

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS C. GOLDSTEIN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	NEAL K. KATYAL, ESQ.	
7	On behalf of the Respondents	28
8	ORAL ARGUMENT OF	
9	EDWIN S. KNEEDLER, ESQ.	
10	For United States, as amicus curiae,	
11	supporting Respondents	49
12	REBUTTAL ARGUMENT OF	
13	THOMAS C. GOLDSTEIN, ESQ.	
14	On behalf of the Petitioners	59
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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 tribunals 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 the
22 Reservation, they call for not just what you describe,
23 which is the application of tribal law, but a consent to
24 the forum. And remember, in this case, there is a
25 consent to the forum, but the -- which the Tribe wrote,

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

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

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

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

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

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

1 Tribe, saying we insist on a State forum, they clearly
2 haven't consented.

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

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

11 But --

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

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

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

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

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

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

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

23 This is not a sovereign action. This is a
24 private suit between two individuals, and so it is
25 important that if the Tribe is exercising its sovereign

1 authority, bringing a civil enforcement action against
2 us, for example, that would have presented -- present a
3 very different question, because it would be
4 sovereignty. It has never been understood that --

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

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

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

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

1 this adjudication.

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

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

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

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

1 would, have really believed that the Tribes could?

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

4 MR. GOLDSTEIN: Yes.

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

7 MR. GOLDSTEIN: Yes.

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

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

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

25 MR. GOLDSTEIN: Justice Kennedy, if I have

1 suggested that Congress could do that, I apologize. It
2 wasn't my intention.

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

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

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

14 It also --

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

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

24 JUSTICE KENNEDY: Then why -- why doesn't --
25 why don't you make that argument here? How -- how can

1 they -- how can they allow a tort suit?

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

4 JUSTICE KENNEDY: We could say --

5 MR. GOLDSTEIN: I'm sorry.

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

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

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

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

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

25 MR. GOLDSTEIN: I agree.

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

3 MR. GOLDSTEIN: Or Triple A.

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

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

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

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

21 MR. GOLDSTEIN: The following. The first is
22 -- and this case is an illustration of it -- those
23 claims that are subject to the contract that allow the
24 individual or the business to come on to the
25 Reservation. We acceded, quite expressly, to

1 jurisdiction over disputes arising from the lease.

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

7 JUSTICE GINSBURG: For example? What would
8 fit into that category?

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

13 If I could reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Katyal.

16 ORAL ARGUMENT OF NEAL K. KATYAL

17 ON BEHALF OF THE RESPONDENTS

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

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

23 Dollar General set up shop on tribally-owned
24 land with a lease and license from a tribe and agreed to
25 participate in a tribal internship program. Then the --

1 then the Tribe placed a Choctaw child at the store and
2 paid his wages.

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

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: And held -- held
25 liable in tort?

1 MR. KATYAL: So this Court decided those
2 questions on antecedent grounds --

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

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

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

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

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

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

20 JUSTICE SCALIA: Cases make it. Judgments
21 make it heartland.

22 MR. KATYAL: Well, Justice -- Justice
23 Scalia, I think everything about this Court's precedents
24 in this area, which are all tort cases, lead to that
25 conclusion.

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

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

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

19 And Justice Scalia, if the rule in those
20 cases was, hey, tribal courts don't have jurisdiction,
21 they would have done what you did in your opinion in
22 Hicks, because at page 369 you said, quote, "Since it's
23 clear tribal courts lack jurisdiction over State
24 officials, adherence to the tribal exhaustion
25 requirement would serve no purpose."

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

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

5 JUSTICE ALITO: On tribal land?

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

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

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

22 So could the -- the person who got into --
23 who was in the accident with the delivery person sue in
24 tribal courts?

25 Could the person who -- the tribal member

1 who purchased the product bring a products liability
2 action against the manufacturer in tribal court?

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

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

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

22 JUSTICE ALITO: All right. What about the
23 -- what about the products liability action?

24 MR. KATYAL: So again, if -- if a business
25 is sending -- intentionally, knowingly sending goods

1 onto tribal land, and those turn out to be defective,
2 then they're liable for that, for that tort. That is
3 something that's a reasonably -- reasonably to be
4 anticipated --

5 JUSTICE KENNEDY: And that could be for
6 punitive damages, millions of dollars?

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

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

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

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

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

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

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

21 JUSTICE KENNEDY: But the --

22 MR. KATYAL: -- I certainly --

23 JUSTICE KENNEDY: There's no -- so punitive
24 damages, millions of dollars?

25 MR. KATYAL: Right, as long as they haven't

1 affirmatively disclaimed it. And I think that is,
2 Justice Kennedy, the proper rule.

3 CHIEF JUSTICE ROBERTS: I don't know what
4 authority --

5 JUSTICE KENNEDY: Again, what about limiting
6 --

7 CHIEF JUSTICE ROBERTS: I'm sorry, Justice
8 Kennedy.

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

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

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

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

1 Opportunity Program. And yes, like every employer in
2 this country, Justice Kennedy, when you do those things,
3 you open yourselves up to the reasonable liability that
4 follows. This --

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

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

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

1 Yes, there --

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

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

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

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

21 That statute doesn't really tell us
22 anything, one way or the other, about tribal
23 jurisdiction. And what this Court went on to say is
24 that civil tribal tort jurisdiction is an incident to
25 sovereignty. It's Williams v. Lee. It's about the

1 right of the people to govern themselves.

2 And, you know, to treat this,

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

12 JUSTICE BREYER: Do --

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

18 MR. KATYAL: I -- I -- I don't think it was
19 limited at all. This is the language at Joint Appendix
20 page 45: "This agreement and any related documents
21 shall be construed" -- excuse me -- "Dollar General
22 shall comply with all codes and requirements of all
23 Tribal and Federal Rules and regulations now enforced or
24 which may hereafter be enforced which are applicable and
25 pertain to Dollar General's specific use of the demised

1 premises."

2 That is not limited language.

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

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

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

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

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

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

7 MR. KATYAL: Exactly.

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

12 MR. KATYAL: Domestic dependent --

13 JUSTICE BREYER: What?

14 MR. KATYAL: Domestic dependent nation?

15 JUSTICE BREYER: Domestic? All right.

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

20 MR. KATYAL: Correct.

21 JUSTICE BREYER: And, of course you're going
22 to agree with this, but if I -- but if I -- if I want --
23 if I wanted -- I wanted the limitation, and I wanted to
24 know if you wanted me to read one thing that you have
25 cited in respect to what is only impressionistic, that

1 the vast number of tribal courts are indistinguishable
2 in terms of fairness, et cetera, from the courts of --
3 other courts in the United States, what would I read?

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

6 JUSTICE BREYER: Which of those do you want
7 me to read?

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

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

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

21 And the reason is because this is a limited
22 thing. It requires a very tight nexus -- that's, you
23 know, this Court's decisions in Plains Commerce Bank and
24 Atkinson's Trading. It requires knowledge. It's got to
25 be -- you got to know what you're doing. You can't just

1 wander on to the Reservation the way the Oklahoma --

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

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

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

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

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

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

24 JUSTICE KENNEDY: They're nonconstitutional
25 entities.

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

8 JUSTICE KENNEDY: I guess they could --

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

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

19 (Laughter.)

20 MR. KATYAL: That's -- that's absolutely
21 right. And -- and -- that's absolutely right, and I --
22 and so in -- in that sort of --

23 CHIEF JUSTICE ROBERTS: Kind of think
24 that -- you think the concerns are on the same level:
25 Forcing somebody in a State court to be subjected -- a

1 New Yorker to be subject to jurisdiction where
 2 everyone's from Massachusetts because it's Massachusetts
 3 court. You think that's the same as subjecting a
 4 nonmember accused of a terrible assault on an Indian to
 5 jurisdiction before a jury consisting solely of members
 6 of the Tribe.

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

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

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

24 JUSTICE KENNEDY: The Constitution runs to
 25 the people. The people have a right to insist on the

1 Constitution even if Mississippi or the Federal
2 government doesn't care.

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

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

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

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

22 But just to be clear, the language of
23 Montana I is broader than what you're saying it is,
24 again, through commercial dealing, contracts, leases or
25 other arrangements. And my friend, Mr. Goldstein,

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

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

14 MR. KATYAL: I do think it would.

15 JUSTICE ALITO: If so, on what theory?

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

25 And of course there's other solutions.

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

7 But this Court --

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

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

17 And, you know, and the other thing is this
18 is really important as a matter of tribal sovereignty
19 that is -- Williams v. Lee says it's about the right of
20 the people to govern themselves. The Domestic Violence
21 brief gives other reasons why in general people want to
22 bring suits in tribal courts because it's a more
23 familiar process and one closer, geographically, to
24 them. Many times State courthouses are hours and hours
25 away. So that's -- that's another reason.

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

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

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

21 MR. KATYAL: Sure. So I think this Court in
22 Regal already said that torts are a form of regulation.
23 I think there's no reason to think of torts any
24 differently because they -- they impact bodies' behavior
25 and precedent, stare decisis. You've said this many

1 times in the cases I've mentioned.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Kneedler.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER

5 FOR UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENTS

7 MR. KNEEDLER: Mr. Chief Justice, and may it
8 please the Court:

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

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

21 Then, importantly, not too long after that,
22 Congress undertook a thorough review of tribal courts in
23 connection with the passage in 1993, as we explain in
24 our brief, of the Tribal Justice Improvements Act --
25 Tribal Justice Act. It held hearings, and in that -- in

1 that statute, Congress made two specific findings:
2 Tribal justice systems are an essential part of tribal
3 government and serve important forums for ensuring
4 public health and safety and political integrity of the
5 Tribe, and Congress in Federal courts --

6 JUSTICE SCALIA: Nobody denies that here.

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

8 JUSTICE SCALIA: It is essential for -- for
9 disputes between tribal members.

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

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

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

25 MR. KNEEDLER: Well --

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

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

9 Another point --

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

12 MR. KNEEDLER: There were --

13 JUSTICE SCALIA: They were aware of those
14 cases, I'm sure. Everybody who voted for that
15 language --

16 MR. KNEEDLER: I -- I --

17 JUSTICE SCALIA: -- were aware that it -- it
18 stemmed from those cases because that's what the
19 committee report says.

20 MR. KNEEDLER: This -- this was a statute
21 against the backdrop of two decisions of this Court
22 saying that the rule of Oliphant does not apply to civil
23 jurisdiction over non-Indians in tort cases
24 specifically.

25 And importantly also, in Iowa Mutual the

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

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

18 So what we have here is not congressional
19 silence but congressional approval of that, here in
20 particular.

21 JUSTICE SOTOMAYOR: Mr. Kneedler, I don't
22 know that you've answered -- I'm going to assume
23 everything you said and accept it. I think it was very
24 clear from the committee report here, every word you've
25 said, and some of us do believe that since a bill is

1 sent with the committee report and Congress is voting on
2 both, if a member hasn't read it, they've abused their
3 official responsibility.

4 JUSTICE SCALIA: Does Congress vote on the
5 committee report, Mr. Kneedler?

6 MR. KNEEDLER: Sometimes.

7 JUSTICE SOTOMAYOR: Sometimes.

8 MR. KNEEDLER: It does not.

9 JUSTICE BREYER: It does not, not normally.
10 If they vote on the committee report in any instance
11 where there is a reconciliation between the two houses
12 because it comes back in the form a vote, do you accept
13 the report of the joint committee?

14 JUSTICE SCALIA: Which was not here.

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

17 MR. KNEEDLER: My -- my point is that this
18 was a --

19 CHIEF JUSTICE ROBERTS: I'm sorry about your
20 point.

21 Did they vote on the committee reports --

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

23 JUSTICE BREYER: If we're getting into this,
24 I'm sort of interested because I bet it could be true
25 that the president of IBM, for example, does not himself

1 read everything that the entire million-man staff or
2 million-person staff at the -- at IBM in fact prepares
3 for the public. So if you want to answer questions like
4 that, go ahead, but if you don't want to answer them,
5 forget it.

6 JUSTICE SOTOMAYOR: So --

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

11 MR. KNEEDLER: I didn't --

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

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

16 JUSTICE SOTOMAYOR: We've gotten off on a
17 side trip.

18 Mr. Kneedler, some of my colleagues have
19 been expressing a question that I am sure you haven't
20 answered, which is how can, or how does the
21 Constitution, particularly Article III, which gives
22 every citizen the right to have their claims adjudicated
23 before an Article III Court, how does Congress have the
24 power to let -- to place adjudicatory powers over a
25 nonmember, non-Tribe member in a tribal court?

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

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

15 JUSTICE GINSBURG: And it's not right that
16 everybody has the -- the right to an Article III
17 tribunal.

18 MR. KNEEDLER: No. That was going to be --
19 that was going to be my second point. State courts over
20 issues of State law does not have the authority -- or do
21 not have the ability to go to Federal court. And -- and
22 the same thing with respect to tribal law.

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

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

6 And if Dollar General was a Mississippi
7 corporation, there would be no -- no ability to remove
8 it.

9 CHIEF JUSTICE ROBERTS: Is it consistent
10 with your concept of due process, as a general matter,
11 to have a nonmember tried by a jury consisting solely of
12 tribal members?

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

23 And Justice Kennedy, in response to your
24 concern, Congress has fulfilled its obligation with
25 respect to the jurisdiction of tribal courts over

1 nonmembers by the Indian Civil Rights Act to assure that
2 the protections that are equivalent to the Due Process
3 Clause are -- are afforded people.

4 There may be -- may be some --

5 JUSTICE KENNEDY: Do the same thing with the
6 American Arbitration Association?

7 MR. KNEEDLER: No, it could not. The Tribes
8 have inherent sovereignty; the American Arbitration
9 Association does not.

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

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

15 MR. KNEEDLER: The courts --

16 JUSTICE KENNEDY: Or -- or is that
17 incorrect?

18 MR. KNEEDLER: But -- but -- no. There was
19 some with the five tribes in Oklahoma. The Tribes did
20 not have developed judicial systems, but that does not
21 mean that they were resolving disputes in some manner,
22 however it may be. They have now given expression to
23 dispute resolution through tribal court systems, for
24 which they should be commended, I think, not -- not
25 undermined.

1 And again, the Court made that point in Iowa
2 Mutual, recognizing that tribes did not have courts at
3 the time, but that did not deprive them of jurisdiction
4 today.

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

17 JUSTICE SCALIA: And so I could say that
18 person was subject to tribal regulatory jurisdiction,
19 which can be interpreted, narrowly, to mean the Tribe
20 can regulate that person's conduct. If he violates that
21 conduct, the Tribe, as a tribe, can fine him. It
22 doesn't necessarily mean that the regulatory
23 jurisdiction includes the -- the power to impose tort
24 law and adjudicate tort law.

25 MR. KNEEDLER: May I answer?

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Goldstein, five minutes remaining.

10 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

11 ON BEHALF OF THE PETITIONERS

12 MR. GOLDSTEIN: Thank you. I have three
13 points, and they all happen to relate to questions by
14 Justice Scalia.

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

22 Imagine a case like Regal. We would say
23 that the application of State tort law was a form of
24 regulation. But if that was heard in a Federal district
25 court, on removal, on -- in diversity jurisdiction, or

1 on a Federal question, it would still be State
2 regulation.

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

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

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

21 We also think that our tradition is that you
22 have access to a neutral court. I understand; I accept
23 that Congress implemented that in a removal statute that
24 does not apply here. But my point is that Congress
25 could not have understood that it was a necessary

1 incident of sovereignty when the States were subject to
2 removal jurisdiction at the time the tribes came into
3 the United States.

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

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

21 My final point is -- relates to
22 administrability. And you have been offered two
23 alternatives. The other side says we have a test about
24 nexus and foreseeability. I have a standard that says,
25 write it down in a contract.

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

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

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

22 MR. GOLDSTEIN: Okay. Justice Sotomayor, I
23 do not want to give up on our broader argument that
24 Montana's first exception doesn't apply here. But our
25 position is consistent with the fact that this is a

1 question, as my friends have emphasized, of State
2 sovereignty. And when the sovereign brings an action,
3 it is much easier to understand that that is an exercise
4 of self government and sovereignty than a private tort
5 suit between two people.

6 In addition, we have --

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

9 MR. GOLDSTEIN: Justice Sotomayor --

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

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

19 MR. GOLDSTEIN: Justice Sotomayor, because
20 my time has expired, I will be brief. The difference is
21 the dependent sovereignty of the Indian tribes and the
22 fact that individuals have the protections of the
23 Constitution.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

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

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A	actual 14:23	36:5 46:11,15	18:18	arising 6:20
\$50,000 43:14	added 50:20	allegation 23:15	applicable 38:24	19:1 28:1
43:17	addition 63:6	allegedly 29:5	application	arrangements
\$75,000 37:12	address 10:2	alleges 54:12	18:23 38:14	39:17 45:25
a.m 1:15 3:2	48:20	allow 26:1 27:23	59:23	47:3 48:17
64:2	addressing 8:20	alternatives	applied 29:10	58:10
ability 46:17	9:10	61:23	applies 25:7	article 10:14
55:21 56:7	adequate 55:24	America 46:7	apply 8:8 13:20	25:23 27:9
able 5:11,15	adherence 31:24	American 24:11	15:14 18:5	41:9 54:21,23
above-entitled	adjudicate 3:20	38:4 39:21	26:8,15 32:1,4	55:16
1:13 64:3	5:6 21:3 58:24	40:17 46:18	48:6 49:15,18	articles 16:22
absence 37:4	adjudicated	57:6,8	51:22 60:24	asked 12:18
absolutely 27:15	12:24 54:22	amicus 1:23	62:24	14:10 23:20
32:8 33:9	adjudication	2:10 49:5	appoint 10:4	49:15
43:20,21	16:4 23:1	amount 46:24	appointed 10:5	asking 6:24
abused 53:2	50:14 60:8,14	55:24	appreciate 48:3	assault 44:4
accede 19:10	61:16	amount-in-co...	approach 16:16	assaulted 29:5
acceded 27:25	adjudicative	56:4	appropriate	asserted 62:12
accept 52:23	24:17	analogy 5:10	50:13	assess 14:18
53:12 60:22	adjudicatory	21:17	approval 52:19	assign 27:14
accepted 5:14	3:16 4:7,15,16	analysis 52:6	arbitration 38:4	Association 38:5
access 4:17	4:23,25 9:1,2	55:8	39:22 45:17	39:22 46:18
60:22	9:13,18 54:24	answer 54:3,4	46:18 57:6,8	57:6,9
accident 32:18	administrability	55:1 58:25	archeological	assume 9:15
32:23	61:22	60:11 62:11	62:21	27:17 52:22
accused 44:4	administrable	answered 52:22	area 30:24 39:25	assumed 7:9,11
acquiescence	62:1	54:20	43:10 46:19	9:12
38:14	adopt 39:18	ante 11:14	arguably 42:18	assumes 3:11
act 15:16,17,20	affirmatively	antecedent 6:25	argue 3:15	assuming 9:17
15:25 16:12	35:1	8:24 9:21 30:2	arguing 8:14	9:20 10:9
21:18 23:13	afford 15:4	anticipate 13:2	39:4	assumption 7:17
49:24,25 56:20	afforded 57:3	anticipated 9:25	argument 1:14	assure 55:11
57:1	affords 16:14	18:17 34:4	2:2,5,8,12 3:3	57:1
action 19:4	agree 26:2,25	36:17	3:7,11 6:9,12	Atkinson 36:15
21:23 22:1,14	27:15 40:22	anticipating	7:2,25 16:25	Atkinson's
22:15,21 24:14	45:3 60:5	33:18 46:23	18:19 19:23	41:24
25:12 28:3	agreed 28:24	anticipatory	23:3,6 25:25	attack 14:14
33:2,23 63:2	agreement 18:4	36:23	26:10,13 28:16	17:4
actions 21:16	38:20 58:14,16	anybody 19:24	30:15 31:1	attacks 14:18
35:19 39:14	agrees 4:25	27:15	32:1,13 39:19	attempt 11:13
48:9	11:16	apologize 7:20	45:19 46:1	attempting 7:25
activities 6:21	ahead 54:4	25:1 26:11	47:10 49:4,10	author 49:17
29:12	62:10	appealed 47:15	49:13 52:1,3	authority 4:3,4
activity 6:19	AL 1:4,8	APPEARAN...	56:14 59:10	4:5,6,7,8,19,21
20:16	Alabama 56:17	1:16	60:7 62:23	4:23 5:1,24 6:3
acts 61:9	Alito 32:1,5,12	Appendix 38:19	arguments 21:6	6:8,11,19 7:1
	33:22 34:10	applicability	21:7,8,12	8:4,24 9:1,2,2

13:12 21:21 22:1 23:25 24:10 26:24 28:3 29:12 35:4,10 54:9 55:20 authorize 24:6 availability 5:9 9:25 10:15 11:4,14 available 13:22 35:21 avoidance 26:13 avoiding 45:6 award 14:10 aware 51:11,13 51:17	61:4,18 believed 14:2 24:1 belongs 16:5 best 18:14 30:15 31:1 best-managed 15:13 bet 53:24 Bethesda 1:17 better 61:12 bias 52:5 big 44:13 59:19 bill 15:16 52:25 53:16 bind 46:13 bit 23:2 33:3 black-letter 5:23 6:1 Blackjack 36:10 board 38:17 bodies 48:24 books 16:21 bottom 48:1 boundaries 24:23 bounds 15:6,8 boy 22:6 Breyer 11:6,18 11:24 12:2,8 12:13,25 13:9 14:4 16:10,20 17:5,8,11 18:3 18:11 20:23 38:12 39:23 40:8,13,15,21 41:6,11 43:13 53:9,23 brief 24:2 36:20 47:21 49:24 63:20 briefly 5:7 bring 22:14 33:1 47:9,22 62:18 62:19 bringing 22:1 brings 28:3 63:2	broad 6:10 broader 9:1 17:11 45:23 62:23 brought 22:5 27:17,20 43:2 business 18:14 20:20 27:24 31:4,5 33:24 46:7 58:13 buy 46:19	certainly 16:22 16:23 34:22 45:16 cetera 41:2 chairman 54:8 change 39:20 cheated 36:9 Cherokee 40:9 cherry 63:8 Chief 3:3,9 28:14,18 29:6 29:14,24 30:3 30:7,9 35:3,7 38:13 39:3,12 42:2,11 43:23 44:8 45:21 49:2,7 53:15 53:19 54:14 56:9 59:8 61:14 63:25 child 23:16 29:1 29:4 58:15 Choctaw 1:8 3:5 29:1 choice 12:23 circuit 14:22 15:2 62:14 circumstance 35:20 36:20 46:5 circumstances 3:12 18:6,20 33:20 citations 22:10 cited 40:25 41:5 citing 31:6 citizen 8:6 10:7 54:22 citizens 23:4 24:12 27:2 35:10 43:15,16 56:15 city 46:8 52:3 civil 6:19 15:16 15:17,20,25 16:4 22:1 24:22 25:8,17	27:16,17,19 29:13 37:24 44:17 49:16,19 51:22 55:14 56:20 57:1,14 claim 14:8,9 18:8 21:15 claims 16:4 21:12,13 27:19 27:23 31:3,4 49:10 51:5 54:22 59:6,7 clash 6:15 clause 25:22 27:11 42:22 43:2 45:17 46:12 55:12 57:3 Clauses 42:19 clear 31:23 45:22 50:17 51:6 52:24 55:5 62:10 clearly 20:1 clever 46:1 close 15:17,19 closer 47:23 codes 38:22 52:15 collateral 14:18 collaterally 14:14 17:4 colleagues 54:18 color 33:15 come 19:5 27:24 29:21 comes 33:12 52:11 53:12 coming 19:9 38:10 comity 10:21,22 commended 57:24 Commerce 33:17 35:13 39:13 41:23 48:4
---	---	---	--	--

commercial 32:2 39:16 45:24 46:2 48:16 commits 18:5 committee 50:16 50:19 51:19 52:24 53:1,5 53:10,13,16,21 54:10 60:10 commonly 21:10 21:11 company 19:22 32:16 compelled 37:9 competence 52:4 complain 11:25 12:10 complete 5:24 25:17 complete-dive... 56:5 completely 45:3 comply 38:22 composed 17:18 42:15 concept 56:10 concern 11:2 47:5 56:24 concerned 17:12 18:14 19:7 21:19,20 41:20 43:4 44:15,22 51:5 concerns 17:6 17:14 35:15 41:11,20 42:3 43:24 47:6 48:4,6 52:4 concluded 8:25 concluding 26:14,14 conclusion 30:25 condition 18:21 19:9	conduct 4:6 58:20,21 Congress 14:1 15:24 16:13,17 23:23 24:5,8 24:20 25:1,16 25:21 26:23 27:13 35:10 41:19 43:1 44:14,18 49:22 50:1,5,12 51:7 52:11,15 53:1 53:4 54:23 55:1,2,9,13 56:24 60:23,24 61:9,19 Congress's 43:11,11 50:11 50:11 52:8 congressional 19:4 52:18,19 connection 49:23 52:1 consensual 20:13,16 33:5 40:4 48:13 58:5,15 consent 5:1,2 18:23,25 19:21 19:23 20:19 34:10,19 35:19 38:3,9 39:13 39:16 45:9,9 45:10,11,12 48:5 58:12 consented 20:2 34:8 consented-to 29:3 consenting 44:10 consents 35:18 48:8 considered 9:14 consistent 13:13 14:19 15:14 28:4,5 56:9	62:25 63:14 consistently 24:3 consisting 44:5 56:11 consists 42:6 constantly 62:3 62:13 Constitution 3:25 5:5,8,16 10:1,14 12:21 12:23 13:2,5 13:18,19,20 15:8,10,19 23:25 25:21 26:21 27:12 42:17 44:24 45:1 54:21 55:4 56:1 60:11,16 63:23 constitutional 13:7 26:13 27:6 35:15,16 47:6 48:3,6 60:12 constitutionally 37:9 construed 38:21 contemplate 5:5 10:15 14:13 23:25 25:23 contemplated 15:7 contemplates 5:8,16 context 7:2 14:6 25:8 59:18 contract 18:12 19:6,13,15,24 19:25 20:8,17 20:18,22,23 27:23 40:5 45:16,20 46:12 61:25 contracts 39:17 45:15,24 48:17 contractual	38:14 39:5 control 44:14 controversy 55:25 corporation 1:4 3:5 56:7 correct 3:22 8:14 40:20 43:1 counsel 28:14 49:2 59:8 63:25 country 3:20 11:21 36:2 course 5:19 29:3 32:19 34:17 37:7 40:21 43:3 46:25 court 1:1,14 3:10 4:23 5:12 5:17,17,18,19 6:16 8:9,20 9:8 9:10,14,16,22 10:18,19 11:21 12:8,10,15,24 13:3,4,11,21 13:21 14:19,21 14:22 15:10,10 18:7,7 20:9 22:20 26:22 27:10,20 28:19 28:22 29:8,8 29:11,18,22 30:1,6,13 31:2 31:6,11,12,15 31:17,17 32:9 33:2,4 35:12 35:14 36:12 37:18,23 38:6 39:7,10 41:18 43:11,17,25 44:3 46:12 47:7,9,12 48:1 48:21 49:8,10 49:15,16 51:21 52:6 54:12,23 54:25 55:4,21	57:23 58:1 59:1,6,7,18,25 60:17,18,22 61:15,17 62:3 62:13,14 Court's 8:18 9:11 21:20 30:16,23 33:16 36:15 37:16 39:14 41:13,23 43:12 55:7 58:6 59:4 courthouses 47:24 courts 4:20 6:21 11:7,9,19 12:19 13:20 14:2,3,20 15:4 15:6,6,12,13 15:25 16:23 17:3 19:11 21:3,11 25:11 31:20,23 32:24 40:18 41:1,2,3 43:6 44:17 47:22 49:22 50:5,12,21 51:8 52:5,9 55:11,13,19 56:16,25 57:14 57:15 58:2 61:10,11,12,13 credit 61:11 crimes 55:10 criminal 24:10 25:17 55:6,10 curiae 1:23 2:10 49:5 current 47:4 customers 35:24
D				
D 3:1 D.C 1:10,19,22 damage 14:10 damages 24:22 26:20 34:6,24				

data 21:1,4	dependent 40:10 40:12,14 63:21	discussed 15:22	56:10,21 57:2 63:14	58:11
deal 37:2 47:5	depends 11:9 33:3	discussing 58:7	dumping 62:20	entering 46:5,6
dealer 36:10	deprives 16:1	displaced 55:4	duties 3:14 8:5,6	enters 32:2
dealing 38:6 39:16 45:24 46:2 48:16	deprive 58:3	dispositive 32:9	duty 23:9	entire 54:1
deals 59:15	Deputy 1:21	dispute 32:19 57:23	E	entirely 14:11
dealt 39:5	describe 18:22 26:14	dispute-resolu... 17:24	E 2:1 3:1,1	entities 42:25 44:21
decades 28:22 44:18	described 19:3 26:18	disputes 6:20 19:1 28:1 29:13 50:9,14 57:21	earlier 39:14 57:12	entity 27:6 48:7
December 1:11	describes 22:18 58:11	disrespectful 62:12	easier 63:3	equivalent 57:2
decide 3:17 9:17 9:22 46:17	describing 26:10 30:8	distinguish 11:20 21:16	easy 34:17	ESQ 1:17,19,21 2:3,6,9,13
decided 30:1	deserve 11:11 11:17 17:25	district 14:21 59:24	EDWIN 1:21 2:9 49:4	essential 50:2,8
decision 8:15 33:16 39:20 41:13 49:17 55:5 58:7	despite 61:15	diversity 37:11 37:12,17,19 52:2 59:25	effectively 47:14	essentially 24:16
decisions 8:18 41:23 51:21	develop 16:17	documents 38:20	either 9:3 19:13 39:6,9 48:8	establish 60:4
decisis 48:25	developed 11:12 16:13 57:20 61:20	doing 16:12 31:4 33:8 36:10 41:25 44:19 46:7	El 31:3,6 32:10 59:5	et 1:4,8 41:2
deeply 16:2	dialogue 5:21	dollars 26:20 34:6,24	elected 10:5	evaluate 42:3
defacing 62:20	dicta 31:9,10	Dollar 1:3 3:4 28:23 29:5 35:21,23,24,25 38:21,25 45:5 47:3,11,14 56:6	element 3:21	events 20:21
defamation 36:12	dictate 63:15	due 11:25 14:9,9 14:19 15:9 16:14 18:1 19:17 25:5,6 25:13 26:17 27:5,8 28:4 42:3,5,13,18 42:19,22 43:2 47:1,2 55:12	emphasized 63:1	everybody 45:12 51:10,14 55:16
default 19:14	dictum 9:11 30:17,17,18,18 61:16		employer 36:1	everyone's 44:2
defective 34:1	difference 22:23 44:13 59:19 60:7 63:20		employers 58:11	ex 11:14
defendant 4:22 10:16	different 8:19 11:17 16:5 22:3 23:8 34:11 45:15 47:4		employment 29:4	exactly 30:8 35:12 40:7
defendants 47:12	differently 48:24		enacted 50:17 51:4 52:16	examined 52:15
deferred 52:3	digs 62:21		encouraging 52:9	example 4:9,18 6:5 14:8 16:11 17:7,16 22:2 28:7 29:23,23 33:12 53:25 61:8
delegate 54:9	directly 40:6		enforce 22:21 40:18 63:13	examples 28:9
delivered 32:17	disagree 11:1 18:18 20:4		enforceable 25:11 61:10	exception 6:5 15:23 19:21 20:13 22:22 26:7,7 38:7,7 45:14 48:11 62:24
delivering 32:19	disagreeing 46:20		enforced 38:23 38:24 49:20	excluded 23:12
delivery 32:18 32:23 33:7,9 33:10,12,14	disclaim 34:16		enforcement 22:1	exclusion 28:12
demeaning 23:17	disclaimed 35:1		enforcing 23:5 28:10,10	excuse 38:21
demised 38:25	discuss 8:2		enhanced 11:4	executive 54:7,8
denies 50:6			enormous 15:5 20:24	executives 54:9
deny 22:24			ensuring 50:3	exercise 20:25 21:21 28:3 63:3,18
depart 39:19			enter 40:3	exercising 21:25
Department 1:22			entered 3:19	exhaust 31:18
depend 45:19				

exhaustion 31:14,24 49:20	51:4 55:5	15:6	general 1:3,21 3:4 28:23 32:8 33:4 35:21,23 35:24,25 38:21 42:4,13 45:5 47:11,14,21 56:6,10 57:12	Goldstein 1:17 2:3,13 3:6,7,9 4:10,13,24 6:2 6:22 7:9,12,15 7:18,20,23 8:12,17 9:9 10:11,25 11:8 11:23 12:1,7 12:12,16,20,25 13:8 15:18 17:5,10 18:11 19:12,16 20:3 20:14 21:14 22:8 23:3,6 24:4,7,13,25 25:5,20 26:2,5 26:9,25 27:3,7 27:21 28:9 45:25 46:20 59:9,10,12 62:22 63:9,19
exist 20:19 21:11	fashion 3:21 5:6 9:23	foreseeability 61:24	General's 29:5 36:20 38:25 47:4	Goldstein's 30:14 31:1
existed 13:24 38:9	fault 26:11	foreseeable 62:6	genuine 11:12	good 7:25 10:12 15:19 16:14 18:12 19:23 41:9 46:3
exists 20:16	favor 7:25 15:21	forget 40:9 54:5	geographically 47:23	goods 33:25
exotic 33:11	features 13:23 13:24	form 4:25 43:2 48:22 53:12 59:2,16,23 60:13 62:5	getting 6:4 53:23	gotten 54:16
expired 63:20	Federal 4:23 5:12,18 12:24 14:8,21 15:4 17:2 21:11 24:15 25:18 38:23 45:1 50:5,12 55:11 55:21 59:24 60:1 62:3	formally 42:17	Ginsburg 4:1,11 4:12,21,24 5:11 6:15,22 7:4 8:10,13,17 9:6,9 13:5,8 15:15,18 22:5 22:17 27:16 28:7 29:10 37:2,8 47:8 55:15	govern 38:1 47:20 48:3
explain 4:2 9:19 20:5 24:14 49:23	feel 43:15	forms 6:4	give 3:16 4:9,10 7:24 26:24 36:5 62:23	governed 42:22 42:23
explaining 7:1	figure 18:2 21:7	forth 11:21	given 5:23 6:1 57:22	government 16:8 20:9 24:15 45:2 50:3 63:4
explains 8:20	final 61:21	forum 4:17 5:9 5:15 9:25 10:6 10:15,24 11:4 11:14 13:3 18:24,25 20:1 21:8,9 35:11 46:11 59:21 60:5	gives 25:16 47:21 54:21	governs 59:4
explanation 22:10,12	finding 50:11 52:17	forums 50:3,13	go 5:21 8:10 11:25 19:13 31:17 32:7 39:18 43:6,16 45:11 54:4 55:21	granted 9:16
explicit 34:19 40:4 48:15	findings 50:1	forward 19:2	going 5:2 9:4 13:1 14:16,17 19:2 40:21 41:18 42:3,9 44:10,18 47:13 52:22 55:18,19 63:13	greater 39:21
express 35:19 38:3 39:16 45:9	fine 11:18 58:21	four 29:21 41:16		ground 8:1
expressing 54:19	finer 23:11	France 46:8		grounds 30:2
expression 52:10 57:22	finish 50:10	Francisco 46:8		growing 40:4
expressly 27:25	first 3:4 4:13 5:8 5:22 6:5 9:24 11:10 14:16 15:22 26:6,7 27:21 42:8 45:14 48:11 59:15 62:24	frankly 31:11		guarantees 26:21
extent 33:7	fit 28:8 41:19	friend 30:14 37:6 45:25 46:20 59:16		guess 29:15 30:3 43:8
extremely 15:1 19:22	flatly 49:13	friend's 39:19 60:10		
	floor 54:15	friends 63:1		
F	follow 46:10	fulfilled 56:24		
fact 17:13 20:7 21:15 38:16 40:16 50:19 54:2 60:12 62:25 63:22	follow-on 22:18	full 37:12 44:14 55:12 61:10		
facts 3:15 18:14 28:20 33:4	following 27:21	fully 9:14		
fairness 10:23 11:20 41:2,11	follows 36:4	function 16:23 17:1		
faith 61:10	footing 39:21	functioning 18:7		
fall 37:14	footnote 8:19 31:6	funding 51:8 52:12		
familiar 47:23	forced 35:22,24 35:25	further 39:18 43:6		
fan 43:18	Forcing 43:25	G		
far 32:7	foreign 12:9	G 3:1		
Farmers 31:16 49:14,19 50:18		game 36:9 43:11		

H haled 29:18,22 happen 32:14 59:13 happens 24:23 hard 22:11 46:21,22 health 50:4 hear 3:3 heard 59:24 hearings 49:25 heart 46:3 heartland 28:21 29:7 30:10,18 30:21 46:4 held 8:23 29:24 29:24 30:5 49:25 56:16 61:15 hewn 58:12 hey 31:20 Hicks 8:19 9:10 31:1,2,22 58:7 59:5 historically 61:4 history 51:6 home 36:8 honest 18:15 38:9 Honor 11:1 29:21 hours 47:24,24 houses 53:11 hunting 23:19 hypothetical 10:12 18:12 25:9,15 36:6 41:16 hypotheticals 45:10	identify 3:23 5:7 8:1,21 11:13 15:1 identifying 13:18 III 10:14 25:23 27:9 54:21,23 55:16 illustration 27:22 Imagine 14:21 59:22 imagines 62:2 impact 48:24 implausible 61:4 61:18 implemented 60:23 implementing 51:7 implied 45:9,12 48:15 important 5:21 21:25 23:18 47:18 50:3 52:9 55:7 importantly 21:16 28:11 49:21 51:25 impose 24:11,22 58:23 impossibility 22:9 impressionistic 40:25 Improvements 49:24 incidence 23:23 incident 27:18 37:14,24 44:23 61:1 includes 58:23 including 10:16 47:3 inconsistent 49:11 52:7,8 60:13	incorporated 3:19 42:19 incorporation 5:14 13:25 incorrect 57:17 indemnity 47:1 47:2 independent 62:15 Indian 3:12,16 15:15,17,20,24 16:1,1 24:9 25:16,16 29:7 29:18 30:5,6 30:10 36:7 44:4 56:20 57:1,14 63:21 Indians 1:8 3:5 55:11 62:18 indicates 21:2,4 indistinguishable 41:1 individual 19:25 20:8,17 22:16 27:24 individual's 24:17 individuals 21:24 23:10 58:8 63:22 infinitely 62:1 inform 52:5 inherent 17:19 55:2 57:8 inherently 5:1 injures 32:20 injury 33:10 inquiry 41:12 insist 4:19 20:1 20:22,22 44:25 instance 4:4 53:10 institutional 16:17 integrity 50:4 intend 7:24 intention 25:2	intentionally 33:25 interest 22:16 22:25,25 23:4 interested 53:24 interesting 44:19 internship 28:25 interpreted 58:19 interpreting 43:5 introduction 9:20 involve 40:2 involved 16:3 32:18 Iowa 29:23 31:16 37:17 41:13,13 49:14 49:19 50:18 51:5,25 58:1 59:2 irrelevant 20:18 issue 29:15 39:4 issues 55:20 J JAMS 38:5 joined 35:13 49:17 joint 38:19 53:13 judges 10:4,8,9 10:18 52:13,14 judgment 14:14 25:7,10 40:18 50:11 52:8 63:13 judgments 30:20 61:10 judicial 4:3,17 10:24 57:20 judiciaries 11:11 17:12,21 judiciary 16:3,7 16:14 17:15	61:9 juries 43:9,16 44:15 jurisdiction 3:13 3:17 4:5,15,16 6:7,13,20 8:15 8:22 9:13,17 9:18,21,22 11:2 16:15 18:8 19:10 20:9 24:6,16 28:1,22 29:8 29:13 30:11 31:7,13,20,23 33:21 36:21 37:23,24 38:16 39:7 41:18 43:10 44:1,5 44:17 46:24 49:10,16,19 50:21 51:23 55:10,14 56:15 56:25 58:3,10 58:18,23 59:7 59:25 61:2 jurisdictional 41:12 62:9 jury 17:18,19 42:6,6,10,14 42:14 44:5 56:11,17 justice 1:22 3:3 3:9 4:1,11,12 4:21,24 5:11 5:20 6:2,15,22 6:24 7:4,6,10 7:13,15,16,19 7:21,24 8:10 8:13,17 9:6,9 10:2,11,21 11:6,18,24 12:2,8,13,14 12:17,22,25 13:5,8,9,23 14:4 15:15,18 16:10,20 17:5 17:8,11 18:3
---	---	--	--	--

18:11 19:12,17 19:20 20:3,12 20:23 21:6 22:5,17 23:2 24:2,5,8,18,25 25:3,15,24 26:2,4,6,9,23 27:1,4,8,16 28:7,14,18 29:6,10,14,24 30:3,7,9,17,20 30:22,22 31:19 32:1,5,12 33:22 34:5,9 34:10,13,18,21 34:23 35:2,3,5 35:7,7,9,13 36:2,5 37:2,8 38:3,12,13 39:3,12,23 40:8,13,15,21 41:6,9,11,20 42:2,11,21,24 43:3,8,13,23 44:8,24 45:4,8 45:18,21 46:11 46:15,21 47:8 48:10 49:2,7 49:17,24,25 50:2,6,8,13,23 51:1,10,13,17 52:21 53:4,7,9 53:14,15,19,23 54:6,7,12,14 54:14,16 55:15 55:23 56:9,23 57:5,11,16 58:17 59:8,14 60:9 61:14 62:16,22 63:7 63:9,10,19,25	46:21 Katyal 1:19 2:6 28:15,16,18 29:9,20 30:1,7 30:12,19,22 32:4,6 33:3,24 34:7,12,14,20 34:22,25 35:12 36:13 37:5 38:18 39:8 40:7,12,14,20 41:4,8 42:8,16 42:23 43:1,9 43:20 44:7 45:3,18 46:14 46:16 47:8,13 48:21 52:2 Kennedy 5:20 6:2,24 7:6,10 7:13,16,19,21 7:24 24:2,5,8 24:18,25 25:3 25:15,24 26:2 26:4,6,10,23 27:1,4,8 34:5,9 34:13,18,21,23 35:2,5,8,9,13 36:2 38:3 41:20 42:21,24 43:3,8 44:24 45:4,8,18 48:10 56:23 57:5,11,16 keys 45:6 kind 34:15 36:17,22 38:9 40:4,10,16 42:12 43:23 63:15 Kneedler 1:21 2:9 49:3,4,7 50:7,10,25 51:3,12,16,20 52:21 53:5,6,8 53:17,22 54:11 54:18 55:1,18 56:1,13 57:7	57:15,18 58:25 knew 38:10 know 4:4 7:16 10:17 17:8,20 21:9 22:11 23:15 24:15 30:3 33:6,8,14 33:16 35:3,9 35:16 37:6,19 38:2,8 40:3,24 41:5,5,17,19 41:23,25 42:9 42:18 45:9 46:2 47:5,17 48:10 52:22 61:7 62:4,6 knowingly 19:10 33:25 34:14 knowledge 41:24 known 11:13 62:9 knows 45:12 46:9 L lack 4:14,15 6:11 31:23 47:2,5 lacked 8:24 lacks 10:6 laid 30:13 land 15:11 18:4 18:16 27:10,13 28:24 29:5 31:5 32:5,6,17 33:6,12 34:1 60:17 62:20 63:12 lands 18:6 32:10 35:23 38:10 language 30:14 30:15,16 37:17 38:19 39:2,12 39:14 45:21,22 51:15	large 41:5 Laughter 43:19 law 3:14 4:18 5:18,23 6:1,5,9 8:5,6,8 11:3,13 11:25 15:11,25 17:2 18:5,18 18:23 22:11,12 22:13 24:8,15 24:21 27:12 33:21 36:21 38:11,15 46:19 55:20,22 58:24 58:24 59:1,4,5 59:16,20,23 60:8,16 62:6 law's 60:4 laws 23:5 26:17 lawsuit 31:5 lawsuits 3:17 lead 30:24 lease 19:1 28:1 28:24 47:4 58:14 leases 39:17 45:24 47:3 48:17 leaves 20:24 Lee 37:25 47:19 48:2 left 15:24 legal 13:15,24 23:8 61:20 legislate 4:5 legislation 6:4 legislative 3:13 4:3,7 5:24 6:11 6:13,25 8:21 8:24 9:2,13,17 9:21 51:6 let's 27:17 level 43:24 liability 33:1,23 36:3 39:25 liable 29:25 30:5 34:2 license 23:19	28:24 58:14 licensing 15:23 22:19 23:5 28:11 48:13 lies 6:21 life 24:11 light 50:18 limit 24:19,20 37:13 limitation 40:23 limited 19:1 33:19 38:7,15 38:19 39:2 41:21 limiting 35:5 limits 25:4,5 32:13 41:16 line 48:1 60:10 litigated 4:20 little 12:13 30:10 31:7 33:3 59:6 local 46:9 long 27:4 28:4 34:25 41:18 46:5 49:21 long-term 34:15 46:6 look 18:17 41:17 43:4 looked 16:22 lose 13:1 17:13 loses 36:7 losing 13:10 loss 26:16 lot 21:14 36:7 lots 11:19 47:4 luggage 45:10 M mailed 62:5 manager 29:5 mandatory 3:16 4:16 manner 57:21 manufacturer 33:2
K K 1:19 2:6 28:16 Kagan 19:12,17 19:20 20:3,12 21:6 23:2				

Massachusetts 43:16,17 44:2 matter 1:13 12:19 24:17 42:4,13 47:18 56:10 64:3 matters 15:22 17:2,2 Md 1:17 mean 6:16 15:16 57:21 58:19,22 62:21 means 63:8 measures 22:21 mechanisms 17:24 member 18:3 19:18 20:17 23:16 27:19 32:3,15,17,25 44:15 46:13 53:2 54:25 56:19 members 5:25 17:18,19 23:10 24:11 42:7,15 44:5,12 46:13 50:9,24 51:2 56:12,15 57:14 mentioned 17:6 49:1 Merrion 32:10 micromanaged 16:9 million-man 54:1 million-person 54:2 millions 26:20 34:6,24 mind 48:19 minor 23:16 minutes 59:9 Mississippi 1:7 3:5 8:7 14:22 22:13 44:22	45:1 56:6,17 62:14 Mississippi's 8:7 Mississippians 56:18 misunderstood 26:11 Mm-hmm 47:13 modern 11:11 15:13 17:14 modify 41:19 molested 22:7 moment 10:3 Monday 1:11 money 36:7 52:13 Montana 6:6 15:22 20:13 21:19 22:18,22 26:6,7,15 28:6 38:6 39:15 45:14,23 46:4 48:11 58:7 Montana's 62:24 morning 3:4 moved 4:22 multiple 26:19 Mutual 29:23 31:16 37:17 41:13 49:14,19 50:18 51:5,25 58:2 59:2 N N 2:1,1 3:1 name 54:10 narrowest 3:11 8:1 narrowly 8:21 58:19 nation 40:10,14 national 5:4 13:24 31:16 49:14,19 50:18 51:4 55:5 nature 23:14	Navajo 59:5 NEAL 1:19 2:6 28:16 necessarily 42:9 58:22 necessary 39:11 60:25 need 6:23 30:4 33:5 47:15 62:9,10 Neither 60:20 neutral 4:17 5:9 5:15 9:25 10:6 10:7,8,10,15 11:4,14 13:3 60:22 neutrality 10:17 Nevada 8:19 9:10 58:7 59:4 never 22:4 29:7 29:17 30:4 38:5 41:11 47:15 55:13 61:15 New 43:15 44:1 newest 25:8 nexus 33:9 36:15 41:22 61:24 62:4 Ninth 15:2 non-Indian 8:16 50:22 non-Indians 3:18 5:14 51:6 51:23 55:10 non-Tribal 50:24 51:1 non-Tribe 5:25 54:25 noncitizen 10:16 10:18,19 17:17 21:18 23:9 noncitizens 5:10 5:10 nonconstitutio... 35:11 42:24 nonmember	17:17 23:22 29:8,18 30:5 31:4 32:2,16 33:8 42:5,14 44:4,10 54:25 56:11 61:16 nonmembers 3:13 6:11,19 8:3 27:20 29:12 40:3 57:1 nonneutral 21:8 nontribal 18:3 24:11 57:13 normal 12:4,5 normally 53:9 number 34:18 41:1 44:13 O O 2:1 3:1 O'Connor's 41:9 obligation 56:24 observation 59:4 obtain 43:17 obviously 16:6 19:7 occurs 27:18 59:21 odd 23:2,7 30:10 30:12 Offenses 16:1 offered 61:22 official 53:3 officials 31:24 Oh 10:11,25 okay 6:22 7:18 18:11 22:7,25 26:9 62:21,22 Oklahoma 42:1 57:19 Oliphant 13:11 49:15,18 51:22 55:8 one-line 8:15	ones 12:3 ongoing 18:16 online 32:16 36:8 open 9:15 36:3 38:9 opened 7:7 opening 4:2 45:5 46:9 operated 33:7 operating 18:15 18:21 20:19 58:13 opinion 9:8 31:21 opinions 9:12 Opportunities 44:12 Opportunity 36:1,24 opposite 20:6 oral 1:13 2:2,5,8 3:7 28:16 49:4 order 55:11 ordinarily 10:17 out-of-State 4:22 out-of-Staters 55:23 outset 49:9 outside 35:16 overriding 3:24 13:13 overruled 62:13 overturned 14:22 15:3,5 P P 3:1 page 2:2 31:22 36:21 38:20 58:6 paid 29:2 painted 33:14 parallel 9:12 parens 22:15 parents 22:6
---	---	---	---	---

part 5:21,22 16:7 50:2 55:2 55:7	place 28:20 41:9 54:24	practice 57:13	57:2 63:14	purposes 5:25
participate 28:25	placed 29:1 55:2 55:9	precedent 48:25	product 32:15	pursuant 58:13
particular 52:20 58:14	places 16:24 17:1	precedents 13:11 21:20 30:23	32:16,20,20 33:1	pursuit 21:21
particularly 54:21	Plains 33:16 35:13 39:12 41:23 48:4	precisely 58:11	product-liabil... 41:15	put 39:20 45:16 45:20
parties 37:12	plaintiff 8:6,8 17:20 26:19 43:18 56:18	predates 55:3	products 33:1 33:23 34:11 39:24,25	putative 14:10
party 22:24	plaintiffs 47:9	preemption 59:18	program 28:25 36:1,25 44:12	Q
Paso 31:3,6 32:10 59:5	please 3:10 4:2 28:19 49:8	premise 11:1 20:15 49:20	proper 12:10 35:2	qualifies 5:2
pass 4:18 24:8	pleased 8:2 9:19	premised 59:3	property 26:16 50:14,24	question 4:6 5:2 6:4 8:11,20 9:14 12:18 13:1,10 18:2 19:14 22:3 25:3 27:9,9 39:24 42:12 46:23 48:14 54:15,19 59:15 60:1 63:1
passage 49:23	plenary 43:10	prepares 54:2	proportion 21:3	questions 5:18 6:23 30:2 54:3 59:13
passing 24:15	point 4:14 5:3 7:3 8:3 9:4 13:2,14 14:1 15:7,21 16:10 17:4,9,10 18:20 20:18,23 23:14,20 26:11 27:7 37:3,16 45:4 51:9 52:2 53:17,20 55:19 57:10,12 58:1 58:6 59:16 60:3,9,24 61:15,21 62:11	present 22:2	proposition 6:18	quite 16:5 27:25 45:13,14 55:5 62:6
path-marking 39:15,20		presented 22:2	prospect 14:13 19:3	quote 31:22
patriae 22:15		president 53:25	prospects 26:16	R
payment 52:13		presumably 25:10	protecting 23:4	R 3:1
people 17:20 38:1 44:25,25 47:20,21 48:2 57:3 62:2 63:5 63:12		presumption 6:6	protection 55:12	radically 39:19
percent 21:4 32:8		presumptively 6:21 31:12	protections 13:16 57:2 63:22	raised 56:22
perfectly 16:23		pretty 15:17	proves 56:15	rare 15:1
permissible 36:14		principle 25:13	provide 47:14 52:12 56:3	reach 39:24
person 19:25 20:7 32:18,20 32:22,23,25 36:8,8,12 58:18	points 59:13 60:12	principles 11:13 28:4 49:18 60:20	provided 26:21 51:7	read 6:17 9:7 40:2,24 41:3,7 53:2 54:1
person's 58:20	policies 52:3	problem 56:19 56:21	provides 52:11 56:2	reading 45:21 48:11
personal 50:14 50:23	political 50:4	procedural 27:8	provision 38:14 50:20	real 11:12 17:6
persons 25:18	position 18:9 20:24 61:7 62:25	procedure 11:20	provisions 39:5 47:1 50:17	really 14:17 18:12 24:1 33:19 36:17 37:21 38:8 47:18
persuasive 31:10	possess 6:18 29:12	procedures 12:9 21:10	public 15:25 50:4 54:3	reason 24:14 25:6 39:3 41:21 47:25
pertain 38:25	possible 39:10	process 11:25 12:10 14:9,9 14:20 15:9 16:15 18:1 25:5,7,13 26:17 27:5,9 28:5 42:3,5,13 42:19,22 43:2 47:2,2,23 55:12 56:10,21	publication 52:14	
Petitioners 1:5 1:18 2:4,14 3:8 59:11	power 3:20 4:18 21:1 24:21,22 54:24 58:23 63:17		punitive 24:22 26:20 34:6,23	
pick 63:8	powers 25:16,17 32:11 54:24		purchased 32:21 33:1	
piece 47:16,16			purchases 32:15	
			purely 16:7	
			purpose 31:25	

48:23 reasonable 36:3 40:18 reasonably 33:17 34:3,3 36:16,22 46:23 reasons 9:16 47:21 REBUTTAL 2:12 59:10 recognition 50:20 recognize 17:22 recognized 17:23 28:22 29:7 32:9 50:12 recognizing 58:2 reconciliation 53:11 reference 24:20 51:2 referring 58:8 Regal 48:22 59:17,22 regard 16:6 22:15 regarded 23:22 regime 14:17 23:8,8 regulate 4:5 6:19 29:12 44:16 58:20 regulation 22:19 22:19 46:10 48:22 59:2,17 59:24 60:2,4 regulations 38:23 regulatory 5:25 6:3,8 15:22 58:9,18,22 Rehnquist 49:17 rejected 49:13 relate 59:13 61:14 related 38:20	40:6 relates 61:21 relation 40:5 relationship 20:13,16 33:5 34:15 38:8 40:4,5 46:6 58:6 relationships 48:14 relevant 41:12 44:20 relies 20:13 remain 60:7 remained 9:15 remaining 59:9 remains 62:17 remedies 31:18 remedy 8:9 28:12 35:21 47:15 remember 4:14 13:17 18:24 19:18,20 20:18 21:1 22:9 31:2 removable 21:19 removal 4:13 11:2 12:18 13:6 37:4,8,11 59:25 60:23 61:2 remove 5:11,15 12:14 56:7 repeatedly 50:12 report 51:19 52:24 53:1,5 53:10,13 reports 50:16,19 53:16,21 60:10 require 19:8 37:9,19 56:2,3 requirement 31:25 56:4,5 requirements 38:22	requires 37:11 38:7,8 39:15 41:22,24 Reservation 18:16,22 19:9 23:10,12 24:24 27:18,25 28:12 42:1 45:7 48:19 58:13 Reservations 25:18 reserve 28:13 resolution 57:23 resolved 8:18 resolving 57:21 respect 8:3 10:17 11:3,12 11:17 15:5 17:1,6,21,25 19:17 37:18 40:25 41:15 55:13,22 56:25 58:5 60:19 respectfully 61:18 respects 3:24 5:4 61:5 respond 49:9 responded 52:2 Respondents 1:20,23 2:7,11 3:15,18 15:1 18:13 28:17 49:6 response 5:22 46:21 56:23 responsibility 53:3 reversal 8:1 review 9:16 14:25 17:3 25:18 26:22 49:22 reviewable 5:19 rigged 36:9 right 10:18 11:18,23 12:7	12:12,16,20 15:9 16:12,16 17:9 21:7,13 29:14,14 30:8 33:22 34:25 35:22 38:1 40:15 43:13,21 43:21 44:25 47:19 48:2 51:11 54:22 55:15,16,25 56:1 63:17 rights 15:16,16 15:17,20,25 50:15,24 56:20 57:1 ROBERTS 3:3 28:14 29:6,14 29:24 30:3,9 35:3,7 38:13 39:3 42:2,11 43:23 49:2 53:15,19 54:14 56:9 59:8 63:25 room 20:24 rule 6:10 11:3 15:7,19 17:19 19:14 28:10,11 29:10 30:13 31:11,19 33:19 35:2 41:16 48:5 49:15,20 51:22 62:1,7 rules 15:13 16:17 38:23 39:20 62:9 ruling 14:19,21 14:24 15:2 rulings 5:18 15:5 running 36:23 36:24 44:11 62:3 runs 44:24	S 1:21 2:1,9 3:1 49:4 safety 50:4 San 46:8 saying 9:6 12:6 20:1 23:18 24:9 29:10 36:19 37:8 44:22 45:23 46:3 51:3,22 62:3 says 6:6,17 12:23 13:2,6 18:4 27:4,11 33:14,17 36:8 36:21 47:19 50:19 51:19 61:23,24 Scalia 12:14,17 12:22 13:23 30:17,20,23 31:19 50:6,8 50:23 51:1,10 51:13,17 53:4 53:14 54:7,12 55:23 58:17 59:14 60:9 searched 45:11 second 5:16 9:4 14:25 19:6 27:7 28:2 50:20 55:19 60:9 see 16:12 42:16 seen 11:19 41:19 44:18 selecting 46:12 selection 46:12 self 63:4 self-governance 21:22 self-help 28:12 sell 35:24 send 34:11 sending 33:25 33:25 sense 10:22
--	--	---	--	---

31:15 sent 39:25 53:1 sentence 6:17 9:7 sentences 24:11 separate 3:23 5:3 6:23 serious 14:16,17 23:15 26:15 seriously 23:16 62:14 serve 31:25 50:3 service 33:7 serving 44:12 set 17:12 23:11 28:23 46:8 setting 44:11 shoes 43:11 shop 28:23 36:23 44:11 46:8 show 35:23 showing 45:6 shows 16:2 shunting 24:16 side 20:14 30:15 37:4,7 39:9 54:17 61:23 62:2 side's 22:9,11 sight 13:1,10 17:13 signed 19:23,25 significant 26:12 signs 18:4 silence 52:19 similar 31:3 44:9 52:17 simply 10:25 15:9,14 20:16 20:19,23 single 15:1 situation 22:13 32:14 40:17 58:12 small 21:2	solely 42:6,15 44:5 56:11 Solicitor 1:21 32:8 36:20 solutions 19:3 46:25 somebody 36:6 43:25 someone's 36:23 36:24 sorry 25:23 26:5 35:7 53:19 sort 31:10 43:22 53:24 Sotomayor 10:2 10:11,21 52:21 53:7 54:6,15 54:16 62:16,22 63:7,9,10,19 sound 48:18 sovereign 4:19 5:6 13:12 14:23 21:18,21 21:23,25 22:21 22:24,25 23:4 23:13 28:3,21 62:15 63:2,11 sovereigns 14:21 44:20 63:15 sovereignty 3:22 3:24 13:13 20:25 22:4 37:15,25 47:18 49:11 52:10 55:3 57:8 61:1 62:12,17 63:2 63:4,8,21 sovereignty 23:23 specific 13:18 38:25 50:1 60:14 specifically 51:24 52:1 square 7:21 squarely 28:21 staff 54:1,2 stake 43:14	standard 61:24 stare 48:25 start 41:9 55:6 State 4:17,18 5:12,17 8:7,7,9 10:6,17,18 12:8,15,19 14:2 20:1,8,9 21:11,17 24:14 25:12,12 31:23 43:25 44:21 46:12 47:12,24 55:19,20 59:23 60:1 61:10,13 62:3 63:1 statement 4:2 States 1:1,14,23 2:10 3:19,25 5:4,13 10:4,22 13:14,19 14:1 16:2,6 17:22 21:2 23:21,24 23:24 24:10 25:11 26:24 27:14 34:11 35:11 41:3 44:21 49:5,12 60:15,17,18,19 61:1,3,6,7 63:11 statute 13:6,6 37:10,11,17,19 37:20,21 50:1 50:16 51:11,20 52:4,7,16 60:23 statutes 52:12 stemmed 51:18 stops 17:19 store 19:22 29:1 29:4 36:24 44:11 46:6 Strate 6:16,16 8:13,14,23 29:11,23 30:14 strip 20:9 strong 56:14	62:4 stronger 37:3 subject 3:13 8:4 25:21 27:23 35:10 44:1 58:18 61:1,16 subjected 42:5 42:14 43:25 subjecting 38:11 38:16 44:3 submitted 58:9 64:1,3 substance 59:20 60:8 substantive 60:4 sue 10:6 32:23 36:12 43:15 47:12 sued 10:18,19 26:19 47:12 sues 20:7 21:18 suggest 16:22 39:6 suggested 17:11 25:1 suggests 24:3 suit 19:18 20:10 21:24 22:6 23:22 26:1 62:18,19 63:5 suits 5:9 47:22 superior 14:3 49:11 61:6 support 52:13 52:14 supporting 1:23 2:11 49:6 suppose 43:18 supremacy 13:19,21 25:22 27:11 supreme 1:1,14 5:17 13:3,21 15:10,11 27:10 27:12 60:16,17 62:13 sure 7:23 29:15	36:17 39:8 48:21 51:14 54:19 susceptible 22:22 swallow 6:10 swath 17:23 sweeping 8:5 switched 25:8 system 14:25 16:1 17:7 24:17 35:17 62:8 systems 16:13 50:2,13 57:20 57:23 61:20 63:15 T T 2:1,1 tailored 33:20 take 6:1 16:25 18:8 20:5 22:18 23:16 27:13 40:18 takes 35:20 talk 15:21 talking 15:12 16:18 48:12,12 talks 45:15 48:13,16 Tasmania 40:16 40:17 taxation 15:23 22:19 23:18 28:10 48:13 tell 37:21 54:10 terms 6:3 30:8 41:2 terrible 12:9 44:4 terribly 12:9 test 36:15 61:23 text 60:10 Thank 28:14,18 49:2 59:8,12 63:24,25
--	--	---	---	---

theory 3:18 46:15	till 61:17	38:4 62:15	22:14,20,23	40:11 44:8,13
thing 12:3,4 36:18,22,23 40:24 41:22 47:17 55:22 57:5,10 60:6	time 5:13 13:25 16:8 23:21 28:13 39:10 41:18 58:3 61:2,8,19 62:8 62:10 63:20	treats 36:21	23:17 25:7 27:19 28:2,11 28:24 29:1 32:15,15 33:6 36:11,12 38:4 42:15 44:6 45:15 46:5,13 46:16 50:5 55:3 58:19,21 58:21 62:5	50:1 51:21 53:11 60:14 61:22 63:5
things 12:1 13:17 14:3,5,6 14:14 15:23 36:2 44:8,23	times 9:11 47:24 49:1	tribal 3:13 6:21 11:7,8,11,19 13:20 14:3,19 14:20 15:2,5 16:3,4,14,23 17:12,14,17,25 18:4,5,6,7,15 18:18,23 19:11 20:17,25 21:3 22:20 23:10 25:18 27:20 28:21,25 29:4 29:18 31:5,17 31:20,23,24 32:5,6,10,17 32:17,24,25 33:2,6,12 34:1 35:23 36:12 37:22,24 38:10 38:11,15,16,23 39:7,25 41:1 41:18 42:6 43:6 44:12,15 44:17 47:9,18 47:22 49:10,22 49:24,25 50:2 50:2,9,13,21 51:8 52:5,9,10 52:13,14,15 54:25 55:22 56:12,14,25 57:14,23 58:9 58:13,14,18 59:3,5,6,7,16 61:11,12,17 62:5,13	tribe's 25:10 32:11	U
think 10:5,7,12 15:20 16:16 18:12 22:8,14 24:13 28:5 29:9,20 30:9 30:12,19,23 32:7,7,9 33:16 35:1 36:13,13 36:15 37:3,6 37:13 38:18 39:8,9,10 41:4 41:8,10,12,16 43:23,24 44:3 44:7,8 45:19 45:20 46:14,16 46:19,22 48:21 48:23,23 49:13 51:10 52:23 54:14 56:13 57:11,24 60:21 61:18 63:14	tort 3:14,17 4:18 6:5,9 7:2,4 8:5 8:6,7,7,15 18:5 18:18 19:18 21:12 22:11,12 22:13 24:20 26:1 29:19,25 30:5,24 31:5 31:16 33:11 34:2 37:24 40:6 49:10 51:5,23 58:23 58:24 59:1,3,5 59:16,20,23 60:4,8 62:5,18 62:19 63:4	tribally-owned 28:23	tribes 3:12,16,19 4:14,25 5:24 6:7,11,18 8:4 11:15 13:12,25 15:24 16:5,7 17:23 18:21 23:21 24:1,9 24:21 25:16 26:17 29:11 34:13 35:15,16 39:21 42:21 43:2,5 52:14 57:7,19,19 58:2 61:2,5,20 62:19 63:21	UN 26:24 27:14
thinking 22:17 43:14	torts 24:23 48:18,22,23	tribe 8:22,24 10:19,20 14:6 17:17,18 18:25 19:8,19,24 20:1 21:4,16 21:25 22:5,12	tribunal 55:17	unanimous 49:16
THOMAS 1:17 2:3,13 3:7 59:10	Townsend 47:11		tribunals 6:25	unanimously 29:11
thorough 49:22	tracks 22:12		tried 56:11,17	unbeknownst 33:13
thoroughly 52:15	Trading 36:15 41:24		trip 54:17	unbroken 31:11
thought 7:7 40:1 61:12,19	tradition 5:4 13:15,24 17:25 18:1 33:13 60:12,21		Triple 27:3,14	unconstitutio... 25:20
three 3:23 5:3,7 59:12 60:12 61:5	traditional 17:24		truck 33:12	undermined 57:25
threshold 8:2	traffic 32:18		trucks 33:14	understand 7:6 13:9 18:19 20:4,5 29:15 31:9 32:13 42:11 60:22 62:11 63:3
tight 41:22	tragic 28:20		true 8:18 9:5 11:22 15:12 38:8 53:24 60:18,20 61:19	understanding 11:1
	training 52:12 52:13		trying 9:20 13:14 32:12 57:13	understands 13:15
	transaction 32:3		turn 34:1	understood 3:21 6:24 22:4 60:25
	treat 38:2,3		twice 31:15	undertook 49:22
	treated 16:3		two 6:23 12:1 13:17 14:5 19:2 21:24	unfair 12:9 21:9
	treaties 63:11			Union 31:16 49:14,20 50:18 51:4 55:5
	treating 14:20			United 1:1,14,22 2:10 3:19,25 5:4,13 13:13 14:1 16:2,6 17:22 21:2 23:21,24 24:10 25:11 26:24 27:14 35:11 41:3 44:21 49:5,12 60:17 60:18 61:3,6

63:11 unlimited 24:10 24:21,22 unremarkable 6:18 unreviewable 14:11 unusual 12:3 33:13 upshot 20:24 use 17:23 38:25 46:17	47:9,21 48:19 54:3,4 62:23 63:8,13 wanted 40:23,23 40:23,24 45:17 57:10 Washington 1:10,19,22 wasn't 25:2 62:4 way 15:6,8 16:12 19:5,14 19:17 23:17 31:2 37:22 38:4,15 42:1 43:4 ways 8:19 16:20 47:4 We'll 3:3 we're 36:19 39:4 42:2,2 44:22 48:12 53:23 we've 11:19 25:8 41:5 54:16 went 22:20 31:2 37:23 40:17 wide 17:23 Williams 37:25 47:19 48:2 willing 40:2 win 20:15 Women 16:12 word 40:9 52:24 words 35:19 39:13 40:11 48:8 work 19:4,16 working 58:15 worried 47:1 wouldn't 14:23 19:16 42:17 write 61:25 wrong 9:8 11:6 11:8 12:6 14:5 14:6 wrongdoer 27:18 wrote 18:25	X x 1:2,9 Y Yankee 43:18 Yeah 53:15 year 52:16 yes-or-no 42:12 York 43:15 Yorker 44:1 Youth 35:25 36:24 Z zenith 32:11 0 1 1 21:4 10:03 1:15 3:2 100 32:8 11:04 64:2 13-1496 1:5 3:4 1789 61:9 1790 55:7 1880 61:19 1900 57:13 1993 49:23 52:7 2 2000 52:16 2015 1:11 28 2:7 280 15:25 3 3 2:4 32 36:21 369 31:22 372 58:6 4 4 31:6 45 38:20 49 2:11 5	50 34:11 500 24:21 500-plus 24:9 59 2:14 6 7 7 1:11 8 9 90 61:9
V v 1:6 3:5 8:19 9:10 37:25 47:19 48:2 58:7 59:4 various 9:11 vast 41:1 verdict 42:6 versus 21:12 view 20:6,10 violate 23:11 25:13,22,22 42:5,13,17,18 42:19 violates 58:20 violating 42:16 Violence 16:11 47:20 voluntarily 58:9 vote 53:4,10,12 53:15,21,22 voted 51:11,14 voting 53:1 W wages 29:2 wake 51:4 wander 42:1 wandering 48:7 want 3:23 5:7 11:5 14:5 16:10 17:8,13 29:15 40:22 41:6 43:15			