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.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.,* 554 U.S. 316 (2008) change the rules established by *U.S. v. Montana,* 450 U.S. 544 (1981) and thus deprive the Mississippi Band of Choctaw Indians ("Tribe") of jurisdiction to regulate working conditions (for non-Indian employers and tribal member employees) on its reservation (trust) lands and deprive its courts of jurisdiction to adjudicate a suit involving a tort claim grounded in an on-reservation agreement ("consensual relationship") between Petitioners (non-Indians) and the Tribe and a tribal member student intern who claims he was sexually assaulted by Petitioners' store manager during working hours at Petitioners' store located on the Tribe's reservation lands?

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INTRODUCTION

Although this Court granted *certiorari* in *Plains Commerce, supra* on the same question on which Petitioners now seek review (Pet., p.14), the Court decided not to rule on that question. After *Plains Commerce,* the Court again declined an invitation to rule on the question whether tribal courts could under *Montana* exercise civil jurisdiction over tort claims against non-Indians based on their on-reservation conduct. A*ttorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,* 609 F.3d 927 (8th Cir. 2010), *cert. denied,* 131 S.Ct. 1003 (2011). This Court should likewise decline Petitioners' current invitation to review these questions.

The Petition does not present any issue under *Montana* respecting (a) the scope of tribal civil jurisdiction over non-Indian activity on non-Indian owned fee lands within reservation boundaries; (b) tribal court jurisdiction to adjudicate contract claims against non-Indians under *Montana's* consensual relationship exception; or, (c) application of *Montana's* second exception. Nor do Petitioners assert that actual bias or due process violations have occurred in the tribal court proceedings in this case. (Pet.App., p.6).

The lower courts upheld the Choctaw court's jurisdiction under *Montana's* consensual relationship exception and satisfaction of the nexus test established by this Court in *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 656 (2001). (Pet.App., pp.1, 38, 75). These rulings were grounded in Petitioners' agreement to

participate in a tribal job training program at its on-reservation store, breach of obligations Petitioners undertook as part of that participation (including provision of appropriate supervision of the Choctaw student interns in a safe work place) the clear nexus between that agreement and the state law tort claims pled; and, the determination that the Tribe had jurisdiction to regulate work place conditions and claims derivative thereof involving tribal members working on its reservation lands. (Pet.App., pp.1-21).

I. Factual Background

Respondent Doe is a minor child and a member of the Mississippi Band of Choctaw Indians, a federally-recognized Indian Tribe (the "Tribe").[1]

Petitioners own and operate a Dollar General store on the Tribe's reservation (trust) land pursuant to a long-term lease with the Tribe which began in 2000 and continues in force today.[2]

The Tribe has a court system consisting of various trial level courts and the Choctaw Supreme Court.[3] Respondent Christopher Collins is an attorney licensed

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[1] Pet., p.5; Pet.App., pp.14, n.4, 40.

[2] Vol. 1, USCA5, pp.53, 67-70.

[3] *See,* Vol. 8, Jackson Miller, Encyclopedia of Mississippi Law, Mississippi Practice Series, Tribal Courts, §72.6 (hereinafter, "Jackson Miller"), page 380; *see, Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773, 781 and n.6 (S.D.Miss. 2001) (rejecting argument that Choctaw Tribal Court is biased forum; noting that the Tribe's judges are subject to a judicial code of ethics).

to practice law in the State of Mississippi and in the Choctaw courts who serves as a civil judge in the Tribe's court system, subject to a judicial code of ethics.[4] The Tribe has a written code of laws[5] which borrows from Mississippi law for certain civil matters.[6]

Petitioners are not strangers to the Tribe's laws or the Tribe's court system. Petitioners' lease with the Tribe provides:[7]

> XXVII. GOVERNING LAW. This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi (pursuant to Section 1-1-4, Choctaw Tribal Code). Exclusive venue and jurisdiction shall be

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[4] §§1-3-1 – 1-3-4, Title I, Chapter 3, Choctaw Tribal Code; *see,* n.3.

[5] The entire Choctaw Tribal Code is available at http://www.choctaw.org/government/court/code.html.

[6] Section §1-1-4, C.T.C.:
Law Applicable in Civil Actions

> In all civil actions the Choctaw Court shall apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any 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.

[7] Vol. 1 USCA5, p.417 and n.6.

> in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents is subject to the Choctaw Tribal Tort Claims Act….

The Tribe operates a job training program for Choctaw students on the reservation known as the Youth Opportunity Program ("YOP"). Petitioners agreed to have the Dollar General store participate in that program in 2003 at the request of the Tribe,[8] and accepted several tribal member student interns to work there, including Respondent Doe.[9]

Alleging that he had been sexually assaulted by the Store Manager at the store during work hours, Doe acting by and through his parents (all tribal members) sued Petitioners in the tribal court on the basis of various state law tort theories borrowed as tribal law, including vicarious liability and/or negligence in hiring, training and supervising the store manager. *See,* cases cited at p.29, *infra*. The Doe Respondents sought compensatory and punitive damages.[10]

Petitioners assert as "fact" the YOP director's deposition answer[11] that her program "had no impact

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[8] Vol. 1 USCA5 p.1058. In the final summary judgment proceedings, Petitioners told the Court: "Dollar General has not argued at this juncture that it did not consent to participate in the YOP." (Emphasis added). Vol. 1, USCA5 p. 1001.

[9] Vol. 1 USCA5 pp.23, 927-931 (Exhibit 4).

[10] Vol. 1, USCA5, pp.23-26.

[11] The YOP director's deposition was not a deposition under Choctaw R.Civ.P. 30(b)(6). (Doc.52, case 4:08-cv-00022-TSL-LRA,

on either the Tribe's governance or internal relations." (Pet., p.5). That testimony does not establish that statement to be "true" or a "fact" for purposes of the *Montana* test, and the statement is not "true" in that sense Whether operation of the YOP program (or depriving the tribal court of jurisdiction to adjudicate tort claims arising from Petitioners' agreement with the Tribe and the Does to participate in the YOP) would harm the Tribe's right of self-governance or intrude on its internal relations under the *Montana* test, is not a factual issue as regards the consensual relationship exception, but an issue of law on which the lower courts properly gave an affirmative answer. *See,* Pet.App., pp.16-17; *see,* pp.21-24, *infra*.

II. Legal Background

A. The Scope Of Indian Tribes' Legislative Authority Over Non-Indians

This Court in *Montana, supra* at 557 affirmed the regulatory jurisdiction of Indian tribes over the hunting and fishing activity of non-Indians occurring on reservation lands owned by or held in trust for the Tribe:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe,…and with this holding we can readily agree. …What remains is the question of the power of the Tribe to regulate

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U.S. District Court, Southern District of Mississippi). Hence, the YOP director's testimony is not binding on the Tribe or its Courts.

> non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

In addressing the latter issue this Court established the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." (*Id.* at 565), subject to two exceptions:

> 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. A tribe may also retain inherent power to 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 and welfare of the tribe.

Montana, supra at 566

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001)—after first reiterating the *Montana* ruling affirming the Tribe's unquestioned sovereign authority over non-Indian activities on reservation (trust) lands, *Id.* at 650—held that to invoke *Montana's* first exception also requires that the exercise of tribal authority "have a nexus to the consensual relationship itself." *Id.* at 656.

This Court (and the Circuits) have continued to acknowledge that even if the *Montana* framework

applies to reservation (trust) lands,[12] the legal basis for tribal government regulatory authority over the activities of non-Indians is enhanced where, as here, those activities occur on the Tribe's own reservation lands rather than on non-Indian owned fee lands located within reservation boundaries. This is because in the reservation (trust) land circumstance tribal jurisdiction is bolstered by the tribe's inherent authority to exclude or condition entry of non-Indians onto their lands. *Plains Commerce, supra* at 328-331; *Atkinson, supra* at 650; *Nevada v. Hicks,* 533 U.S. 353, 359-360 (2001); *Strate v. A-1 Contractors, Inc.,* 520 U.S. 438, 454, n.9 (1997); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148-149 (1982); *Attorney's Process, supra* at 938-940 (reiterating that "tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner"

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[12] *Montana's* general rule as originally established applied only when a tribe sought to regulate or adjudicate non-Indian conduct occurring on non-Indian owned fee land. *Montana, supra* at 557, 566; *Strate v. A-1 Contractors,* 520 U.S. 438, 445-447, 454 (1997); *Atkinson, supra* at 646 and 653. Now, although there has never been a U.S. Supreme Court holding to that effect, *dicta* in *Nevada v. Hicks,* 533 U.S. 353, 373 (2001) (Souter, J. concurring) and in *Plains Commerce, supra* at 328-331 (2008) have given rise to the view that *Montana's* general rule now also applies to non-Indian conduct occurring on reservation trust land. The Choctaw Supreme Court has so ruled. (Pet.App., pp.82-83). However, as argued to the District Court, if the *Montana* rule and exceptions only apply to non-Indian owned fee lands within reservation boundaries and the Tribe's regulatory power to exclude and condition entry of non-Indians onto reservation (trust) lands is sufficient to sustain the exercise of tribal jurisdiction over claims against non-Indians arising from their activity on those lands, this provides an alternative ground supporting the Fifth Circuit's ruling; *see,* n.13, *infra.*

whether it does so via positive law or adjudication of civil tort claims); *accord, Water Wheel Camp Recreational Area, Inc., et al. v. Gary LaRance, et al.,* 642 F.3d 802, 808-816 (9th Cir. 2011).[13] (Tribal power to exclude non-Indians from tribal land includes the power to regulate them for conduct occurring there, except as otherwise limited by the Congress or the Supreme Court).

On-reservation employment relationships between non-Indian employers and tribal member employees involve the kind of non-Indian activity which is properly subject to tribal government regulatory jurisdiction. *Plains Commerce, supra* at 334-335 (referencing "a business enterprise employing tribal members" as an example of on-reservation non-Indian activities ("consensual relationships") that may be regulated by a tribe under *Montana* if the nexus test is met); *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311 (9th Cir. 1990); *MacArthur v. San Juan County,* 497 F.3d 1057, 1071 (10th Cir. 2007); *Salt River Project Agricultural Improvement and Power District v. Lee,* 2013 WL 321884 (D.Ariz.) (unpublished) (requirement that tribal court suit based on consensual relationship exception must "be justified by reference to the tribe's sovereign interest" is deemed satisfied where the suit involved dispute implicating tribal member employment on-reservation); *see, Walls v. North Mississippi Medical Center,* 568 So.2d 712 (Miss. 1990)

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[13] The Ninth Circuit also held in *Water Wheel* (after *Plains Commerce*) that where a suit involves non-Indian torts (there, trespass) on reservation trust land, the tribe's power to exclude (and set conditions on entry) will anchor tribal court jurisdiction independent of the *Montana* test. *Id.* at 816-819; *see,* n.12, *supra*.

(student nurse assigned to work at medical center under an unwritten student intern program constituted "a consensual relationship between the parties to the arrangement").

Petitioners told the Choctaw Supreme Court in Oral Argument that John Doe's relationship with their store was in the nature of an employment relationship (Vol. 1 USCA5 p.320). *See, infra* at pp.14-15.

B. The Scope of Indian Tribes' Adjudicatory Authority Over Non-Indians

In *Strate, supra* at 438, this Court ruled that a tribe's adjudicatory authority over non-Indians does not exceed its regulatory authority, and discussed the *Montana* rules as they apply to cases examining when non-Indian parties are required to exhaust tribal court remedies regarding claims arising from their on-reservation (or within reservation) activities under the tribal exhaustion rule established in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987). Under that rule, exhaustion of tribal remedies is not required unless a tribe has at least colorable jurisdiction under the *Montana* test. *Id.; e.g., Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002) (Choctaw Tribal Courts have colorable jurisdiction to adjudicate contract and tort claims filed by tribal members against lender respecting on-reservation transactions), *cert. denied*, 537 U.S. 818 (2002).

Although *National Farmers Union* and *Iowa Mutual* were tribal exhaustion cases, this Court in *Strate* reaffirmed that those rulings (when read together with

Montana) stand for the "the unremarkable proposition that where tribes possess authority to regulate the activities of non-members, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' 480 U.S., at 18, 107 S.Ct. at 977." *Strate, supra* at 452. In *Strate* the Court reaffirmed that "*Montana,* as we have explained, is the controlling decision for this case. To prevail here, petitioners must show that [the plaintiff's] tribal court action against non-members qualifies under one of *Montana's* two exceptions." *Id.* at 457.

Applying these rules, the Circuits (before *Plains Commerce*) routinely affirmed tribal court adjudicatory authority where one of the *Montana* exceptions and the *Atkinson* nexus test were satisfied and the non-Indian activity giving rise to the tribal court claim fell within the Tribe's regulatory jurisdiction. *E.g., TTEA v. Ysleta del Sur,* 181 F.3d 676, 685 (5th Cir. 1999) (upholding tribal court's jurisdiction to declare that a non-Indian company's contract with a tribe was void under federal law in a suit filed against the non-Indian party in tribal court); *Burrell v. Armijo,* 456 F.3d 1159, 1170 (10th Cir. 2006) (affirming tribal court jurisdiction to adjudicate lease termination dispute with non-Indian tenant); *FMC, supra* 1312-1315 (tribal court had jurisdiction to adjudicate dispute between tribe and non-Indian company regarding enforcement of tribal employment laws based on consensual relationship exception).

In *Plains Commerce* this Court reaffirmed that a tribe's adjudicatory jurisdiction does not exceed its regulatory jurisdiction. *Id.* at 330. Then, based on its ruling that Indian tribes have no jurisdiction to regulate a sale of non-Indian owned fee land to a non-

Indian buyer even if that land is located within the tribe's reservation boundaries, the Court held (applying the rule that a tribe's adjudicatory jurisdiction does not exceed its regulatory jurisdiction) that the tribal court did not have jurisdiction to adjudicate tort claims arising from that non-Indian activity. *Id.* at 340. The Court in *Plains Commerce* did not address whether a tribal court could adjudicate tort claims against non-Indians arising on tribal (trust) reservation land where the consensual relationship, nexus and regulatory jurisdiction requirements are met.[14]

There is unanimity among the Circuits which have addressed the issue that this Court's ruling in *Plains Commerce* did not change anything about the consensual relationship exception or the nexus test. Pet.App., pp.15-18; *Evans v. Shoshone-Bannock Land Use Policy Commission,* 736 F.3d 1298, 1303 (9th Cir. 2013) (citing *Plains Commerce* and applying *Montana's* consensual relationship exception without change); *accord, Grand Canyon Skywalk Development, LLC v. 'SA' NYU WA Incorporated,* 715 F.3d 1196, 1205-1206 (9th Cir. 2013); *Water Wheel, supra* at 810-820 and n.6 (affirming tribal court jurisdiction over contract and tort claims under *Montana* exceptions as regards on-reservation lease and post-lease disputes between tribe

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[14] This Court did redefine the second *Montana* exception and significantly narrowed the circumstances in which it can be invoked to sustain the exercise of tribal jurisdiction, requiring proof that the exercise of tribal jurisdiction is necessary to address non-Indian conduct "which imperil(s) the subsistence of the tribal community." *Plains Commerce, supra* at 340-341. Respondents have not relied upon the second exception to support tribal jurisdiction in these proceedings.

and non-Indian parties, rejecting arguments that *Plains Commerce* changed the rules regarding the consensual relationship exception); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140 (10th Cir. 2011) (affirming district court's application of the consensual relationship test after *Plains Commerce*; ruling that the *Montana* test is satisfied by proof of a consensual relationship and "a sufficient 'nexus' between that relationship" and the subject tribal court claim, without any suggestion that any separate proof of special harm to the tribe's right of self-governance or internal affairs was required); *Attorney's Process, supra* at 936, 937-946 (8th Cir. 2010) (recognizing that *Plains Commerce* left intact the basic *Montana* framework and its two exceptions); *Phillip Morris USA, Inc. v. King Mountain Tobacco,* 509 F.3d 932, 937, 940-942 (9th Cir. 2009) ("*Montana, Strate,* and *Hicks*…are affirmed in important respects by the Court's most recent tribal jurisdiction decision in *Plains Commerce;*" expressly rejecting the argument that a special showing of significant harm to the tribe's political existence or internal relations is required to invoke the consensual relationship exception).

III. Procedural Backgrounds

A. Proceedings In The Tribal Court

The Does' Amended Choctaw Court Complaint pled *inter alia*:

> I.
>
> Your Plaintiff alleges and charges that as a thirteen year old minor on July 14, 2003, that he was employed with the Youth Opportunity Program and was assigned to the Dollar General

> Store at Choctaw Towne Center on the Pearl River Reservation located within the exterior boundaries of the Choctaw Indian Reservation. Further, this Honorable Court has jurisdiction of the parties and subject matter in that all occurrences giving rise to Plaintiff's cause of action occurred within the confines of the Choctaw Indian Reservation.
>
> II.
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> That the minor Plaintiff was assigned to Dollar General's store and that Dale Townsend was the immediate supervisor of the minor at Dollar General Store.
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> * * * *
>
> III.
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> That at all times complained of herein, the Defendant, Dale Townsend, an adult, was the manager in charge of the Dollar General Store at Choctaw Towne Center, and at all times acted as the agent, servant, and alter-ego of the Defendant, Dollar General Corporation, and that all acts complained of were intentional and amounted to gross negligence on the parts of Dale Townsend and Dollar General Corporation, jointly and severally.
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> * * * *
>
> VI.
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> Defendant, Dollar General Corporation, negligently hired, trained or supervised Defendant Townsend. (Emphasis added)

Paragraphs IV, V and VII of the Does' Choctaw Court Complaint then set out their factual allegation respecting the several sexual assaults he sustained at

the Dollar General store at the hands of Dale Townsend, and their aftermath.[15]

At no time during the Choctaw Tribal Court proceedings did Petitioners seek discovery or make any kind of factual attack on the Choctaw Court's jurisdiction.[16] Instead, they sought dismissal by motion under Choctaw Rule of Civil Procedure 12(b)(1), arguing only legal grounds in attacking the Tribal Courts' jurisdiction. In that context, all factual allegations of the Complaint (and reasonable inferences therefrom) were taken as true.[17] None of the Complaint's allegations were controverted.

Petitioners admitted in oral argument before the Choctaw Supreme Court that there existed an employment type relationship between the minor child and Petitioners which they expected to support a worker's compensation exclusive remedy defense which they planned to raise if their jurisdictional motion was denied:

> The Plaintiff filed a complaint in Choctaw Tribal Court alleging that he was assaulted at a Dollar General Store that is located on the Reservation. …Dollar General would not have any liability in this case, regardless, under the Plaintiff's

[15] Vol. 1 USCA5 pp.23-26.

[16] Vol. 1 USCA5 pp.19-180, 303-386.

[17] Vol. 1 USCA5 p.29.

> allegations due to worker's comp. exclusive remedy…[18] (Emphasis added).

After briefing and oral argument,[19] the Choctaw Supreme Court ruled (prior to the this Court's decision in *Plains Commerce*) that the Choctaw Courts could properly exercise jurisdiction over the Does' claims against Petitioners and its reservation store manager Dale Townsend under both exceptions to *Montana's* general rule.[20] The Court's ruling relied in part upon the consensual relationship evidenced by Petitioners' agreement with the Tribe (and the Does) to participate in the Tribe's YOP.[21]

B. Proceedings In The District Court

The District Court initially denied Petitioners' Motion for Temporary Restraining Order/Preliminary Injunctive Relief.[22] The Court, however, granted injunctive relief in favor of the store manager "as the

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[18] Vol. 1 USCA5 p.320.

[19] Vol. 1 USCA5 pp.42-187.

[20] Vol. 1 USCA5 pp.194-197, 199; The Choctaw Supreme Court (sensitive to the due process rights of Petitioners and the Does) has ruled that the Does' claims against Petitioners cannot proceed in the Tribal Court until an Exclusion Order barring Dale Townsend (the former store manager) from coming onto the reservation has been modified to permit his participation in the trial and discovery proceedings as a witness. That Order remains in force. Vol. 1 USCA5 pp.191-193, 199 and n.8; *see also,* pp.296, 303-311 and 562-563.

[21] Vol. 1 USCA5 p.195.

[22] Vol. 1 USCA5 p.635.

absence of tribal court jurisdiction over Dale Townsend is manifest."[23]—because he was not a party to a qualifying consensual relationship. Neither of those rulings was appealed.

Later, after permitting discovery bearing on "the particulars of the Tribe's and John Doe's relationship(s) with [Petitioners] as a result of John Doe's placement with [Petitioners] pursuant to the Tribal [YOP],"[24] the District Court ruled that Petitioners had agreed to participate in the Choctaw YOP program,[25] that the YOP agreement constituted a qualifying consensual relationship with the Tribe and with John Doe and his parents (all tribal members) under *Montana*;[26] and, that the Does' tort claims had a direct logical nexus to that consensual relationship.[27] The Court rejected

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[23] Vol. 1 USCA5 pp.635-636.

[24] Vol. 1 USCA5 pp.806-808. Respondents opposed this discovery order (Vol. 1 USCA5, pp.638-665, 767-905) and continue to believe that Petitioners should have been required to seek discovery on these issues in the Choctaw Courts based on *National Farmers Union. See, Water Wheel Camp, supra* at 817 and n.9 (9th Cir. 2011) (District Court erred in considering evidence "which was not before the tribal court" in ruling on *Montana* jurisdiction question as this violated the admonition of *National Farmers Union* at 856 that "[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.").

[25] Pet.App., p.45, n.1; *see,* n.8, *supra.*

[26] Pet.App., pp.45-46.

[27] Pet.App., p.46.

Petitioners' *Plains Commerce* arguments, granting summary judgment for Respondents and against Petitioners.[28]

C. Proceedings in the Court Of Appeals

The Fifth Circuit initially affirmed the District Court for the same reasons as set out above and as summarized in the Petition at pp.6-9. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 732 F.3d 409 (5th Cir. 2013). Petitioners sought rehearing *en banc* which was denied by a vote of 9 to 5. The panel then vacated its original opinion and issued a new opinion (with minor revisions) affirming the District Court on the same grounds. *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014) (Pet.App., pp.1-36). Judge Smith dissented. (Pet.App., pp.22-36); *see, infra* at pp.24-28.

REASONS FOR DENYING THE WRIT

I. There Is No Split In The Circuits

There is no split in the circuits as to any aspect of the Fifth Circuit's ruling. No federal circuit which has applied the consensual relationship exception and nexus test after *Plains Commerce* has ruled that *Plains Commerce* changed anything about that exception or the nexus test. (Pet.App., pp.16-17); *See,* pp.11-12, *supra.*

Further, every federal circuit which has considered the issue has ruled that tribal courts can exercise civil jurisdiction over tort claims satisfying these tests, so

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[28] Pet.App., pp.46-54.

long as the subject matter of the suit otherwise falls within a tribe's regulatory jurisdiction. Pet.App., p.11, n.3; *Attorney's Process, supra* at 938 ("If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here."); *Water Wheel, supra* at 810-820 and n.6 (affirming tribal court jurisdiction over contract and tort claims under *Montana* exceptions as regards on-reservation lease and post-lease disputes between tribe and non-Indian parties); *accord, Plains Commerce Bank v. Long Family Land and Cattle Company,* 491 F.3d 878, 887 (8th Cir.2007) ("Tort law is after all both a means of regulating conduct, *see e.g.,* W. Page Keeton, et al., Prosser and Keeton on Torts 25 (5th ed.1984) (Prosser), and an important aspect of tribal governance"), *reversed on other grounds, Plains Commerce, supra,* 554 U.S. 316; *see, Bank One, N.A. v. Shumake, supra* (requiring exhaustion of tribal remedies on contract and tort claims against non-Indian defendant arising from Bank's on-reservation consensual relationship because the tribal court had colorable jurisdiction over all of those claims); *see, Farmers Union Oil Company v. Guggolz,* 2008 WL 216321 (D.S.D.) (unpublished) (ruling that adjudicating a tort claim based on a premises liability theory was a kind of "other means" for exercising tribal jurisdiction where the tort claim had a logical nexus to underlying consensual relationships between the tribe and tribal members and an on-reservation convenience store operator).

These cases are directly in line with this Court's recognition in *El Paso Natural Gas Co. v. Neztsosie,*

526 U.S. 473, 482 (1999) that but for a federal statute which converted state (and tribal) law tort claims against uranium mining companies into federal claims and evidenced a clear intent of Congress (even for tort claims arising on-reservation) to have all such claims heard in the federal courts, "there was little doubt that the tribal court had jurisdiction over such tort claims." This point was reiterated in *Hicks, supra* at 369.

Likewise, all the federal circuits which have addressed the issue have ruled that employment relationships on the reservation between a non-Indian employer and tribal members are the kind of consensual relationship which can satisfy *Montana's* first exception and trigger tribal regulatory and adjudicatory jurisdiction—when the nexus test is also satisfied. *See,* pp.8-9, *supra.*

Given the absence of a split in the Circuits this case is not a proper vehicle for addressing the question presented. *McCray v. New York,* 461 U.S. 961, 963 (1983) (Stevens, J.).

II. This Case Is Still In An Interlocutory Stage And Is Not Suited For This Court's Review

This Court has ruled that suits challenging tribal court jurisdiction under *Montana* should be decided by the federal courts after exhaustion of tribal court remedies based on a full record as developed in the tribal courts. *National Farmers Union,* 471 U.S. at 856 ("The orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court…").

Since Petitioners mounted their jurisdictional challenge in the Choctaw Court solely via the

equivalent of a Rule 12(b)(1) *facial* attack on the tribal court's jurisdiction, the only facts which were before the Choctaw Trial Courts were those set out in the Plaintiff Does' Complaint—all of which had to be taken as true for purposes of Petitioner's Motion to Dismiss. *See, Miller v. Nationwide Life Ins. Co.,* 391 F.3d 698, 699-700 (5th Cir.2004) (on Rule 12(b)(1) motion asserting facial attack on jurisdiction factual allegations of complaint "are taken as true"). [29]

Unlike *Plains Commerce,* which came to this Court only after trial and post-trial proceedings in the tribal court—this case is still in an interlocutory stage and is not a suitable vehicle for assessing the reach of tribal court civil jurisdiction over tort claims as requested by Petitioners. *Hamilton-Brown Shoe Company v. Wolf Brothers and Company,* 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor and Aroostock R.R. Company,* 389 U.S. 327, 328 (1967).

III. The Fifth Circuit's Ruling Does Not Conflict With Any Ruling Of This Court And Does Not Expand Tribal Court Jurisdiction

(1) The Fifth Circuit's ruling does not conflict with any ruling of this Court. It is true (as noted at Pet., p.1) that this Court said in *Hicks, supra* at 358, n.2 that it "has never held that a tribal court had jurisdiction over a nonmember defendant." It is equally true that this Court has never held that a tribal court cannot lawfully

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[29] Although limited jurisdictional discovery was permitted in the U.S. District Court, none of the facts elicited in that discovery were ever put before the tribal courts. This violated this Court's rules requiring exhaustion of tribal remedies. *See,* n.24, *supra*.

exercise jurisdiction over civil claims filed by a tribe or its members arising from voluntary consensual relationships formed on (and imposing non-Indian obligations to be carried out on) a tribe's reservation trust lands falling within the Tribe's regulatory jurisdiction and satisfying *Montana's* first exception where the nexus test of *Atkinson* is also satisfied. The plain import of this Court's post-*Montana* cases is that the exercise of tribal jurisdiction in those circumstances is appropriate. *National Farmers Union; Iowa Mutual; South Dakota v. Bourland,* 508 U.S. 679 (1993)*; Neztsosie; Strate; Hicks; Atkinson.*

Plains Commerce did not change anything about these rules as regards the consensual relationship exception. *See,* authorities cited at pp.11-12, *supra.*[30] The same principles respecting the requirement for linkage between a given tribal court case and the Tribe's underlying right to self-government established

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[30] *See,* Krakoff, "Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges," 81 University of Colorado Law Review, 1187, 1223 (2010) ("Plains Commerce left Strate's doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the Montana exceptions"); "Note: Sorting out Civil Jurisdiction in Indian Country after Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation," 33 American Indian Law Rev. 385 (2008-2009) ("As it stands, Plains Commerce Bank represents no disagreement over the Strate-Montana doctrine. The two exceptions continue untouched. The five justice majority excluded the first Montana exception by finding that the case involved a sale of fee land between nonmembers. …Lower courts should apply the Strate-Montana doctrine as before, mindful that the Supreme Court of the United States has passed on a chance to overrule that doctrine.").

in *Montana* were simply reiterated in *Plains Commerce. Id.* at 332-335.

The Fifth Circuit correctly ruled that *Plains Commerce* imposed no evidentiary requirement to make the kind of "special harm to tribal self-government or internal relations" showing required to invoke *Montana's* (second) "political integrity" exception (*see,* n.14) in order to invoke *Montana's* (first) consensual relationship exception. (Pet.App., pp.15-18, n6).

Petitioners' argument below (and the Petitioners' reference to the YOP Director's deposition testimony on this issue, *see,* pp.5-6, *supra)* all rest on the erroneous premise that the Court in *Plains Commerce* collapsed the two *Montana* exceptions into one—requiring a tribal party to satisfy all the requirements for both exceptions to invoke the *Plains Commerce* consensual relationship exception. That argument rests upon two words in the *Plains Commerce* opinion at 337:

> … The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land within the limits set forth in our cases.
>
> ****
>
> …Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his action. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal

relations. *See Montana,* 450 U.S., at 564. (Emphasis added).

This Court in *Plains Commerce* clearly distinguished between the two exceptions and their requirements. *Id.* at 337-340 and 391. In context, the Court's "even then" reference in the *Plains Commerce* passage Petitioners rely upon (Pet., pp.9, 12) is simply a reminder that the reach of tribal jurisdiction under the consensual relationship exception is restricted to those circumstances when the non-Indian activities giving rise to the suit fall within the Tribe's regulatory jurisdiction, where a consensual relationship anchoring the claim exists, the nexus test is satisfied and no special laws otherwise deprive the tribal court of jurisdiction. (Emphasis added). (Pet.App., pp.16-18). As the Fifth Circuit recognized and rejected, adopting Petitioners' (and Judge Smith's) "'profoundly narrow' interpretation of the *Montana* consensual relationship exception would read [that] exception out of existence." *Id.* at Pet.App., p.18, n.6. Nothing in *Plains Commerce* requires or supports that interpretation.

If those requirements are not satisfied, the tribe's assertion of regulatory or adjudicatory jurisdiction cannot be justified as an exercise of a tribe's right of self-government; but, if those requirements are met, the exercise of tribal court jurisdiction is justified based on the tribe's right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 (1959), cited in *Montana.* Under *Williams* and *Montana* it is integral to a tribe's right of self-government that it be able to regulate voluntary consensual relationships between nonmembers and the tribe (or tribal entities) or tribal members on their reservation lands, and for

their courts to be able to adjudicate claims involving disputes arising from such relationships—where those claims have the requisite nexus to the consensual relationship involved. *Montana, supra* at 565-566; *Nevada v. Hicks, supra* at 361 (paramount among the interests the *Montana* exceptions were intended to protect is the right of Indian tribes "to make their own laws and be governed by them"); *Plains Commerce, supra* at 332-333; *TTEA, supra* at 683-685.

(2) Judge Smith in dissent from the Fifth Circuit majority opined (Pet.App., pp.22-36) that there is a difference between subjecting a non-Indian defendant to tribal court jurisdiction to adjudicate tax or contract disputes which involve enforcement of contract rights or tax laws which were in existence at the time the non-Indian entered into an otherwise qualifying consensual relationship under *Montana,* as compared to the circumstances involved in adjudication of tort claims arising from such relationships. (Pet.App., pp.31-33); and, opined that "*Montana's* first exception envisages discrete regulations consented to ex ante;" (emphasis added) whereas "the [Fifth Circuit] majority…upholds an unprecedented after-the-fact imposition of an entire body of tort law based on [Petitioners'] participation in a brief, unpaid internship program." (Pet.App., p.32). (Emphasis and insert added).

Judge Smith also opined that "[a]lthough the claims that Doe wishes to press against Dolgencorp have familiar state-law analogues, the majority's aggressive holding extends to the entire body of tribal tort law – including any novel claims recognized by the Choctaws but not by Mississippi." *Id.* at 31.

Judge Smith's dissent further relied on another unsupportable assertion that "Dolgencorp could not have anticipated that its consensual relationship with Doe would subject itself to any and all tort claims actionable under tribal law" and concluded that "there is an insufficient nexus to satisfy *Montana's* first exception." (Pet.App., p.31).

Judge Smith's *ex ante* distinction fails because there is no golden divide which separates the circumstances involved in (a) tax or contract disputes filed in tribal courts against non-Indians based on contracts or other "consensual relationships," from (b) tort claims filed in tribal courts against non-Indians arising from such relationships, in terms of what body of law is to be applied. While contract terms are negotiated in advance and then existing tribal tax laws may be known, tribal tax law (and other tribal law) bearing on contract disputes can and does change after contracts are signed—just as occurs with state and federal law. *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711 (1974) (reiterating general rule that "…a court is to apply the law in effect at the time it renders its decision…"). The same is true for tort law. The body of tort and other law that exists at the time a contract is signed (or a different kind of "consensual relationship" is formed) may very well evolve from then until a dispute arises. In *Merrion, supra* at 147-149, the Court affirmed a tribe's new constitutional authority to impose a severance tax on mining company lessees for on-reservation mineral extraction after the leases were signed based on the tribe's inherent sovereignty and power to exclude. The Court emphasized that "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign,"

citing Veix v. Sixth Ward Building and Loan Assn. of Newark, 310 U.S. 32 (1940) and *Home Building and Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934). There is no valid "*ex ante*" *vs.* "after-the-fact" distinction here.

Moreover, Petitioners were clearly on notice from this Court's ruling in *Neztsosie, supra* at 482, n.4 (reiterated in *Hicks, supra* at 369) (that "there was little doubt" the Navajo Courts would have had jurisdiction over the torts involved in *Neztsosie,* but for a supervening federal statute); and, from the Fifth Circuit's prior rulings in *TTEA, supra* (tribal court had jurisdiction to adjudicate dispute with non-Indian grounded in interpretation of 25 U.S.C. §81) and *Bank One, N.A. v. Shumake*, *supra* (ruling that the Choctaw Courts had colorable jurisdiction to adjudicate tort and contract claims arising from on-reservation transactions), *cert. denied*, 537 U.S. 818 (2002) where the *Montana* consensual relationship exception and *Atkinson* nexus tests were satisfied.

Finally, the Fifth Circuit properly rejected Petitioners' (and Judge Smith's) views that "there is no nexus between [Petitioners] participation in the YOP and Doe's tort claims" and that the Tribe has no regulatory jurisdiction here:

> … In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reservation is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children on its own land. It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The

fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in a tribal court makes no difference. *See, e.g., Attorney's Process,* 609 F.3d at 938. To the extent that foreseeability is relevant to the nexus issue, as Dolgencorp suggests, it is present here. Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment. (Pet.App. p.13).

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… 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. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.

Dolgencorp notes the statement in *Plains Commerce* that "a business enterprise employing tribal members … *may* intrude on the internal relations of the tribe or threaten self-rule" and that "[t]o the extent [it does], [its] activities … may be regulated." 554 U.S. at 334-35, 128 S.Ct. 2709 (emphasis added). This statement expresses nothing more than the uncontroversial proposition that a tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members. However, such a limitation is already built into the first *Montana* exception. Under that exception, the tribe may

> only regulate activity having a logical nexus to some consensual relationship between a business and the tribe or its members. (*Id.* at pp.16-17).

There is nothing surprising, unprecedented, or after-the-fact about anything in the Fifth Circuit's ruling.

(3) This Court long ago recognized that private party tort suits for damages authorized under local (common) law amount to a form of government regulation—equivalent to positive law. *San Diego Building Trades Council v. Garmon,* 389 U.S. 235, 795 S.Ct. 773 (1959); *accord, Kurns v. Railroad Friction Products Corporation,* 132 S.Ct. 1261, 1269-1270 (2012). And, as noted above, this Court recognized in *Neztsosie, supra* at 482, n.4 (as acknowledged by *Hicks, supra* at 369) that there was little doubt that the tribal court would have had jurisdiction over the tort claims there at issue but for a supervening federal statute which reflected Congressional intent that all tort claims derivative of uranium mining be heard in the federal courts; and, in both *National Farmers Union* and *Iowa Mutual* the non-Indian parties were required to exhaust their tribal remedies in re tort claims filed against them by tribal members because the tribal courts had "colorable jurisdiction" over those tort claims.

Accordingly, every federal circuit which has considered the issue has ruled that tort claims against non-Indian parties anchored in consensual relationships otherwise satisfying *Montana* and the nexus test may be adjudicated in tribal courts to the same extent as contract or statutory claims, absent

federal statutes to the contrary. (Pet.App., p.11, n.3; *see,* pp.17-19, *supra*).

No traditional tribal tort law which could be pled in this case has been identified and no such claims have been pled; but, even if traditional tribal law were brought to bear upon such claims, that prospect is plainly spelled out in §1-4-4 of the Choctaw Tribal Code (*see,* n.6, *supra*), putting all who do business on the Choctaw Reservation on notice of this fact; and, applying traditional law is simply another manifestation of the tribes' right to "make their own laws and be ruled by them" under *Williams v. Lee, supra* at 223 ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there").

Here, all the tort claims pled are based on Mississippi law as incorporated into the Choctaw's tribal law. *Ferrell v. Shell Oil Co.,* 1996 WL 75586 (E.D.La.1996) (employer's vicarious liability for co-employee torts); *Goodman v. Coast Materials Company,* 858 So.2d 923 (Miss. App. 2003) ("After Newell there is still a recognized right to bring a civil suit against an employer for some intentional torts committed by co-employees..."); *Gulledge v. Shaw,* 880 So. 2d 288 (Miss. 2004); *Davis v. Pioneer, Inc.,* 834 So.2d 739 (Miss. App. 2003) (tort claim seeking damages not compensable under state workers compensation law for injuries caused by co-employee assault and battery, not barred by workers compensation law).

Finally, Petitioners recognized in 2003 that it was a foreseeable risk that its employees and supervisors might violate company rules, including company rules

on employing minors or sexually assaulting co-employees.[31]

If in some other case legitimate concerns regarding the application of unwritten tribal law arise, those concerns can be dealt with then.

IV. Petitioners' Speculation Regarding An Explosion Of Tribal Court Tort Claims Is Unfounded

Petitioners suggest that allowing the Fifth Circuit's ruling to stand will subject the many casual, non-Indian, recreational visitors to reservations in the Fifth Circuit (or elsewhere) to a litany of tort claims in tribal court. (Pet., pp.6-7). This is vastly overstated and no evidence supporting this speculation is provided. The absence of the requisite consensual relationship and/or the required nexus between a qualifying consensual relationship and the potential tort claims to which Petitioners refer will bar the exercise of tribal court jurisdiction over non-Indian defendants in virtually all circumstances for those kinds of tort claims. Under the Fifth Circuit's ruling, tribal jurisdiction is not sustainable over a non-Indian defendant solely because he committed a tort on the reservation harming a tribal party. Pet.App., pp.16-17; *accord, Wilson v. Marchington,* 127 F.3d 805, 815 (9th Cir. 1997).

Further, virtually all work related common law tort claims that tribal member employees might otherwise seek to file against their non-Indian employers will be barred by workers compensation laws, where those employers participate in workers' compensation

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[31] Vol. 1 USCA5 pp.920-926 (Exhibit 3).

programs, as is common in Indian Country. *See, Begay v. Kerr-McGee Corp.,* 682 F.2d 1311, 1319 (9th Cir. 1982) (40 U.S.C. §3172 authorized application of Arizona's workers' compensation statute to injuries that Indian employees of a non-tribal owned mining company sustain on Navajo reservation); *Hamby v. Cherokee Nation Casinos,* 231 P.3d 700, 702 (Okla. 2010) (40 U.S.C. §3172 authorizes extension of state workers; compensation laws to employers on Indian reservations, but does not waive tribal sovereign immunity to compel tribal governments themselves to participate in such programs); *accord, Swenson v. Nickaboine,* 793 N.W.2d 938 (Minn. 2011). *Howard Delivery Serv., Inc. v. Zurich Ins. Co.,* 547 U.S. 651, 655 (2006). The present case (because it involves an intentional co-employee tort) is the rare exception which proves the rule. *See,* authorities cited at p.29, *supra*. Further, *Neztsosie* makes clear that employee claims for injuries at uranium mines cannot be tried in tribal courts.

V. Petitioners' Arguments Regarding Due Process And Punitive Damages Are Overblown

Petitioners (Pet., pp.20-21) speculate that allowing tribal courts to decide tort claims grounded in *Montana's* first exception will give rise to reams of judgments evidencing rampant violations of due process and unfairness to non-Indian parties. This is the sheerest of speculation. Petitioners do not claim that any due process violations have occurred in this case. If this Court chooses to consider the important question of whether the *Montana* framework should be revised to limit tribal court jurisdiction due to concerns

regarding tribal court bias or due process violations, it should do so in a case evidencing such concerns. This is not that case. (Pet.App., p.18, n.6). The very reason this court frequently denies *certiorari* in cases at an interlocutory stay is to avoid ruling on important legal issues based on hypotheticals and speculation about what might happen somewhere at some time in the future, instead of what has happened in a particular case that is before the Court. *Hamilton-Brown Shoe Co., supra; see,* Part II, p.19, *supra.*

The Choctaw courts are subject to a judicial code of ethics[32] and have a history of enforcing core due process principles against the tribe's own government,[33] as they are required to do by 25 U.S.C. §1302 and the Tribe's own Constitution. (Pet.App., pp.18, n.6 and 81). There is no evidence here of any tribal government political interference in any civil case before those courts. Hence, Petitioners' speculations have no foundation in this record. This Court should decline Petitioners' invitation to curtail tribal court jurisdiction as now authorized under *Montana's* first exception based on hyperbole and speculation. If in this, or a different case, after trial any serious due process violations occur, this Court will have the opportunity to grant *certiorari* and examine the issues there presented based on what really happened. *United States v. Virginia,* 518 U.S. 515 (1996).

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[32] Choctaw Tribal Code, Sec. 1-6-7–Ethics Provisions.

[33] *Wanda Sharp v. Mississippi Band of Choctaw Indians,* No. S.C. 2002-02 (enforcing due process guarantees against the Tribe).

Petitioners also urge that non-Indians have no practical protection from rogue money judgments that might someday be entered in tribal courts violative of fundamental due process principles. (Pet., pp.17-23). Aside from this Court's rule that speculation about tribal court bias is not a valid ground for avoiding tribal court jurisdiction (*Iowa Mutual, supra*), and the existence of a tribal court's duty to adhere to core due process principles (Pet.App., p.18, n.3), Petitioners are otherwise mistaken. To convert tribal court money judgments into money requires enforcement—typically in off-reservation state or federal courts via comity principles. It is well-settled that those courts will not enforce tribal court money (or other) judgments issued in circumstances violative of due process. *Wilson, supra* at 813 ("…Tribal Court proceedings must afford the defendant the basic tenants of due process or the judgment will not be recognized by the United States"); *Bird v. Glacier Electric Cooperative, Inc.,* 255 F.3d 1136 (2001) (refusing to recognize tribal court judgment entered in circumstances evidencing bias and violation of due process); *Burrell v. Armijo, supra* at 1171-1172 (federal court should not recognize tribal court judgment entered in violation of due process requirement that litigant had "a full and fair opportunity to litigate its cases (citing *Kemer v. Chern Const. Corp.,* 456 U.S. 461…(1982)"); *MacArthur v. San Juan County,* 497 F.3d 1057, 1067 (10th Cir.2007) ("…recognition of a tribal court judgment *must* be refused…where the party against whom enforcement was sought was not afforded due process of law) (emphasis added).

These rulings send a strong message to tribal courts, tribal court parties and to the tribal

governments that tribal courts have a fundamental duty to enforce core due process principles as required by the Indian Civil Rights Act, 25 U.S.C. §1302. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978):

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal 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.

This kind of federal court judicial oversight serves both to further those core principles and to strengthen tribal courts, an objective this Court and the Congress have supported. *Iowa Mutual, supra* at 14-15 ("[T]ribal Courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development").

Finally, as the Fifth Circuit correctly ruled, assessment of punitive damages in civil cases do not involve the exercise of criminal jurisdiction.[34] (Pet.App.,

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[34] This Court in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 195, 212 (1978) held that tribal courts do not possess any retained (inherent) sovereign authority to exercise criminal jurisdiction over non-Indians; but, then in *Montana* and its progeny has ruled that there are circumstances where Indian tribes can properly exercise civil jurisdiction over non-Indians. The *Oliphant* bar to exercise of criminal jurisdiction says nothing about whether tribal courts can properly adjudicate tort claims against non-Indians in the circumstances involved in this case.

pp.20-22). If and when an assessment of punitive damages by a tribal court transgresses this Court's substantive due process limitations on punitive damages, *see, BMW of North America v. Gore,* 517 U.S. 559 (1996), the tribal appellate courts and the federal courts (after exhaustion of tribal remedies) can address those circumstances; and, the non-Indian parties involved will have a clear duty to first raise and litigate those issues in the tribal courts. *National Farmers Union*; *Iowa Mutual*.

VI. Petitioners' Reservation "Poverty" Argument Is Misplaced

Petitioners' "reservation poverty" argument was not raised below; hence, there is nothing of record bearing on it. Petitioners (Pet., pp.17-18) and *amicus* South Dakota Banker's Association (Am.Br., pp.6-8) nonetheless argue that leaving the Fifth Circuit's ruling intact will exacerbate on-reservation poverty. The Mississippi Choctaw experience is to the contrary. The Choctaw Courts routinely exercise jurisdiction over non-Indian plaintiffs and defendants per *Montana*; and, yet—a decade after the Fifth Circuit's rulings in *TTEA* and *Bank One*, and after this Court's rulings in *Strate* and *Neztsosie*, the Tribe continues to be the third largest employer in Mississippi. Mississippi Blue Book, Official and Statistical Register (2008-2012); *see,* Rezek and Millea, "Economic Impacts of the Mississippi Band of Choctaw Indians on the State of Mississippi," p.1 ("Outside of its own activities, MBCI supports 350.3 million in economic activity, 6,062 jobs, 221.7 million in GSP and 142 million in personal income for the State…"). The Tribe has had no difficulty in attracting private capital ($400 million plus) to its reservation

over the last 40 years—including bank financing for a new $55 million on-reservation tribal hospital construction project started in 2013—and has drastically reduced its reservation poverty and unemployment levels over that same period. Murray, "Analysis of the Labor Market on the Mississippi Choctaw Indian Reservation," Mississippi Cooperative Extension Service (Sept. 13, 1983); U.S. Census Bureau—Selected Economic Characteristics (2008-2012) for Mississippi Choctaw Reservation Communities.

Further, just as with the similar arguments regarding the economic wisdom of tribes invoking sovereign immunity as a defense to unconsented civil suits for on or off-reservation transactions (and the public policy judgments involved in predictions about the long term economic consequences of such decisions), the reservation poverty arguments which Petitioners and the bank association believe should bear upon the *Montana* jurisdiction framework requires legislative judgments which should be left to the tribes and the Congress. *See, Kiowa Tribe v. Manufacturing Technologies,* 523 U.S. 751 (1998) (ruling that Congress, rather than this Court, was the proper forum for addressing issues regarding the wisdom of continuing the recognition of tribal sovereign immunity for on or off-reservation transactions); *accord, Michigan v. Bay Mills Indian Community,* 572 U.S. __, 134 S.Ct. 2024 (2014) (declining to revisit question whether tribal sovereign immunity defense should be recognized for off-reservation transactions). Wading into this public policy thicket would push the Court far beyond its judicial role of deciding concrete

cases that come before it based on the facts involved in those cases.

Ultimately, absent Congressional action to the contrary, it remains a tribal choice whether to authorize their courts to exercise the full range of jurisdiction permitted by *Montana.* If and when a tribe determines that doing so will cause economic harm to its reservation community, it will be free to restrict the jurisdiction of its courts accordingly. Absent action by the Congress to address this issue, these kind of judgments must be left to the tribes on their reservations in exercise of their inherent right "to make their own laws and be ruled by them."

CONCLUSION

The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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