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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a tribal court has jurisdiction under the consensual-relationship exception in *Montana* v. *United States*, 450 U.S. 544, 565 (1981), 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 sexual 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 brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This Court has recognized that Indian tribes "retain considerable control over nonmember conduct on tribal land." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997). As "a general rule," however, "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. Those exceptions, articulated in *Montana* v. *United States*, 450 U.S. 544 (1981), provide (1) 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"; and (2) that a tribe may "exercise civil authority over the conduct of non-Indians on fee land 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. "[W]here 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).

2. Petitioners are a Tennessee corporation and its wholly owned subsidiary. Pet. ii; D. Ct. Doc. 1, at 1 (Mar. 10, 2008) (Compl. ¶ 2). 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; D. Ct. Doc. 1-2, at 35.

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." D. Ct. Doc. 1-2, at 51-52 (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." *Id.* at

49-50 (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." *Id.* at 51 (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 places young tribal members in short-term positions with local businesses so that they can obtain job training and mentorship in return for free labor. 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. He alleges that while he was working in the store on July 14 and 15, 2003, Townsend made multiple uninvited sexual advances against him, offering him money to allow the advances, grabbing him "in his crotch area" until he escaped, and thereafter continuing to make sexually offensive remarks. D. Ct. Doc. 1-2, at 6-7 (Tribal Ct. Compl. ¶¶ IV-V). In light of those 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. *Id.* at 16-19; Pet. App. 57.

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[1] Section 1-1-4 of the 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.

3. a. In January 2005, Doe, by and through his parents (who are 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. The tribal court denied the defendants' motions to dismiss the complaint for lack of jurisdiction under *Montana*. *Ibid.*

b. On interlocutory appeal, the Choctaw Supreme Court agreed. Pet. App. 75-91. Although *Montana* had originally applied only to 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. The court held that the tribal court had jurisdiction under both *Montana* exceptions. *Id.* at 82-90. With respect to the first exception—which applies to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565—the court identified three consensual 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. Pet. App. 86. The court 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.*[2]

4. 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 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 found that petitioners "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* at 46. The court fur-

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[2] The Choctaw Supreme Court rejected Dolgencorp's contention that the request for punitive damages presents due process concerns under the United States Constitution. Pet. App. 90. It explained that the relevant proscriptions on excessive punishment are contained in the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(a)(8), and in the Tribe's Constitution, and that the tribal courts are "available to vindicate" those rights. Pet. App. 90 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978)).

ther concluded that Doe's claims "arise directly from this consensual relationship" and therefore provide "a sufficient nexus between the consensual relationship and exertion of tribal authority." *Ibid.*

5. 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 between petitioners and the Tribe 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. 16-17.

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 the negligent hiring, training, or supervision of 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.

Finally, the court of appeals responded to statements in the dissenting opinion. As relevant here, it noted that no circuit court has held or suggested that "tort claims are not allowed" or that they "should be treated differently from other types of regulation of non-member conduct." Pet. App. 11 n.3.

b. Judge Smith dissented. Pet. App. 22-36. In his view, there was no need to address the *Montana* exceptions "[b]ecause 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 does apply, 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 tribes' adjudicative jurisdiction should be construed more narrowly than their legislative jurisdiction because "*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.

c. The court of appeals denied rehearing en banc, over the dissent of Judge Smith and four other judges. Pet. App. 92-95.

DISCUSSION

The court of appeals correctly concluded that the tribal court has jurisdiction over the claims here, 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.

Rather than repeat the arguments they advanced in the court of appeals, petitioners now contend (Pet. 18) that tribal courts universally "lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress." There is no foundation in this Court's cases for that categorical prohibition, and it has not been endorsed (or even suggested) by any court of appeals. To the contrary, courts have repeatedly resolved questions about tribal-court jurisdiction without proposing that different rules apply to tort claims. Thus, as petitioners concede (Cert. Reply Br. 5-6), there is no conflict in the circuits. And petitioners' concerns about potential unfairness in tribal-court proceedings, and about the chilling effect that jurisdictional uncertainty may have on commerce with tribes, can be addressed without the novel and categor-

ical curtailment of tribal-court jurisdiction that petitioners now urge. The Court should deny certiorari.

A. The Court Of Appeals Correctly Held That The Tribal Court Has Jurisdiction To Adjudicate The Claims Against Petitioners

Petitioners contend (Pet. 14-15, 20-21) that the court of appeals erred in holding that there is tribal-court jurisdiction over the claims against them under the consensual-relationship exception to the general rule in *Montana* v. *United States*, 450 U.S. 544 (1981). In the circumstances of this case, the tribal court has jurisdiction over 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. Under that exception, an Indian 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, petitioners' specific entreaty—that the Court find the first exception inapplicable by establishing a novel and sweeping bar on tribal-court adjudication of any "private tort claims against nonmembers," Pet. 18—is inconsistent with *Montana*'s essential concern about protecting tribal self-government and the health and welfare of the tribe.

1. In this case, the parties and the courts below have generally assumed that any tribal-court jurisdiction over petitioners, as nonmembers, must satisfy one of the *Montana* exceptions. See Pet. App. 9-10, 42-43. In the United States' view, however, jurisdiction would be appropriate on the basis of a determination that, to the extent that the tortious conduct at issue here oc-

curred at petitioners' store on tribal trust land,[3] the Tribe had jurisdiction to regulate that conduct without regard to *Montana*'s general rule or its exceptions.

The *Montana* Court "readily agree[d]" that a tribe may regulate nonmembers' activities "on land belonging to the [t]ribe or held by the United States in trust for the [t]ribe." 450 U.S. at 557. The rest of the Court's discussion in *Montana*—including the general rule limiting tribal authority over nonmembers' activities and its two exceptions—applied to the "remain[ing]" dispute about activities on "land owned in fee by nonmembers of the [t]ribe." *Ibid.* Thus, *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), described *Montana*'s "main rule and exceptions" as "[r]egarding activity on non-Indian fee land." *Id.* at 453. And the Court found *Strate* to be "govern[ed]" by *Montana* only because it determined that the stretch of 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; see *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 654 (2001) (referring to "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land").

Although *Nevada* v. *Hicks*, 533 U.S. 353 (2001), later stated that *Montana* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land," *id.* at 360, the Court still acknowledged that a tribe's ownership and control of the land on which the

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[3] Petitioners forfeited any argument that their allegedly negligent conduct might have occurred somewhere else. Pet. App. 19-20. They do not embrace the suggestion in Judge Smith's dissent that resolving that question would "require[] no factual development." *Id.* at 34.

activities in question occur is a "significant," and may sometimes be a "dispositive," factor, *id.* at 370-371. The Court held that 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.*

Most recently, although the Court similarly described *Montana*'s rule in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 330 (2008), it also reiterated that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation" and noted that a tribe loses "plenary jurisdiction" over tribal land if it is "converted into fee simple." *Id.* at 327, 328. The Court thus explained that, in addition to their "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.

Tribal-court jurisdiction in this case could be predicated on a conclusion that *Montana*'s general rule limiting tribal regulatory authority 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.[4] Even so, it would require a

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[4] See *Water Wheel Camp Recreational Area* v. *LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (holding that a "tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*," where the 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").

departure from the Court's normal practice to address that argument as a distinct ground of decision in the context of this case, in which that argument was not pressed or passed upon in the court of appeals. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992).[5]

2. In any event, assuming (consistent with the posture of the case) that tribal-court jurisdiction in this case must satisfy *Montana*'s consensual-relationship exception, the court of appeals correctly held it has been satisfied. And in assessing the application of that exception, the occurrence of the conduct on tribal trust land is, at the very least, highly relevant.

Petitioners do not dispute that they had a consensual relationship with the Tribe. That 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*.

Nor do petitioners contend (as did Judge Smith's dissent, Pet. App. 22, 24, 27) that protecting a tribal member from sexual molestation while he participated in a program established by the Tribe does not sufficiently "implicate[] tribal governance and internal relations" (*Plains Commerce Bank*, 554 U.S. at 335) to satisfy the *Montana* exceptions. Such an objection would be particularly misdirected in this case, where

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[5] Respondents do suggest in passing (Br. in Opp. 7 n.12) that this could be "an alternative ground supporting the Fifth Circuit's ruling."

the conduct occurred on tribal land and therefore implicated an additional sovereign power recognized in *Plains Commerce Bank*: the power to "manag[e]" or "superintend" tribal land and thus to "set conditions on entry" to that land. *Id.* at 334, 336, 337. Cf. p. 2, *supra* (quoting lease provision reflecting that premises could not be used "for any unlawful conduct or purpose").

Petitioners do contend (Pet. 16, 20) that the court of appeals erred in sustaining tribal-court jurisdiction based on a "logical nexus" between a consensual relationship and the activity the Tribe seeks to regulate. See Pet. App. 17. But the court's discussion belies petitioners' insinuation that a merely "logical" nexus is too abstract or unlimited. See *ibid.* (explaining that the nexus requirement serves as "a limitation" and that "the suit must * * * arise out of th[e] consensual contacts") (citation omitted). Petitioners, moreover, do not contest the court's conclusion that the connection between petitioners' agreement to participate in the Youth Opportunity Program and the alleged torts was "obvious." *Id.* at 13. That conclusion requires no leap from "[a] nonmember's consensual relationship in one area" to "tribal civil authority in another" area. *Atkinson Trading Co.*, 532 U.S. at 656. The victim was no "stranger[]" to the relationship (*ibid.* (citation omitted)) but rather the intended beneficiary of the store's consensual participation in the program.

Petitioners criticize (Pet. 15, 20) what they characterize as the "breadth and dramatic consequences" of the court of appeals' analysis, asserting that it will open the door to "pervasive tort liability against countless business[es] and individuals" in consensual relationships with tribes or tribal members. But petitioners give no reason to think that the tribal courthouse doors

have heretofore been closed to all tort claims against nonmembers—especially ones occurring on tribal land and arising out of ongoing consensual commercial relationships with the tribe.[6]

3. Petitioners instead seek to sidestep the very questions they raised in the courts below by asking this Court to announce that, at least under the consensual-relationship exception, tribal courts *never* have "jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress." Pet. 18, 23-24. There is no foundation in this Court's cases for such a categorical prohibition.

Petitioners ground (Pet. 21) their proposal in Judge Smith's declaration that *Montana*'s reference to tribal regulation "through taxation, licensing, or other means" (450 U.S. at 565) was intended to be limited to "discrete regulations consented to *ex ante*." Pet. App. 32. In their view, "tort claims are vitally different" because "[t]ort law is generally unwritten and often vague." Pet. 21. But contract law is often equally

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[6] 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 that 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, 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).

unwritten, and petitioners do not suggest that the consensual-relationship exception precludes breach-of-contract actions.

Moreover, this Court has never indicated that tort claims are categorically different. To the contrary, in *Nevada* v. *Hicks*, *supra*, 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] tort claims" arising from nonmembers' uranium mining and processing on tribal lands, until that jurisdiction was withdrawn by Congress. 533 U.S. at 368. And *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985)—the Court's seminal decision concerning exhaustion of tribal-court remedies—considered a personal-injury claim arising from a motorcycle accident and rejected the argument that the tribal court's "civil subject-matter jurisdiction over non-Indians in a case like this" should be "automatically foreclosed." *Id.* at 855. Similarly, both *Strate* and *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), involved tort claims, and in neither did the Court suggest the categorical bar petitioners now urge.

Indeed, precluding tribal-court tort adjudications 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 Mut. Ins. Co.*, 480 U.S. at 16. It is no sound objection that tribal tort law, like state tort law, may be unwritten. Indian tribes have not been divested of the inherent sovereign power to articulate and apply their tort law in a common-law manner. And, if common-law tort obligations were deemed to be intrinsically unenforceable simply because of their unwritten nature,

that would also vitiate any notion that petitioners seek only an analogue to diversity jurisdiction, in which state or federal courts would still be able to apply tribal tort law. See Pet. 17; Cert. Reply Br. 12. Of course, even if such claims could be adjudicated by state or federal courts, barring tribal-court adjudication would still impinge on "the right of reservation Indians to make their own laws." *Strate*, 520 U.S. at 459 (citation omitted); see *Hicks*, 533 U.S. at 361.

In the end, petitioners admit that they do not intend to leave any gap between tribes' regulatory and adjudicative authority; they are instead asking the Court to find that there is no "regulatory authority in the first place when * * * the mode of regulation is tort law," Cert. Reply Br. 4 n.5. Depriving tribes of that quintessentially American form of lawmaking authority—even in circumstances that involve activities on tribal trust land and nonmembers' consensual relationships with the tribe—would unquestionably "threaten tribal self-rule," *Plains Commerce Bank*, 554 U.S. at 335, and therefore defeat an essential purpose of the *Montana* framework. The Court should not accept petitioners' invitation to effect such a sweeping change in the law of tribal-court jurisdiction.

B. There Is No Conflict In The Lower Courts Concerning Petitioners' Proposed Prohibition On Tribal-Law Tort Suits Against Nonmembers

Petitioners correctly concede (Cert. Reply Br. 5-6) that there is no conflict in the lower courts concerning their contention that *Montana*'s consensual-relationship exception categorically precludes adjudication of tort claims against nonmembers. Indeed, petitioners seek to distinguish the cases respondents discuss by contending that none of them actually re-

solved such a question. *Id.* at 2, 6-7. But the Eighth Circuit has concluded that when a tribe has "power under *Montana* to regulate" conduct, it makes no "difference whether it does so through precisely tailored regulations or through tort claims." *Attorney's Process & Investigation Servs., Inc.* v. *Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 938 (2010), cert. denied, 131 S. Ct. 1003 (2011).[7] And the courts of appeals have repeatedly resolved various questions about tribal-court jurisdiction without suggesting that tort claims require fundamentally different rules.[8] In any event,

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[7] Petitioners contend (Cert. Reply Br. 2, 6 & n.4) that *Attorney's Process* considered only the second *Montana* exception. But the quoted sentence appeared in the court's general discussion of "[t]he *Montana* exceptions." 609 F.3d at 938. After holding that there was no jurisdiction over a conversion claim under the second exception, the court remanded for the district court to determine whether there was a "sufficient nexus to [a] consensual relationship" to satisfy the first exception with respect to that claim, which it described by referring to the Restatement (Second) of Torts rather than any precisely tailored tribal regulation. *Id.* at 940-941.

[8] See, *e.g.*, *DISH Network Serv. L.L.C.* v. *Laducer*, 725 F.3d 877, 885 (8th Cir. 2013) (requiring exhaustion of jurisdictional question in tribal court 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 Court*, 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 the tribal court), cert. denied, 558 U.S. 1024 (2009); *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1062, 1071-1074 (10th Cir. 2007) (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), cert. denied, 552 U.S. 1181 (2008); *McDonald* v. *Means*, 309 F.3d 530, 538-539 (9th Cir.

petitioners could scarcely justify this Court's review by establishing that only the case below has resolved the question—especially when it did so largely in response to statements in the dissent rather than petitioners' own arguments, see Pet. App. 11 n.3.

Petitioners nevertheless assert that the broad question warrants review here because "[t]he Court *presumably* granted certiorari" to resolve it in *Plains Commerce Bank* and then failed to do so. Cert. Reply Br. 1, 5-6 (emphasis added); see also Pet. 15.

We do not presume to tell the Court whether it previously determined that the question was certworthy. But we note that the Court may well have granted review not to address a broad question about whether tribes may ever regulate nonmembers via tort law, but instead to decide the narrow question it recited in the opening paragraph of its opinion, which said "[t]he question presented is whether the Tribal Court had jurisdiction to adjudicate a discrimination claim *concerning the non-Indian bank's sale of fee land* it owned." *Plains Commerce Bank*, 554 U.S. at 320 (emphasis added). Indeed, the limited ground of decision in *Plains Commerce Bank* suggests that sweeping pronouncements of the sort petitioners urge are not appropriate for resolution of questions of tribal-court jurisdiction. See *id.* at 330 ("the Tribe lacks the civil authority to regulate the Bank's sale of its fee land"); *id.* at 332 ("*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land."); *id.* at 340 ("The Longs' discrimination claim, in short, is an at-

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2002) (holding, without needing to consider the *Montana* exceptions, that tribal court had jurisdiction over tort claims against nonmembers arising from accident on tribal trust land).

tempt to regulate the terms on which the Bank may sell the land it owns.").

But even if the Court did conclude that the broader question warranted review in 2007, the paucity of cases that have needed to get even close to considering such a question in the intervening years strongly suggests that, in the absence of any conflict, the Court's intervention is unnecessary.[9]

C. Other Mechanisms Can Ameliorate Petitioners' Policy Concerns

Nor do petitioners' policy concerns demonstrate that this Court should establish a blanket prohibition on the application of tribal tort law to nonmembers under the consensual-relationship exception.

1. Petitioners express concern (Pet. 15, 18-19) that, without congressional direction, it is unfair to allow nonmembers to be sued in tribal courts that are not subject to the Due Process Clauses of the Fifth and Fourteenth Amendments. But, as the court of appeals noted, Pet. App. 18 n.6, the Indian Civil Rights Act of 1968 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); see also Pet. App. 81 n.4 (quoting identical provision in Tribe's constitution). Congress has spoken still further, find-

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[9] There is potential uncertainty about how to satisfy *Plains Commerce Bank*'s reference to the prospect that activities "may intrude on the internal relations of the tribe or threaten tribal self-rule," 554 U.S. at 335; see Pet. App. 17 n.5, 51 n.2, 53 n.3. But petitioners have abandoned those questions in favor of their argument of first impression that tribal tort law can never be applied to nonmembers (at least under the consensual-relationship exception). Pet. 18, 23-24.

ing that "tribal justice systems" are "the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(6). This Court has similarly "rejected * * * attacks on tribal court jurisdiction" predicated on alleged "local bias and incompetence." *Iowa Mut. Ins. Co.*, 480 U.S. at 18-19.[10]

Even so, if a tribal court failed to accord due process to a nonmember defendant in any individual tort case, that failure would, as respondents note (Br. in Opp. 33), 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).

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[10] Petitioners have made no showing that the facts here support any such concerns. See Br. in Opp. 32. The Choctaw Tribal Code sets forth, *inter alia*, the jurisdiction of the tribal courts (Tit. I, Ch. 2) and the qualifications of tribal judges (Tit. I, Ch. 3), including the requirement that judges be admitted to practice law in Mississippi (§ 1-3-3(2)). As is often the case, the procedural rules (Tit. VI, Ch. 1) are modeled on the Federal Rules of Civil Procedure. 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).

Furthermore, Congress could respond to any actual evidence of harm by providing for review of tribal-court decisions by federal courts, as it has done to some extent in the criminal context. See 25 U.S.C. 1303. Or it could divest tribal courts of portions of their jurisdiction. For instance, as noted above, in *El Paso Natural Gas*, the tribal court had jurisdiction over "Navajo tort law claims for wrongful death and loss of consortium arising from uranium mining and processing" that "occurred on tribal lands," 526 U.S. at 478, 482 n.4, until Congress transformed such claims into federal actions that could be removed to federal court, *id.* at 484-485; see *Hicks*, 533 U.S. at 368. In other words, although petitioners suggest that Congress must affirmatively *confer* tort jurisdiction on tribal courts (Pet. 22, 24; Cert. Reply Br. 12), *El Paso Natural Gas* demonstrates the opposite.

2. Petitioners also speculate that allowing uncertainty about the scope of tribal-court tort-law jurisdiction "stands as a deterrent to nonmember participation in the economic life of many tribes," Cert. Reply Br. 8, potentially costing them business investors and customers, Pet. 17-18. Yet, as respondents note (Br. in Opp. 35-36), the Tribe continues to attract investment and to be one of the largest employers in Mississippi.

In any event, tribes are best suited to determine how best to exercise their sovereign authority so as not to discourage economic activity by non-Indians, especially on tribal lands. For example, if tribes or tribal members wish to promote certainty in their commercial dealings with nonmembers (*i.e.*, in core applications of *Montana*'s consensual-relationship exception), they, like nonmembers, remain free to negotiate appropriate choice-of-law or forum-selection clauses. See p. 3,

supra (quoting provisions in Dolgencorp's lease); see also *Plains Commerce Bank*, 554 U.S. at 346 (Ginsburg, J., dissenting) (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 petition for a writ of certiorari should be denied.

Respectfully submitted.

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