No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL., PETITIONERS

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a tribal court has jurisdiction to adjudicate civil tort claims brought by tribal members against a nonmember corporation that operates a store on tribal trust land pursuant to a lease with, and business license from, the Tribe, when the claims arise from the store manager's alleged assaults upon a tribal member who was, pursuant to an agreement with the Tribe, working at the store as an intern.

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INTEREST OF THE UNITED STATES

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government" through means including the "development" of "[t]ribal courts." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. Petitioners are a Tennessee corporation and its wholly owned subsidiary. Pet. Br. ii; J.A. 20. The subsidiary, Dolgencorp, LLC, operates a Dollar General Store on land held in trust for, and within the Reservation of, the Mississippi Band of Choctaw Indians (the Tribe). Pet. App. 2. Dolgencorp operates the store pursuant to a business license issued by the Tribe and

has leased the premises since 2000 from an entity owned by the Tribe. *Id.* at 2, 84; J.A. 28.

In the lease, Dolgencorp "acknowledges" that the premises "are upon land held in Trust by the United States of America for the [Tribe]" and that Dolgencorp "will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose." J.A. 48-49 (Provision XXIX). The lease provides that Dolgencorp "shall * * * comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." J.A. 45 (Provision XXVIII). The lease further provides that "[t]his agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi"[1]; that "[e]xclusive venue and jurisdiction shall be in the Tribal Court"; and that "[t]his agreement and any related documents is [*sic*] subject to the Choctaw Tribal Tort Claims Act." J.A. 47-48 (Provision XXVII).

In spring 2003, the store's non-Indian manager, Dale Townsend, agreed that the store would participate in the Tribe's Youth Opportunity Program, which placed young tribal members in short-term positions with local businesses. Pet. App. 2-3, 5. Respondent John Doe, a 13-year-old tribal member, participated in the Youth Opportunity Program at the store. *Id.* at 3.

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[1] Section 1-1-4 of the Choctaw Tribal Code (2013) generally provides that, in civil actions, "[a]ny matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi." The entire code is available at www.choctaw.org/government/court/code.html.

Doe alleges that, while they were working in the store on July 14 and 15, 2003, Townsend made multiple uninvited sexual advances against Doe, offering Doe money to allow the advances, grabbing him "in his crotch area" until he escaped, and thereafter continuing to make sexually offensive remarks. J.A. 13. In light of the allegations, the Tribe sought an order from the Choctaw Tribal Court excluding Townsend from the Reservation, and, with Townsend's consent, the court entered such an order in September 2003. Pet. App. 57; D. Ct. Doc. 1-2, at 16-19 (Mar. 10, 2008).

2. a. In January 2005, Doe, by and through his parents (also tribal members), filed a complaint against Townsend and Dolgencorp in the Civil Division of the Choctaw Tribal Court, seeking compensatory and punitive damages for severe mental trauma resulting from the alleged assaults. Pet. App. 3, 77. The complaint claims that Dolgencorp is vicariously liable for Townsend's actions and that it was negligent in hiring, training, or supervising him. *Id.* at 3.

Defendants moved to dismiss the complaint for lack of jurisdiction under *Montana* v. *United States*, 450 U.S. 544 (1981), which provides that tribes generally lack authority to regulate the activities of nonmembers, at least on non-Indian fee land within their reservations, subject to the following two exceptions: (1) that "[a] tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) that a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health

or welfare of the tribe." *Id.* at 565-566. Defendants contended that neither of those exceptions applies here. D. Ct. Doc. 1-2, at 27-28, 32. The tribal court denied their motion to dismiss. Pet. App. 3, 78.

b. On interlocutory appeal, the Choctaw Supreme Court affirmed. Pet. App. 75-91. Although *Montana* had originally addressed only activities on non-Indian fee lands, the court concluded that *Nevada* v. *Hicks*, 533 U.S. 353 (2001), had "morphed *Montana's* primary concern with *place* into a primary concern with (non-Indian) *persons*, where place was still relevant, but not determinative or dispositive." Pet. App. 82-83. In that light, the court held that the tribal court had jurisdiction under both *Montana* exceptions. *Id.* at 82-90. With respect to the consensual-relationship exception, the court identified three agreements between Dolgencorp and the Tribe: the lease, the business license authorizing operation of the store, and the agreement to participate in the Youth Opportunity Program. *Id.* at 86. The court further found that there was a "considerable nexus between the alleged tort and the commercial lease" because the tort was committed by the manager of the leased premises, *ibid.*, and that the nexus was made tighter because the victim was not simply a customer or employee but a "[t]ribal minor placed at the store by the Tribe to receive job training," *ibid.*

3. Petitioners and Townsend then filed this action in the United States District Court for the Southern District of Mississippi, seeking injunctive relief barring the tribal-court proceedings. Pet. App. 55. The court granted a permanent injunction as to Townsend, finding that he was not a party to any consensual relationship sufficient to support tribal-court jurisdiction. *Id.*

at 71-73. Following discovery, the remaining parties filed cross-motions for summary judgment. *Id.* at 39-40. They agreed that, because the tribal-court defendants are nonmembers, one of *Montana*'s "two exceptions must apply in order for the Tribe to assert regulatory authority over their actions." *Id.* at 43.

The district court held that the case against petitioners falls within *Montana*'s consensual-relationship exception. Pet. App. 45-54. The court found a consensual relationship by virtue of petitioners' agreement to participate in the Youth Opportunity Program, pursuant to which Doe "functioned as an unpaid intern or apprentice" providing "free labor" to petitioners, and determined that petitioners "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* at 46. The court further concluded that Doe's claims "arise directly from this consensual relationship" and there is therefore "a sufficient nexus between the consensual relationship and exertion of tribal authority." *Ibid.*

4. a. The court of appeals affirmed. Pet. App. 1-22. In finding *Montana*'s consensual-relationship exception applicable, the court rejected five arguments made by petitioners. First, it found that, although the consensual relationship need not be a "commercial" one, the relationship here was "unquestionably" commercial in nature. *Id.* at 12.

Second, the court of appeals identified an "obvious" nexus between petitioners' consensual participation in the Youth Opportunity Program and Doe's tort claims, because the Tribe was regulating "the safety of the child's workplace." Pet. App. 13. The court concluded that it "makes no difference" that "the regulation takes the form of a tort duty that may be vindicated * * * in

tribal court." *Ibid.* To the extent "foreseeability" is relevant, the court observed it "would hardly be surprising" that an employer would "have to answer in tribal court for harm caused to the child in the course of his employment," and, more specifically, that petitioners could have easily anticipated that sexual molestation of an intern by a store manager "would be actionable under Choctaw law." *Id.* at 13-14 & n.4.

Third, the court of appeals rejected petitioners' contention that *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), had limited tribal-court jurisdiction to situations where "one specific relationship, in itself" (Pet. App. 16)—such as the single employment relationship between Doe and Dolgencorp—can be shown to "intrude on the internal relations of the tribe or threaten tribal self-rule." *Plains Commerce Bank*, 554 U.S. at 334-335. The court explained that "at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government." Pet. App. 16.

Fourth, because the argument was asserted for the first time on appeal and therefore waived, the court of appeals declined to entertain petitioners' contention that Doe failed to allege and prove that any negligence in hiring, training, or supervising Townsend had occurred on the Reservation. Pet. App. 19-20.

Fifth, the court of appeals held that, even though tribes generally lack criminal jurisdiction over non-Indians, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 195, 212 (1978), they are not "categorically prohibited from imposing punitive damages on non-

members," because punitive damages are distinct from criminal punishment. Pet. App. 20-22.

b. Judge Smith dissented. Pet. App. 22-36. In his view, the *Montana* exceptions are not satisfied because "Dolgencorp's conduct indisputably falls outside the [Tribe's] authority to 'protect tribal self-government or to control internal relations.'" *Id.* at 27 (quoting *Montana*, 450 U.S. at 564). Judge Smith further reasoned that, even if the consensual-relationship exception applies, there was no "legally sufficient nexus between Dolgencorp's participation in a short-term, unpaid internship program and the full body of Indian tort law." *Id.* at 28. He concluded that "*Montana*'s first exception envisages discrete regulations consented to *ex ante*" rather than an "after-the-fact imposition of an entire body of tort law." *Id.* at 32.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the tribal court has jurisdiction over the civil tort claims against petitioners, which are based on conduct that occurred on tribal trust land and arose from petitioners' operation of a store pursuant to a lease with, and business license from, the Tribe, as well as from the store's voluntary participation in the Tribe's Youth Opportunity Program.

A. Tribal-court jurisdiction is consistent with the framework established in *Montana* v. *United States*, 450 U.S. 544 (1981).

1. Under the first exception to *Montana*'s general rule against jurisdiction over nonmembers, "[a] tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 565. Petitioners had such a relationship, reflected in three separate agreements

with the Tribe, including a lease in which Dolgencorp agreed to comply with tribal law, which expressly contemplates tribal-court jurisdiction over civil actions arising from on-reservation business or activity. The allegedly tortious conduct had an obvious connection to that consensual relationship, and the ability to protect tribal members from physical assaults on tribal land serves the Tribe's legitimate sovereign interests.

2. In the alternative, the Court could find that jurisdiction was appropriate under the portion of *Montana* that "readily agree[d]" with the exercise of tribal jurisdiction over nonmember activities on tribal land (as opposed to on land held in fee by nonmembers), 450 U.S. at 557, since the non-Indian defendants were not transient visitors but operators of an established business.

B. The Court should reject petitioners' request for a categorical carve-out from tribal-court jurisdiction of claims sounding in tort. The Court has previously endorsed tribal courts' jurisdiction over tort claims, and the federal courts of appeals and district courts, state courts, and tribal courts have consistently rejected, either expressly or implicitly, the premise that tort claims against nonmembers are somehow inherently unsuited for tribal-court jurisdiction. Petitioners contend that uncodified tort law is harder to discern than other kinds of law, but it was easy to foresee that the Tribe would seek to hold an employer liable for a sexual assault committed against an intern by a supervisor in one of its stores.

C. Nor should the Court repudiate the settled distinction it has long drawn between tribal jurisdiction in criminal and civil cases. Because petitioners' contrary argument was not raised below, and was characterized

as outside the question presented in petitioners' certiorari-stage briefs, the Court should decline to reach it. In any event, the argument lacks merit. Although the Court has concluded that Congress must affirmatively authorize tribes' exercise of criminal jurisdiction over nonmembers, it has declined to extend that framework to the civil context and observed that there are critical differences between criminal and civil jurisdiction. Petitioners' historical analysis does not demonstrate that the Court has erred in that regard.

Consistent with the Court's jurisprudence, Congress has continued to "recognize[] tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(6). The Court should not effectuate the fundamental transformation of civil jurisdiction that petitioners seek when Congress has continued to endorse tribal courts' ability to resolve disputes arising on reservations, including those involving non-Indians.

D. Petitioners suggest, based on a cursory and selective literature review, that tribal courts are incompetent and biased against nonmembers. But, partly because of federal support, many tribal courts are effectively administering justice. Petitioners' concerns are more appropriately addressed by Congress and are particularly unpersuasive in the context of this case, which involves a well-developed tribal court and a widely recognized tort claim. Even without congressional action, nonmembers have other means to avoid unfair treatment.

ARGUMENT

THE TRIBAL COURT HAS JURISDICTION OVER THE CLAIMS AGAINST PETITIONERS, WHICH ARISE OUT OF THEIR CONDUCT ON TRIBAL LAND IN CONNECTION WITH THEIR CONSENSUAL RELATIONSHIP WITH THE TRIBE

At the certiorari stage, petitioners presented this case as an opportunity to answer the question they believed the Court wished to decide in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008): "whether tribal courts may adjudicate tort claims against nonmembers pursuant to their authority under the first *Montana* exception." Cert. Reply Br. 1; see Pet. 12-13; Pet. Supp. Br. 1. The Court should not adopt petitioners' categorical restriction on tribal-court jurisdiction over tort claims, which petitioners now relegate to secondary status (Br. 47-58). It should instead affirm that the tribal court has jurisdiction over assault claims arising from the consensual relationship between petitioners and the Tribe, as reflected in three separate agreements associated with operating a store and supervising a tribal-member intern on the Tribe's own land.

Petitioners' new lead argument (Br. 20-47) is even more sweeping and groundless: that tribal courts lack jurisdiction over virtually all civil claims against nonmembers, except where expressly authorized by Congress. The Court has rejected prior attempts to extend such a rule from the criminal to the civil context. If the Court addresses that argument, it should again refuse to effect such a sea-change in its jurisprudence —jurisprudence on which Congress has long relied in supporting tribal courts as "the most appropriate forums for the adjudication of disputes affecting personal

and property rights on Native lands," 25 U.S.C. 3651(6).

A. Under *Montana*, A Tribal Court May Exercise Jurisdiction Over A Claim Against A Nonmember Arising Out Of Its Operation, Pursuant To Agreements With The Tribe, Of A Store On The Tribe's Own Land

Although petitioners repeatedly assert (*e.g.*, Br. 2, 20, 23, 37, 58) that Indian tribes now possess only those aspects of sovereignty that Congress has expressly granted, the Court recently reaffirmed the error of that view. Tribes are, of course, subject to Congress's "plenary control," but, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Thus, the Court has repeatedly recognized that tribes "retain considerable control over nonmember conduct on tribal land." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997). By contrast, tribes generally "lack civil authority over the conduct of nonmembers on non-Indian land within a reservation," but that rule is "subject to two exceptions." *Id.* at 446. Those two exceptions were articulated in *Montana* v. *United States*, 450 U.S. 544 (1981). The first exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. Moreover, "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate*, 520 U.S. at 453 (brackets and internal quotation marks omitted).

Applying those principles, the court of appeals correctly concluded that the tribal court has jurisdiction to hear the claims against petitioners because the allegedly tortious conduct occurred on tribal trust land and arose from a consensual relationship that satisfies *Montana*'s first exception.

1. Tribal-court jurisdiction in this case is appropriate under* Montana*'s consensual-relationship exception

a. Petitioners do not dispute that they had a consensual relationship with the Tribe. Nor can they dispute that the relationship developed in the "private commercial" context most closely associated with *Montana*'s first exception. *Nevada* v. *Hicks*, 533 U.S. 353, 372 (2001). The relationship was reflected in the lease for the store's premises, which specifically provided that Dolgencorp was required to comply with current and future federal and tribal law; it was reflected in the business license that Dolgencorp obtained from the Tribe to operate the store; and it was reflected in the agreement to participate in the Tribe's Youth Opportunity Program, which placed a 13-year-old tribal member under the supervision of the store manager. Pet. App. 2-3, 5, 45-46, 86; see pp. 2-3, *supra*.

Petitioners suggest that the consensual-relationship exception is "[n]arrow" and entails a stringent test for specific consent, akin to that needed to waive a federal statutory right to a judicial forum. Pet. Br. 44-45, 48-49. But that proposition is not supported by *Montana*'s focus on the existence of a relationship that is consensual in nature, rather than specific consent to the regulation in question. In any event, petitioners acknowledge that, even under their theory, consent may be express or "implicit[]," and it may be reflected either in documents or in "conduct." *Id.* at 48, 50; see

Plains Commerce Bank, 554 U.S. at 337 (noting a nonmember may consent "either expressly or by his actions"); *Hicks*, 533 U.S. at 372 (parties' dealings may "expressly or impliedly confer tribal regulatory jurisdiction over nonmembers").

Here, petitioners plainly consented to the Tribe's regulatory and adjudicatory jurisdiction. As a condition of leasing the premises from the Tribe, Dolgencorp acknowledged that it would "comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." J.A. 45 (Provision XXVIII). The Choctaw Tribal Code—one of the tribal laws with which Dolgencorp agreed to comply—provides that the Tribe's courts may exercise jurisdiction "in civil cases" over claims arising from the conduct of non-Indians within the Choctaw Indian Reservation where the defendant has "significant minimum contacts on or with the Reservation," unless the dispute involves or affects only non-Indian parties. Choctaw Tribal Code §§ 1-2-1 and 1-2-2 (2013). It further provides that the Tribe's courts have civil jurisdiction over any persons who commit tortious acts within the Choctaw Indian Reservation and over "any civil cause of action" that "aris[es]" from "business or activity" "conduct[ed] within the Choctaw Indian reservation." *Id.* § 1-2-3(2)(c) and (g). Petitioners thus agreed that, if the store's premises were used for tortious activities involving a tribal member, any resulting civil claims could be brought in the tribal court.

b. Of course, the existence of a consensual relationship with a tribe will not support just any civil action. The tribal regulation must "have a nexus to the consen-

sual relationship itself." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001). Here, the court of appeals appropriately found an "obvious" connection between the Tribe's Youth Opportunity Program and the tort allegedly committed by the store supervisor against the intern who worked in the store pursuant to the program. Pet. App. 13. That conclusion required no leap from "[a] nonmember's consensual relationship in one area" to "tribal civil authority in another" area. *Atkinson Trading*, 532 U.S. at 656. The victim was not a "stranger[]" to the relationship (*ibid.* (citation omitted)) but the intended beneficiary of the store's consensual participation in the Tribe's program.

c. Finally, the consensual-relationship exception "permit[s] tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332. That requirement is satisfied here for two independent reasons. First, the conduct occurred on tribal land. It therefore directly implicated the Tribe's sovereign power to "manag[e]" and "superintend" tribal land and thus to "set conditions on entry" to its land. *Id.* at 334, 336, 337. Cf. J.A. 49 (lease Provision XXIX, reflecting that premises could not be used "for any unlawful conduct or purpose"). Petitioners assert (Br. 57) that those powers involve only such matters as "the sale of tribal land, the extraction of reservation resources, or the zoning of property." But *Plains Commerce Bank* also referred to "licensing requirements and hunting regulations." 554 U.S. at 335. A tribe surely has as much sovereign interest in protecting its members from physical assaults as it does in protecting its wild game from unlicensed hunting.

Second, *Plains Commerce Bank* explained that the consensual-relationship exception was designed to capture "regulation of non-Indian activities on the reservation that ha[ve] a discernible effect on the tribe or its members," including, for instance, "a contract dispute arising from the sale of merchandise * * * to an Indian on the reservation." 554 U.S. at 332. Again, a physical assault has as discernible an effect on a tribal member as a contract dispute. Moreover, *Plains Commerce Bank* also identified "a business enterprise employing tribal members" as a kind of "activit[y] on non-Indian fee land" that "[t]he logic of *Montana*" would allow a tribe to regulate. *Id.* at 334-335.

The Court's analysis squarely applies here: An alleged assault on tribal land against a tribal member arising out of a consensual commercial relationship with the Tribe and its member falls within the Tribe's regulatory power under *Montana*'s consensual-relationship exception.

2. Tribal-court jurisdiction is also consistent with* Montana *because the conduct at issue occurred on the Tribe's own land

Except to the extent that petitioners now seek a categorical carve-out for all tort claims or even all civil claims, the courts below and the parties have generally assumed that any tribal-court jurisdiction over petitioners, as nonmembers, must satisfy one of the *Montana* exceptions. Pet. App. 9-10, 42-43. Yet, as the United States explained in its petition-stage response to the Court's invitation (at 9-12), jurisdiction could also be based on *Montana*'s "read[y] agree[ment]" that a tribe may regulate nonmembers' activities on its own land, 450 U.S. at 557, at least where petitioners were not merely transient visitors but the operators of an

established business on the Tribe's land. This argument was not pressed or passed upon as a distinct ground below, and need not be resolved as such by the Court. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992). But the Court could clarify the ambit of *Montana*'s general rule and its exceptions by considering this further argument for affirmance, see *United States* v. *Tinklenberg*, 131 S. Ct. 2007, 2017 (2011); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994), or at least by underscoring the great weight that the tribal-land situs must play in the analysis.[2]

This Court in *Montana* "readily agree[d]" that the tribe had jurisdiction over tribal land (whether owned by the tribe or held by the United States in trust for the tribe), and the rest of the Court's discussion—including the general rule limiting tribal authority over nonmembers' activities and its two exceptions—applied only to the "remain[ing]" dispute about activities on "land owned in fee by nonmembers of the [t]ribe." 450

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[2] Unlike petitioners' proposed proscription on virtually all jurisdiction over civil claims (see p. 25, *infra*)—which would be an alternative basis for *reversal*—this argument was clearly preserved at the certiorari stage (see Br. in Opp. 7 n.12) and has occasioned disagreement in the courts of appeals. See *Water Wheel Camp Recreational Area* v. *LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (holding that "tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*," where nonmembers' activity "occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play"). But see *Attorney's Process & Investigation Servs., Inc.* v. *Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) (applying *Montana*-exception analysis to "both Indian and non-Indian land"), cert. denied, 562 U.S. 1179 (2011); *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1069-1070 (10th Cir. 2007) (same), cert. denied, 552 U.S. 1181 (2008).

U.S. at 557. One year after *Montana*, the Court confirmed that, even if a tribe's authority to tax non-Indian extraction of oil and gas on tribal trust property were based only on its "power to exclude nonmembers from tribal lands," that would include the power to place new conditions "on reservation conduct." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144-145 (1982). Because that power "derives from sovereignty itself," it can be exercised without securing "consent" from the non-Indians on tribal land. *Id.* at 147.

In *Strate*, the Court again described *Montana*'s "main rule and exceptions" as "[r]egarding activity on non-Indian fee land." 520 U.S. at 453. The dispute in *Strate* was "govern[ed]" by *Montana* only because the state highway at issue (the location of an accident giving rise to tort claims) was "equivalent, for nonmember governance purposes," to "land alienated to non-Indians." *Id.* at 454, 456. Similarly, in *Atkinson Trading*, the Court applied what it described as "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land." 532 U.S. at 654.

One month after *Atkinson Trading*, however, the Court's decision in *Hicks* stated that *Montana* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land." 533 U.S. at 360. But the Court still acknowledged that a tribe's ownership and control of the land on which the activities in question occur is a "significant," and may sometimes be a "dispositive," factor. *Id.* at 370-371. Such ownership was not sufficient to establish tribal jurisdiction in the narrow context of that case, which involved the activities of state law-enforcement officers executing search warrants relating to off-reservation violations of state law. *Ibid.*; see *id.* at 358 n.2 ("Our holding in this case

is limited to the question of tribal-court jurisdiction over state officers enforcing state law.").

Most recently, *Plains Commerce Bank* described *Montana*'s rule in terms similar to those used in *Hicks*. 554 U.S. at 328, 330. But it also reiterated that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation" and that a tribe loses "*plenary* jurisdiction" over tribal land if it is "converted into fee simple." *Id.* at 327, 328 (emphasis added); *id.* at 327 ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe.") (quoting *Hicks*, 533 U.S. at 392 (O'Connor, J., concurring in part and concurring in the judgment)). Thus, in addition to "interests in protecting internal relations and self-government," tribes retain "inherent sovereign authority to set conditions on entry" and otherwise "superintend tribal land," *id.* at 336, 337—the same powers that supported the tax in *Merrion* irrespective of consent.

Accordingly, tribal-court jurisdiction in this case could be predicated on a conclusion that *Montana*'s general rule limiting tribal regulatory authority over nonmembers does not apply to claims such as those at issue here, which are brought against private defendants and arise out of an ongoing business on tribal trust land pursuant to a lease and license from the Tribe.

B. The Court Should Not Categorically Remove Tort Claims From The Jurisdiction That Tribal Courts Otherwise Possess Under *Montana*

Petitioners contend (Br. 47-58) that, even where a tribe would otherwise have civil regulatory jurisdiction over a nonmember under *Montana*, that regulation cannot take the form of uncodified tort law.

1. The Court has previously endorsed tribal-court jurisdiction over tort claims

Petitioners' proposed categorical exclusion of tort claims cannot be reconciled with express statements in some of this Court's cases, and accepting its premise would have radically altered the analysis in others. In *Hicks* itself, the Court recognized (in discussing *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 482 n.4 (1999)) that "there was little doubt that the tribal court had jurisdiction over [Navajo-law] tort claims" arising from nonmembers' uranium mining and processing on tribal lands, until that jurisdiction was affirmatively withdrawn by Congress. 533 U.S. at 368. In other words, petitioners get it exactly backward: Congress did not need to confer tort-claim jurisdiction on the Navajo court.

Similarly, the Court's seminal decision concerning exhaustion of tribal-court remedies considered a personal-injury claim arising from a motorcycle accident—indeed one that occurred on non-Indian land. *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 847 (1985). The Court specifically rejected the argument that the tribal court's "civil subject-matter jurisdiction over non-Indians in a case of this kind" should be "automatically foreclosed." *Id.* at 855. Subsequently, both *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), and *Strate* also involved tort claims, and in neither did the Court suggest anything like the categorical bar petitioners now urge.

Neither have other courts considering tort claims. The courts of appeals have consistently rejected, either expressly or implicitly, the premise that tort claims against nonmembers are inherently unsuited for tribal-

court jurisdiction.[3] District, state, and tribal courts also have often found that, when jurisdiction over the parties is otherwise warranted, it is not defeated by the presence of tort claims against nonmembers.[4]

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[3] See *Attorney's Process & Investigation Servs.*, 609 F.3d at 938 (concluding that, if tribe has "power under *Montana* to regulate" conduct, it makes no "difference whether it does so through precisely tailored regulations or through tort claims"); see also *DISH Network Serv. L.L.C.* v. *Laducer*, 725 F.3d 877, 885 (8th Cir. 2013) (requiring tribal-court exhaustion of jurisdictional question because "[i]t is not 'plain' that a tribal court lacks authority to exercise jurisdiction over tort claims closely related to contractual relationships between Indians and non[-]Indians on matters occurring on tribal lands"); *Elliott* v. *White Mountain Apache Tribal Ct.*, 566 F.3d 842, 845 & n.2, 849-850 (9th Cir.) (finding tribal-court jurisdiction over common-law negligence and trespass claims against nonmember to be sufficiently "plausible" to require exhaustion in tribal court), cert. denied, 558 U.S. 1024 (2009); *MacArthur*, 497 F.3d at 1062, 1071-1074 (finding no tribal-court jurisdiction over tribal members' claims, including several common-law tort claims, against their employer because the alleged consensual relationship was with a state agency, not a private party); *McDonald* v. *Means*, 309 F.3d 530, 538-540 (9th Cir. 2002) (holding, without considering *Montana* exceptions, that tribal court had jurisdiction over tort claims against nonmembers arising from accident on tribal land).

[4] See, *e.g.*, *State Farm Ins. Cos.* v. *Turtle Mountain Fleet Farm LLC*, No. 12-CV-94, 2014 WL 1883633, at *11 (D.N.D. May 12, 2014) (holding tribal court had jurisdiction over bad-faith claim against nonmember, whether characterized as contract or tort claim); *Diepenbrock* v. *Merkel*, 97 P.3d 1063, 1064, 1067-1068 (Kan. Ct. App. 2004) (holding tribal court had jurisdiction over wrongful-death and negligence claims against nonmembers for acts in casino on land owned by tribe); *Doe BF* v. *Diocese of Gallup*, 10 Am. Tribal Law 72, 78-80 (Navajo 2011) (holding tribal-court jurisdiction over personal-injury claims against nonmembers arising from sexual assault would depend on location of conduct and application of *Montana*); *Marathon Oil Co.* v. *Johnston*, No. AP-04-003,

2. Withdrawing tort jurisdiction would threaten tribes' legitimate sovereign interests

Under *Montana*, a tribe "may *regulate*, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 565 (emphases added). Common-law tort remedies are a well-established means of regulation, see *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008), and there is no good reason to strip that means of regulation from tribes—especially here, where there is no surprise in the prospect that an employer doing business under a tribal lease on tribal land may be liable for its supervisor's sexual assaults on an intern in the workplace.

a. Petitioners note (Br. 50, 55) that the cases cited in *Montana* involved tax or contract disputes. In their view, "tort law is fundamentally different" because it is harder for nonmembers "to discern." Pet. Br. 52, 53. But that is a red herring. A contract dispute, like one about a statutory or regulatory scheme, may well involve uncertainty about the precise content of the underlying legal obligations. Indeed, that is often why there is a *dispute* requiring judicial resolution, often after briefing in which the parties express differing views about the law (as well as the facts). Indeed, basic principles of tort law—like the wrongfulness of sexually assaulting a minor or the need to exercise reasonable care to protect others from being injured by one's agents—may be more readily knowable than even the most detailed written prescriptions. Cf. *Nautilus, Inc.*

2006 WL 6926419, at *1, *3 (Shoshone & Arapaho Tribal App. Ct. Apr. 6, 2006) (holding tribal court had jurisdiction over negligence claims against nonmember arising from its operation of oil well leased from tribe).

v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2128 (2014) (noting "the inherent limitations of language"). Here, in particular, there is no suggestion that proving a breach of duty to refrain from sexual molestation would require resort to "unique customs, languages, and usages" of the Tribe, Pet. Br. 53 (quoting *Duro* v. *Reina*, 495 U.S. 676, 693 (1990)).

b. Petitioners further contend (Br. 55) that tort law is so "pervasive" that it would allow tribes to regulate "nearly everything a nonmember does on a reservation." But, as discussed above, regulation under the first *Montana* exception must "have a nexus to the consensual relationship." *Atkinson Trading*, 532 U.S. at 656. Where the allegedly tortious conduct arises out of the circumstances created by the nonmembers' agreements to operate a store on the Tribe's land and employ a young tribal member, the Tribe is not "imposing tort regulation on nearly everything a company does on [the] reservation." Pet. Br. 56. Nor is the power to proscribe workplace assaults any more sweeping than the ability to prescribe other conditions of employment for tribal members employed by a non-Indian corporation.

c. Finally, petitioners contend (Br. 56) that tort law differs from other forms of law because it is not related to tribes' "sovereign interests [in] managing tribal land, protecting tribal self-government, and controlling internal relations." Pet. Br. 56 (quoting *Plains Commerce Bank*, 554 U.S. at 335). As explained above, however, protecting tribal members from assault, especially on the tribe's own land, does implicate the sovereign interests discussed in *Plains Commerce Bank*. See pp. 14-15, *supra*.

That conclusion is supported by *Williams* v. *Lee*, 358 U.S. 217 (1959), the contract-law case cited in *Montana*'s description of the consensual-relationship exception, 450 U.S. at 565. In *Williams*, the Court held that a non-member who operated a store on the Navajo Reservation could not bring an action in state court against a tribal member to collect for goods purchased on credit. 358 U.S. at 217-218, 223. The Court explained that state-court, rather than tribal-court, jurisdiction over such a transaction "would infringe on the right of the Indians to govern themselves." *Id.* at 223; see *Kennerly* v. *District Ct.*, 400 U.S. 423 (1971) (per curiam) (finding tribal-court had exclusive jurisdiction over action filed against Indian by non-Indian owner of store on non-Indian fee land within Blackfeet Indian Reservation).[5]

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[5] Petitioners suggest (Br. 51 n.34) that *Williams* differs because the nonmember was the plaintiff, and, in their view, the nonmember may expressly consent to tribal-court jurisdiction. But the point of *Williams* for present purposes was that the dispute arising from the transaction was within "the authority of Indian governments over their Reservations." 358 U.S. at 223.

Petitioners also attempt (Br. 51 n.34) to distinguish *Williams* on the ground that the Navajo tribal court was a Court of Indian Offenses. Such courts are established by the Department of the Interior, see 25 C.F.R. Pt. 11, but *Williams* might still have viewed the tribal court as being tribal in the relevant sense, rather than federal. See *Wheeler*, 435 U.S. at 327 n.26 (declining to decide, for double-jeopardy purposes, whether such courts are arms of the federal government or derive from tribes' inherent sovereignty); *Secretary's Power to Regulate Conduct of Indians*, 1 Op. Solicitor of the Dep't of the Interior Relating to Indian Affairs 531, 536 (Feb. 28, 1935) ("[Courts of Indian offenses] are manifestations of the inherent power of the tribes to govern their own members."). Moreover, the Blackfeet tribal court in *Kennerly* was *not* a Court of Indian Offenses.

The same would be true if, as petitioners suggest (Br. 43), the governing tribal law could be applied to nonmembers only by federal or state courts. Depriving tribes of the quintessentially American form of articulating and applying their tort law in a common-law manner—even in circumstances that involve activities on tribal trust land and nonmembers' consensual relationships with the tribe—would directly "infringe[] upon tribal lawmaking authority" by sidelining the very entities, tribal courts, that "are best qualified to interpret and apply tribal law." *Iowa Mutual*, 480 U.S. at 16. That would invade another sovereign interest by "threaten[ing] tribal self-rule." *Plains Commerce Bank*, 554 U.S. at 335.

The Court should not accept petitioners' invitation to effect such sweeping changes in the law by categorically withdrawing tribal courts' jurisdiction over tort claims.

C. The Court Should Not Abandon Its Settled Distinction Between Tribes' Criminal And Civil Jurisdiction

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes were long ago deprived of their power to exercise criminal jurisdiction over non-Indians who commit crimes on the reservation. In 1990, it extended that reasoning to criminal jurisdiction over Indians who are members of other tribes. See *Duro*, *supra*. Petitioners now ask (Br. 23-47) the Court to extend that reasoning from the criminal to the civil context and find that any civil adjudicatory jurisdiction over nonmembers must be newly recognized by Congress (or by the nonmember's express and specific consent). The Court should not declare that more than three decades of its jurisprudence about tribal jurisdiction has largely been for

naught—especially when that jurisprudence has provided the backdrop for Congress's continuing efforts to strengthen tribal courts' ability to adjudicate civil disputes arising on reservations.

1. Petitioners' alternative basis for reversal was neither pressed nor passed upon in the courts below

Unlike their tort-claim argument, which was at least briefly addressed by the court of appeals (see Pet. App. 10-11 & n.3), petitioners' broadside against virtually all civil jurisdiction was neither pressed nor passed upon below. In the court of appeals, petitioners relied on *Oliphant* only when arguing that tribal courts have no jurisdiction over *punitive-damages* claims against nonmembers, without contending that its reasoning precludes all civil claims against nonmembers for compensatory damages or other relief. Pet. C.A. Br. 37-38. Presumably for that reason, the court of appeals addressed *Oliphant* solely in the context of punitive damages. Pet. App. 20-21. That should dissuade the Court from addressing petitioners' civil-jurisdiction question. *Williams*, 504 U.S. at 41-42.[6]

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[6] The broader question about civil jurisdiction could technically be seen as included within the question presented, which referred broadly to the existence of "civil tort claims against nonmembers," Pet. i. But all three of petitioners' briefs at the certiorari stage described the case as presenting the question about tort claims. See Pet. 12 ("This case presents the Court a chance to * * * defin[e] the scope of tribal authority to adjudicate tort claims against nonmembers."); Pet. 13, 14-15; Cert. Reply Br. 1, 3; Pet. Supp. Br. 1. While petitioners mentioned uncertainty about tribal jurisdiction over all civil claims, they did not suggest that the Court would undertake to answer that larger question as well. To the contrary, they said that the case would "begin to resolve" the larger question "by deciding whether tribal courts have jurisdiction over one of the most important and recurring classes of civil litigation." Pet. 13;

2. The Court has previously declined to extend its criminal-jurisdiction framework to the civil context, and nothing warrants a different result now

If it addresses petitioners' categorical argument against civil jurisdiction, the Court should reject it.

a. Since *Oliphant*, the Court has repeatedly reaffirmed that there are critical differences between tribal courts' civil and criminal jurisdiction. "The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction." *Duro*, 495 U.S. at 687-688 (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.)). Congress's actions in those two contexts have not been "comparable," *National Farmers Union*, 471 U.S. at 854, and "[t]he exercise of criminal jurisdiction * * * involves a far more direct intrusion on personal liberties," *Duro*, 495 U.S. at 688. The Court has therefore continued to "recognize broader retained tribal powers outside the criminal context," including tribal courts' power to "resolve civil disputes involving nonmembers, including non-Indians," *id.* at 687.

In particular, the Court has concluded that, precisely because "an extension of *Oliphant*" into the civil context is unwarranted, nonmember defendants in civil cases generally must exhaust their objections to tribal jurisdiction in tribal court. *National Farmers Union*, 471 U.S. at 855-857. Similarly, in *Iowa Mutual*, the Court stated that, because civil and criminal jurisdiction are not "similarly restricted," "[c]ivil jurisdiction over [non-Indians'] activities [on the tribally owned

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see Cert. Reply Br. 1 ("this case presents a subset of the broader question"); Pet. Supp. Br. 1 (answering the tort-claim question would "decide an important part" of the larger question).

reservation lands at issue there] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 15, 18; see, *e.g.*, *Strate*, 520 U.S. at 449 (noting "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings"); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (noting cases about tribal authority to "tax the activities or property of non-Indians * * * on Indian lands * * * differ sharply from *Oliphant*").

b. Indian tribes have inherent jurisdiction "over both their members and their territory." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (citation omitted); see *United States* v. *Lara*, 541 U.S. 193, 204 (2004). Petitioners' attempt to eliminate civil as well as criminal jurisdiction over nonmembers ignores the well-established territorial component of their retained sovereignty.

Although petitioners suggest (Br. 24) that their "examination of the treaties, legislation, and history" sheds new light on the purported extinguishment of civil jurisdiction in the nineteenth century, the Court has previously seen most of their material and been unmoved. Petitioners discuss several treaties. Br. 24-30. But *National Farmers Union* already recognized that treaties about the surrender of non-Indian criminal offenders "did not contain provision for tribal relinquishment of *civil* jurisdiction over non-Indians." 471 U.S. at 855 n.17 (quoting Cohen, *Handbook* at 253-254) (emphasis added). It further discussed the Attorney General opinions that petitioners invoke (Br. 27 & n.26), explaining that one "specifically noted the difference between civil and criminal jurisdiction." 471 U.S. at 853 n.15, 854-855; see 7 Op. Att'y Gen. 174, 179-181

(1855). The Court and the Attorney General emphasized that Congress had long provided for general federal *criminal* jurisdiction over offenses committed by non-Indians against Indians in Indian Country, but had never similarly provided for resolution in federal court of *civil* disputes between Indians and non-Indians. See *National Farmers Union*, 471 U.S. at 854; 7 Op. Att'y Gen. at 180 (noting, with respect to the Choctaws, that Congress had "tak[en] jurisdiction in criminal matters, and omitt[ed] to take jurisdiction in civil matters"); *id.* at 184 (neither treaty nor statute had reserved to the United States "civil jurisdiction" related to U.S. citizens).

c. Moreover, petitioners err in contending (Br. 33-35) that twentieth-century legislation indicates any understanding by Congress that tribes had previously been deprived of their civil jurisdiction over nonmembers. It is true that, in 1953, Public Law 280 provided a means for state courts to assume *civil* jurisdiction over reservation disputes (including those "between Indians" and those "to which Indians are parties"). See Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589; 28 U.S.C. 1360(a). But Congress exempted tribes with "adequate Indian forums for resolving private legal disputes," indicating that it was concerned about providing jurisdiction in an alternative forum, not withdrawing tribal civil jurisdiction. *Bryan* v. *Itasca County*, 426 U.S. 373, 383, 385-386 (1976).

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, expressly provides that no tribe may "deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. 1302(a)(8) (emphasis added); see also Pet. App.

81 n.4 (quoting identical provision in Tribe's constitution). That provision is not, as petitioners suggest (Br. 34-35), limited to criminal cases or tribal members. Thus, when the Court held (two months after *Oliphant*) that tribal courts, with one exception inapplicable here, have exclusive jurisdiction to enforce the rights guaranteed by ICRA, it observed that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal *and property* interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphases added); see *Iowa Mutual*, 480 U.S. at 19 (noting, in civil case, that ICRA "provides non-Indians with various protections against unfair treatment in the tribal courts").

d. Consistent with this Court's post-*Oliphant* and post-*Montana* jurisprudence, Congress has continued to act upon that understanding, declaring that "Congress and the federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(6) (enacted in 2000); see 25 U.S.C. 3601(6) (similar finding enacted in 1993).[7] Along with the recognition that "tribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), 3651(5), that understanding has formed the backdrop for Congress's

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[7] See also S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993) (noting that Section 3601(6) "emphasize[s] that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals"); H.R. Rep. No. 205, 103d Cong., 1st Sess. 8 (1993) ("Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands," and "non-Indians may be sued in tribal court.").

multiple efforts to strengthen tribal courts rather than simply shunt their cases into other forums.[8]

In practice, there is no doubt that tribal courts are exercising jurisdiction over nonmembers in civil cases, though practices vary and we have not located comprehensive data about how many such cases there are. Many tribal courts handle civil matters, including cases against non-Indians, but some "refer all matters involving non-Indians to state courts."[9] In a 2002 survey, 160 tribes estimated that a total of 85,288 civil cases were filed in their tribal courts in the previous year and that, of those, 7017 (or 8.2%) had involved a non-Indian defendant.[10] Congress has not only left the *Montana* framework in place but also taken steps to confirm that civil jurisdiction over nonmembers is appropriate.[11]

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[8] See, *e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, 450a (providing funding and assistance for tribal government institutions, including courts); Indian Tribal Justice Act of 1993, 25 U.S.C. 3601 *et seq*. (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing up to $50 million annually to assist tribal courts); Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. 3651 *et seq*. (supplementing federal support for tribal courts); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 242, 124 Stat. 2292 (further enlarging scope of funding directive).

[9] American Indian Law Ctr., *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final Report* 14 (2000), https://www.tribalcourtsurvey.org/_files/Survey_of_Tribal_Justice_Systems_and_CIOs_2000.pdf (*Survey of Tribal Justice Systems*).

[10] Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *2002 Census of Tribal Justice Agencies in Indian Country: Data File*, Cols. b22 & b23 (2005) (counting tribes reporting both figures), www.bjs.gov/content/pub/sheets/ctjaic02dst.csv.

[11] In 2013, Congress overturned a contrary district-court decision by clarifying that tribal courts have "full civil jurisdiction to issue and enforce protection orders involving any person," including

This Court should not effectuate the fundamental transformation of civil jurisdiction that petitioners seek when Congress has not seen fit to do so.

D. Petitioners' Policy Concerns Can Be Addressed By Congress And Be Ameliorated By Other Mechanisms

1. Petitioners' refrain (*e.g.*, Br. 2, 20, 23, 37, 58) is that tribes possess only those powers given them by Congress. There is no doubt about Congress's "plenary control" over tribes, but petitioners get the baseline wrong: "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (quoting *Wheeler*, 435 U.S. at 323).

Contrary to petitioners' cursory and selective review of certain literature, many tribal courts, including the Mississippi Band of Choctaw Indians' Tribal Court, have developed into effective institutions for administering justice and are respected by federal, state, and local governments. Petitioners do not substantiate their abstract concerns about tribal courts, much less indicate that they would suffer any injustice on account of such concerns. They raise the specter of "political interference" (Br. 4-5), but that has been found to be widely exaggerated.[12] They complain that tribal judges often lack legal training, without acknowledging that the Tribe's civil-court judges must be law-school graduates admitted to practice law in Mississippi. Choctaw

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non-Indians. 18 U.S.C. 2265(e); see S. Rep. No. 265, 112th Cong., 2d Sess. 21, 27, 36, 43 (2012). As respondents note (Br. 41-42), it would have been particularly incongruous for Congress to have taken the trouble in 1991 to overturn *Duro*'s restriction on criminal jurisdiction over Indians who are members of different tribes but not confer civil jurisdiction over such nonmembers, unless Congress understood that such civil jurisdiction already existed.

[12] *Survey of Tribal Justice Systems* vii.

Tribal Code § 1-3-3(2).[13] They complain that substance and procedure in tribal court may be foreign to them, even though this case involves allegations of conduct that would be tortious under the law of any jurisdiction, and, as is often the case, the tribal court's rules are modeled on the Federal Rules of Civil Procedure. *Id.* Tit. VI, Ch. 1.[14] In short, petitioners put forth exactly the kind of generic allegations of "local bias and incompetence" that this Court has previously rejected as the basis for "attacks on tribal court jurisdiction." *Iowa Mutual*, 480 U.S. at 18-19.

The Court should not impose novel and wholesale restrictions on tribal-court tort or civil suits on the basis of abstract and speculative assertions in briefs about what might happen in other cases. As petitioners acknowledge (Br. 41), Congress can gather information about tribal courts and devise tailored solutions to any actual problems it finds. It is the proper forum for redressing the concerns that petitioners have about the

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[13] In cherry-picking unfavorable factoids about tribal courts, petitioners oddly rely (Br. 4 n.6) on a report that more than 40% of the magistrates in Alaska's *state* courts "are *not* law trained."

[14] See generally Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 734-735 (2006) (discussing tribal-court use of Anglo-American legal constructs and state and federal common law, and concluding that there is little evidence that tribal courts are unfair to nonmembers); *id.* at 739 (noting tribal law "tends to mirror American laws" because tribes "must be able to function in the American political system in a seamless manner"); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable "to those in state courts" even when tribal codes do not).

potential consequences of choosing to do business on tribal lands.

2. Even in the absence of congressional action, potential nonmember defendants are not without recourse. If a tribal court fails to accord due process to a nonmember defendant in any individual tort case, that failure will likely prevent the plaintiff from having the tribal court's judgment recognized and enforced in a state or federal court. See, *e.g.*, *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001) (holding that tribal court's judgment was not entitled to recognition because its proceedings violated due process); Resp. Br. 53-54. Moreover, nonmembers entering into consensual commercial relationships with tribes may negotiate appropriate choice-of-law or forum-selection clauses. See p. 2, *supra* (quoting provisions in Dolgencorp's lease); see also *Plains Commerce Bank*, 554 U.S. at 346 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that bank could have used "forum selection, choice-of-law, or arbitration clauses" to "avoid responding in tribal court or the application of tribal law"); *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 806-807, 815 (7th Cir.) (finding no need to exhaust jurisdictional question in tribal court where contract with tribe-owned corporation provided that it would be construed in light of state law and that venue would lie in state and federal courts), cert. denied, 510 U.S. 1019 (1993).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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