respect to the consensual  
10 relationship, I point out on page 372 of this Court's  
11 decision in -- in Nevada v. Hicks discussing the Montana  
12 case, it was referring to private individuals who  
13 voluntarily submitted themselves to tribal regulatory  
14 jurisdiction by -- by arrangements that they or their  
15 employers entered into. That precisely describes the  
16 situation where you have consent hewn. You have a  
17 business operating on the Reservation pursuant to tribal  
18 license, a tribal lease agreement, and this particular  
19 child was working there because of a consensual  
20 agreement.

21 JUSTICE SCALIA: And so I could say that  
22 person was subject to tribal regulatory jurisdiction,  
23 which can be interpreted, narrowly, to mean the Tribe  
24 can regulate that person's conduct. If he violates that  
25 conduct, the Tribe, as a tribe, can fine him. It

1 doesn't necessarily mean that the regulatory  
2 jurisdiction includes the -- the power to impose tort  
3 law and adjudicate tort law.

4 MR. KNEEDLER: May I answer?

5 This Court has often said that tort law is a  
6 form of regulation, and again, that Iowa Mutual and  
7 those cases are premised on the idea that tribal tort  
8 law governs. And this Court's observation in Nevada v.  
9 Hicks about El Paso, that the Navajo tribal law tort  
10 claims, the tribal court -- there was little doubt that  
11 the tribal court had jurisdiction over those claims.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Goldstein, five minutes remaining.

14 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

15 ON BEHALF OF THE PETITIONERS

16 MR. GOLDSTEIN: Thank you. I have three  
17 points, and they all happen to relate to questions by  
18 Justice Scalia.

19 The first deals with the question of whether  
20 tribal tort law, the last point by my friend, is a form  
21 of regulation. And we have cases like Regal, we have  
22 the preemption context in which the Court has said  
23 something like that. But the big difference is that  
24 that is about the substance of the tort law, not the  
25 forum where it occurs.

1           Imagine a case like Regal. We would say  
2   that the application of State tort law was a form of  
3   regulation. But if that was heard in a Federal district  
4   court, on removal, on -- in diversity jurisdiction, or  
5   on a Federal question, it would still be State  
6   regulation.

7           So my point here is: The most that can  
8   establish is that the substantive tort law's regulation,  
9   not the forum. We do not agree that that's so, but it  
10   would be the only thing that they could get from that  
11   argument. What would remain is the difference of  
12   adjudication from the substance of the tort law.

13          The second point, as Justice Scalia, I will  
14   line up my friend's committee reports against the text  
15   of the Constitution. We do not have an answer to the  
16   fact that our constitutional tradition has three points  
17   in it that are inconsistent with this form of  
18   adjudication. And two of them are not specific to the  
19   States.

20          The Constitution is the supreme law of the  
21   land in the United States. This Court is the Supreme  
22   Court of the United States. That's not true just with  
23   respect to the States, that is a bedrock -- those are  
24   bedrock principles. Neither of them are true here.

25          We also think that our tradition is that you

1 have access to a neutral court. I understand; I accept  
2 that Congress implemented that in a removal statute that  
3 does not apply here. But my point is that Congress  
4 could not have understood that it was a necessary  
5 incident of sovereignty when the States were subject to  
6 removal jurisdiction at the time the tribes came into  
7 the United States.

8               It is historically implausible to believe  
9 that in all three of these respects, when the tribes  
10 came into the United States, they were in a superior  
11 position to the States. And we know that from one other  
12 example, and that is also at the time -- so these are  
13 the judiciary acts of 1789 and '90, Congress made the  
14 judgments of State courts enforceable by full faith and  
15 credit, but not tribal courts. And it cannot be, then,  
16 that it thought the tribal courts were better than the  
17 State courts.

18               And it does relate, Mr. Chief Justice, to  
19 your point that the Court has never held, despite  
20 dictum, that a nonmember is subject to adjudication in a  
21 tribal court. Because if you haven't done it till now,  
22 it is, I think, respectfully implausible to believe that  
23 Congress thought it was true in 1880, at a time when the  
24 tribes had much less developed legal systems.

25               My final point is -- relates to

1     administrability. And you have been offered two  
2     alternatives. The other side says we have a test about  
3     nexus and foreseeability. I have a standard that says,  
4     write it down in a contract.

5                     My rule is infinitely more administrable  
6     because the other side imagines that people will  
7     constantly be running to State and Federal court saying  
8     this nexus wasn't strong enough; I didn't know when I  
9     mailed this to the Tribe, or this form of tribal tort  
10    law is not quite foreseeable enough for me to know what  
11    the rule is.

12                    That is a bad system. You have said, time  
13    and again, that jurisdictional rules need to be known  
14    ahead of time, and they need to be clear. And I don't  
15    understand the answer to our point that it is  
16    disrespectful of the sovereignty that is asserted here.  
17    If the Tribal Supreme Court can constantly be overruled  
18    by a circuit court in Mississippi, are we seriously  
19    treating it as an independent sovereign? That --

20                    JUSTICE SOTOMAYOR: Well, let me ask you  
21    something. What then remains of the sovereignty of the  
22    Indians? They can -- they can bring a tort suit against  
23    you? The Tribes can bring a tort suit against you for  
24    dumping on their -- on their land? For defacing their  
25    archeological digs? I mean, why is that okay?

1                   MR. GOLDSTEIN: Okay. Justice Sotomayor, I  
2 do not want to give up on our broader argument that  
3 Montana's first exception doesn't apply here. But our  
4 position is consistent with the fact that this is a  
5 question, as my friends have emphasized, of State  
6 sovereignty. And when the sovereign brings an action,  
7 it is much easier to understand that that is an exercise  
8 of self government and sovereignty than a private tort  
9 suit between two people.

10                   In addition, we have --

11                   JUSTICE SOTOMAYOR: It makes -- you're --  
12 you just want to cherry pick what "sovereignty" means.

13                   MR. GOLDSTEIN: Justice Sotomayor --

14                   JUSTICE SOTOMAYOR: Because if they're  
15 sovereign, the United States can have treaties with  
16 people that basically say in your land, you do what you  
17 want; I'm not going to enforce your judgment if I don't  
18 think it's consistent with due process here. But we  
19 don't dictate to other sovereigns what kind of systems  
20 they should have.

21                   You're right we have the power to do that,  
22 but it's still something that we don't have to exercise.

23                   MR. GOLDSTEIN: Justice Sotomayor, because  
24 my time has expired, I will be brief. The difference is  
25 the dependent sovereignty of the Indian tribes and the

1 fact that individuals have the protections of the  
2 Constitution.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 11:04 a.m., the case in the  
7 above-entitled matter was submitted.)

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<p><b>A</b></p> <p><b>a.m</b> 1:15 3:2 64:6</p> <p><b>ability</b> 46:20 55:25 56:11</p> <p><b>able</b> 5:11,15</p> <p><b>above-entitled</b> 1:13 64:7</p> <p><b>absence</b> 37:6</p> <p><b>absolutely</b> 27:16 32:10 33:11 43:23 43:24</p> <p><b>abused</b> 53:5</p> <p><b>accede</b> 19:11</p> <p><b>acceded</b> 28:2</p> <p><b>accept</b> 53:1,16 61:1</p> <p><b>accepted</b> 5:14</p> <p><b>access</b> 4:17 61:1</p> <p><b>accident</b> 32:20,25</p> <p><b>accused</b> 44:7</p> <p><b>acquiescence</b> 38:16</p> <p><b>act</b> 15:16,17,20,25 16:12 21:19 23:14 50:2,3 56:24 57:5</p> <p><b>action</b> 19:5 21:24 22:2,15,16,22 24:15 25:13 28:5 33:4,25 63:6</p> <p><b>actions</b> 21:17 35:21 39:17 48:12</p> <p><b>activities</b> 6:21 29:14</p> <p><b>activity</b> 6:19 20:18</p> <p><b>acts</b> 61:13</p> <p><b>actual</b> 14:23</p> <p><b>added</b> 50:23</p> <p><b>addition</b> 63:10</p> <p><b>address</b> 10:2 48:23</p> <p><b>addressing</b> 8:20 9:10</p> <p><b>adequate</b> 56:3</p> <p><b>adherence</b> 32:1</p> 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