No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY, JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE, SR. AND JANE DOE,

Respondents.

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

BRIEF AMICUS CURIAE OF ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street SW
Suite 1000
Washington, DC 20024
(202) 639-2500

LYNN H. SLADE
Counsel of Record
BRIAN K. NICHOLS
DEANA M. BENNETT
SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.C.
500 Fourth Street NW
Suite 1000
Albuquerque, NM 87102
(505) 848-1800
lynn.slade@modrall.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads (AAR) is a non-profit national trade association whose members include America's major railroads. AAR appears as amicus curiae because its members have a vital interest in ensuring that their property interests and activities within Indian reservations and across tribal lands are subject to clear and predictable rules governing tribal civil adjudicatory jurisdiction over nonmembers. AAR represents member railroads before courts, agencies, and the United States Congress on matters of common concern to its members, and has filed previous briefs amicus curiae before this Court.[2]

AAR's members include intercity passenger, commuter, and freight railroads. The freight railroad members operate 85 percent of the line-haul mileage, employ approximately 95 percent of the workers, and account for approximately 97 percent of the freight revenues of all railroads in the United States. In addition, some AAR member railroads operate on

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity other than amicus curiae or its members has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have filed blanket consents to the filing of amicus curiae briefs in this case.

[2] *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9 (2007); *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158 (2007); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14 (2004); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000).

longstanding rights-of-way that cross Indian reservations or tribal lands, and some lines also traverse areas located off reservations or tribal lands, but within areas over which tribal nations or groups may assert civil jurisdiction. For example, one AAR member railroad operates on rail lines crossing lands under the asserted jurisdiction of 25 different tribal nations, and another crosses lands under the asserted jurisdiction of 86 tribal nations.

AAR appears here recognizing its members' important and beneficial working relationships with many tribes. There are 566 federally recognized tribal nations in the United States,[3] and their legal and court systems vary widely. Some are highly structured, like the Navajo Nation, which has a multi-volume statutory code and a well-defined system of trial and appellate courts. Others are poorly financed and lack experienced personnel or identifiable law, with inadequate review in tribal appellate courts. For all tribal courts, there is simply no effective federal review of merits and civil rights issues. It is critical to AAR members—and, indeed, to all businesses in, or considering doing business in, areas potentially subject to tribal jurisdiction—to be able to determine efficiently which sovereign's courts have jurisdiction over their activities and the law that will be applied. The decision below, by concluding that agreements that do not provide clear and unequivocal consent supported tribal civil adjudicatory jurisdiction over a nonmember in an action seeking compensatory and punitive damages, injects further uncertainty into an already difficult jurisdictional calculus.

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[3] *See* 80 Fed. Reg. 1942 (Jan. 14, 2015).

Railroads have a particular need to voice their concerns about the decisions below. Retailers and other businesses generally have the freedom to choose whether to do business with tribes and their members. But railroads do not. Many railroads operate on rights-of-way through tribal lands, many of which are over a century old, and which cannot be abandoned without federal approval. In such circumstances, railroads' federal common carrier responsibilities essentially require them to interact with tribal nations to effectively operate their rail lines and to perform maintenance and other federally mandated activities. *See, e.g.*, 49 C.F.R. §§ 213.233-237. Accordingly, the situs of some railroads may leave little choice but to have a variety of agreements with tribal nations, tribal entities, and tribal members, ranging from easements or rights-of-way authorized under federal statutes, to maintenance, supply, or personnel-related agreements.

While the safest mode of surface transportation, rail operations, like all heavy industry, entail risk of injuries that may give rise to tort claims against rail operators. Congress has unambiguously insulated interstate railroads from certain state law based tort claims, but it has not directly addressed whether those protections apply to tribal law or in tribal courts. For these and other reasons, uncertainty as to whether tribal courts may have jurisdiction, or what laws and procedures may apply, is a persistent problem for AAR's member railroads. America's railroads highlight the need for brighter lines delineating the bounds of tribal court jurisdiction and the level of consent required to support tribal court jurisdiction.

While this Court's previous decisions define the scope of tribal jurisdiction in reasonable ways, lower court decisions, like that under review here, engender troubling uncertainty regarding the proper scope of tribal civil adjudicatory jurisdiction over nonmembers under *Montana v. United States*, 450 U.S. 544 (1981). Simply to determine the proper forum for tort and other litigation frequently requires extended, multi-forum litigation. Jurisdictional uncertainty discourages business investment and economic development in reservation and non-reservation areas over which tribal nations may assert jurisdiction.[4] While this case concerns a tort action, tribal court jurisdiction in regulatory and contract cases, and the risk of potentially devastating injunctive relief, present comparable threats to nonmember business. Uncertainty about the geographic scope of tribal jurisdiction further counsels for clear guidelines regarding the nature of consent required to support tribal civil adjudicatory power over nonmembers. A single rule governing the conditions necessary to invoke tribal court jurisdiction over nonmembers in all civil cases would allow nonmembers, members, and tribal nations to fashion their conduct to support fairer and more predictable dispute resolution.

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[4] Federal law defines "Indian country" for certain criminal jurisdictional purposes as "all land within the limits of any Indian reservation," including private lands and rights-of-way within those limits, "dependent Indian communities," and "all Indian allotments." 18 U.S.C. § 1151. The Court has declined to give this definition civil jurisdictional effect because "Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001). Tribes may assert adjudicatory jurisdiction over broader categories of lands than those included in Section 1151.

SUMMARY OF ARGUMENT

The Court's Indian law jurisprudence establishes that tribal nations and tribal courts lack jurisdiction over nonmembers unless one of two limited exceptions applies. *See Montana v. United States*, 450 U.S. 544, 564-66 (1981). As the decision below evidences, lower courts persistently misapply this Court's opinions determining the appropriate forum for resolution of civil litigation, improperly expanding *Montana*'s consensual relationship exception to permit tribal court jurisdiction whenever a "consensual relationship" bears some "nexus" with the asserted jurisdiction. They frequently fail to require any indication of clearly expressed consent to such jurisdiction over the controversy at hand. This case affords the Court an opportunity to clarify the proper scope of tribal civil adjudicatory jurisdiction over nonmembers. A rule that clarifies and simplifies determining whether such jurisdiction exists will allow courts, nonmembers, and tribes and their members to predict confidently where disputes may be resolved.

AAR urges a rule that clear and unequivocal consent is required to demonstrate nonmember consent to tribal civil adjudicatory jurisdiction, not just over tort actions but in all civil actions against nonmembers. Absent such a showing, tribal courts should lack civil jurisdiction over nonmembers under *Montana*'s first exception. Such a rule is well-grounded in this Court's jurisprudence and would limit the risk of prejudice to nonmember litigants that may arise from unexpected and unconsented-to litigation in tribal courts. Clear consent is essential because the great variations in tribal courts and legal systems and the absence of federal review of federal questions arising from tribal

court merits determinations, including from deprivations of federally protected civil rights, contradict fundamental precepts and jurisdictional allocations underlying dispute resolution in the federal system. The rule AAR proposes also will allow America's railroads and other businesses whose activities are charged with a federal purpose supporting a preemption of certain claims in federal or state court to prevent litigation in tribal court that may contravene Congress' intent to maintain uniform regulatory standards over litigation arising from their operations.

ARGUMENT

Dispute resolution in Indian country currently is fraught with uncertainty, leaving tribal nations, tribal members, nonmembers, the business community, and the lower courts without sufficient guidance or bright line rules to predict and determine efficiently tribal civil adjudicatory jurisdiction over nonmembers. The decision below, ruling that tribal court jurisdiction applies whenever a nonmember has any "consensual relationship" with a tribe or its members that is related to the tribal court action, improperly seeks to impose tribal court jurisdiction on a nonmember without regard to whether the nonmember has expressly consented to the court and law. This case affords the opportunity to clarify the nature of the consent required to support tribal civil adjudicatory jurisdiction under *Montana*'s first exception over claims against nonmembers.[5]

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[5] The Court has held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), but it has not answered the question of whether tribal adjudicatory jurisdiction is equal to tribal legislative, or regulatory, jurisdiction over nonmembers.

The Court's Indian law jurisprudence underscores an important limitation on the scope of tribal nation and tribal court jurisdiction: Tribal nations presumptively lack authority over nonmembers, while retaining inherent jurisdiction sufficient to govern their internal affairs. In case-by-case fashion, the Court has addressed specific circumstances where tribal court jurisdiction is inappropriate. *See* Part I.A, *infra*. This Court's present review affords the vehicle to address remaining uncertainty and prevent abuse by announcing a rule that tribal nations lack civil adjudicatory jurisdiction over claims against nonmembers absent clear and unequivocal consent. *See* Part I.B, *infra*.

This Court's guidance makes clear that the courts below, as well as other federal, state, and tribal courts, have inconsistently, and often incorrectly, applied this Court's jurisprudence in concluding that a tribal court had jurisdiction over a nonmember. *See* Part I.C, *infra*. This departure from the Court's guidance is unsettling, given that tort actions, like the one giving rise to this matter, exemplify the challenges arising from the exercise of tribal civil adjudicatory jurisdiction. Tort actions engender substantial risk for unconsenting nonmembers, in contexts where critical procedural and substantive safeguards present in the federal and state court system do not exist. *See* Part II, *infra*. The necessity of having a clear and predictable rule is especially important to interstate businesses that must serve in many locales or to which Congress has provided defenses to state court litigation, such as federally regulated railroads and

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See Nevada v. Hicks, 533 U.S. 353, 358 (2001). It is not necessary to answer that question in this case, as the proposed rule will provide a clear guide regardless of whether the two types of jurisdiction are equal in breadth.

similarly situated businesses, as discussed in Part III, *infra*.

I. THE COURT'S JURISPRUDENCE ESTABLISHES THAT TRIBAL COURTS LACK JURISDICTION OVER NONMEMBERS ABSENT THEIR CLEAR AND UNEQUIVOCAL CONSENT.

This Court, in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, has enumerated several principles that confirm the Fifth Circuit erred in ruling that the "nexus between the *alleged* misconduct and the consensual action of Dolgencorp in participating in the YOP [youth opportunity program]" supplied the consent necessary to establish a consensual relationship under *Montana*. Pet. App. 14-15. This Court's groundbreaking decision in *Montana*, and its cases applying the "*Montana* rule," rest on a common foundation: "[E]fforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). It is the tribal court plaintiff's burden to demonstrate that an exception to the *Montana* rule applies. *Plains Commerce Bank*, 554 U.S. at 330. *Montana*'s two "exceptions are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks and citations omitted).

However, despite the Court's several fact-based formulations, many lower courts still fail to discern the Court's guidance on the fundamental question, what conduct or agreement suffices to form the required "commensurate consent," *id.* at 337, to tribal court

jurisdiction. The Court should address that question here and declare that nonmembers must give clear and unequivocal consent to the jurisdiction asserted.

A. The Court's Development and Application of the *Montana* Rule Supports a More Definite Rule Governing Tribal Civil Adjudicatory Jurisdiction Over Nonmembers.

From the earliest days, this Court has confirmed that tribal nations' powers are grounded in internal self-government. *Johnson v. M'Intosh* reasoned that members of the broader society have "perfect independence" from tribal nations. 21 U.S. (8 Wheat.) 543, 572 (1823). In *Worcester v. Georgia*, this Court observed the limited nature of tribal power:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the *internal affairs of the Indians* . . . . The king . . . *never intruded into the interior of their affairs, or interfered with their self-government,* so far as respected themselves only.

31 U.S. (6 Pet.) 515, 517 (1832) (emphasis added). From this historical foundation, when recognizing tribal inherent sovereignty, this Court has embraced the bedrock principle that tribal nations have the "right of internal self-government" and "*the right to prescribe laws applicable to tribe members* and to enforce *those* laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis added and citations omitted); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (tribes "have power to make their own substantive law *in*

internal matters and to enforce that law in their own forums") (emphasis added and citations omitted).[6]

In *Montana*, this Court built upon its jurisprudence addressing when a tribal nation's powers extend beyond its members to reach nonmembers. The Court's conception of the limited nature of tribal authority formed a major predicate underlying the *Montana* decision. *Montana*, 450 U.S. at 564-65 (noting that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), relied on "principles [that] support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," foreclosing tribal criminal jurisdiction over nonmembers).

Montana established an outer boundary of tribal civil authority over nonmembers on nonmember-owned fee lands within reservations, holding that tribal nations lack inherent authority over nonmembers, unless the tribal nation can demonstrate that one of two exceptions is met. 450 U.S. at 564-66. Under the first exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565-66 (citation omitted). Under the second exception (not at issue here), "[a] tribe may also retain inherent

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[6] In *Johnson v. M'Intosh*, Chief Justice Marshall explained the effect of European "discovery" and the relationship between the European nations and tribes: "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [t]heir rights to complete sovereignty, as independent nations, were necessarily diminished . . . ." 21 U.S. (8 Wheat.) at 574.

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 or welfare of the tribe." *Id.* at 566. Unless a *Montana* exception applies, sovereign authority over nonmembers "cannot survive without express congressional delegation." *Id.* at 564.

In decisions applying *Montana* to tribal courts' civil adjudicatory jurisdiction over nonmembers, the Court has labored case-by-case to clarify the narrow scope of jurisdiction under the *Montana* exceptions and to simplify the standard by which courts may determine the scope of that jurisdiction. In *Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997), this Court's first interpretation of the "consensual relationship" required by *Montana*'s first exception, the Court extended *Montana* to a right-of-way across tribal trust lands. The Court found "no 'consensual relationship' *of the qualifying kind*," *Strate*, 520 U.S. at 457-58 (emphasis added), in a subcontract agreement between A-1 and the Tribes for work to be performed on the reservation, because the injured plaintiff was a "stranger" to A-1's subcontract with the Tribes. Hence, "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them. The *Montana* rule, therefore, and not its exceptions, applies to this case." *Strate*, 520 U.S. at 459 (internal quotation marks and citation omitted). Since the injured plaintiff might pursue her claim in state court, "*[o]pening the Tribal Court for her optional use* is not necessary to protect tribal self-government . . . ." *Id.* (emphasis added).

This Court next addressed tribal court civil jurisdiction over nonmembers in *Nevada v. Hicks*, 533 U.S. 353 (2001). In holding that the Fallon-Paiute-Shoshone Tribal Court lacked subject matter jurisdiction over tort and civil rights claims against a state game warden who executed a warrant at the plaintiff's residence on tribal trust land, the Court extended the *Montana* rule to such lands. *Hicks* reinforced the bedrock principle that tribal jurisdiction over nonmembers "must be connected to that right of the Indians to make their own laws and be governed by them." 533 U.S. at 361. The Court found the execution by state officers of a search warrant pursuant to an authorizing agreement with the Tribe did not satisfy *Montana*'s first exception because the exception contemplated a "*private consensual* relationship," *Hicks*, 533 U.S. at 359 n.3, and "private individuals who *voluntarily submitted themselves* to tribal regulatory jurisdiction . . . .", *id.* at 372 (emphasis added). With respect to the plaintiff's civil rights claims, the Court recognized that "the tribe and tribe members are . . . able to invoke [federal or state courts] to vindicate constitutional or other federal- and state-law rights[,]" *id.* at 373, and the tribal court could not address federal civil rights claims because "[t]ribal courts, it should be clear, cannot be courts of general jurisdiction" over nonmembers, *id.* at 367. Stating that land status is only "a factor" in the *Montana* analysis, *Hicks*, 533 U.S.at 370, *Hicks* recognized that *Montana* and *Oliphant* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land." *Hicks*, 533 U.S. at 360.

The Court returned to tribal court civil jurisdiction in *Plains Commerce Bank*, where the tribal court plaintiffs asserted contract and tort claims against the nonmember bank, located outside tribal lands, arising

from loan transactions regarding real property within the Cheyenne River Sioux Reservation. 554 U.S. at 320-21. The Court did not fully reach the broader question presented there, and here, regarding the scope of adjudicatory jurisdiction over nonmembers. However, though focusing on tribes' lack of legislative power over the sale of nonmembers' fee lands, the Court reinforced the necessity of nonmember consent given the profound differences between tribal court and state or federal adjudications: regulating the sale of fee land through adjudicatory jurisdiction lies "beyond the tribe's sovereign powers, [and] runs the *risk of subjecting nonmembers to tribal regulatory authority without commensurate consent*." *Id.* at 337 (emphasis added).

B. A Rule Requiring Clear and Unequivocal Consent to Tribal Civil Adjudicatory Jurisdiction over the Subject Matter of the Claim Should Be the Standard to Determine Whether *Montana*'s First Exception Is Satisfied.

AAR proposes the Court adopt a uniform and unambiguous rule for determining when a tribal court may exercise civil adjudicatory jurisdiction over a nonmember. The Court's cases addressing the scope of the *Montana* consent exception demonstrate that nonmembers should not be subject to tribal civil adjudicatory jurisdiction, whether on tribal nation lands or non-Indian fee land or its equivalent within or outside of a tribal nation's reservation, absent their clear and unequivocal consent to such jurisdiction and tribal law for the claim asserted.

AAR's proposed rule is consistent with this Court's rules regarding appropriate consent for a waiver

of presumptions governing dispute resolution. For example, as this Court has recognized, federal and state courts do not have jurisdiction over tribal nations absent the "clear" waiver by the tribal nation of its sovereign immunity or "unequivocal" abrogation of that immunity by Congress. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19 (2001); *accord Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, ___, 134 S. Ct. 2024, 2031 (2014). Similarly, the proponent of tribal court jurisdiction must demonstrate comparable consent by a nonmember before this Court's presumption against tribal court jurisdiction over that nonmember is rebutted.

The rule AAR proposes also is supported by the Court's decisions requiring consent to support a waiver of judicial remedies by contractually electing arbitration. Although Congress has "declared a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), "a party may not be compelled" to participate in arbitration because of the "foundational [Federal Arbitration Act] principle that arbitration is a matter of consent." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Given that tribal nations presumptively lack jurisdiction over nonmembers and tribal courts do not enjoy general jurisdiction, at least a similar level of consent should be required before a tribal court may exercise civil adjudicatory authority over nonmembers.

The Court's *Montana* line of cases requires the rule proposed here. *Strate* rejected the notion that tribal court civil adjudicatory jurisdiction over a nonmember could be founded on a subcontract agreement between A-1 and the Three Affiliated Tribes for work to be

performed on the reservation, where the injured plaintiff was not a party to the contract, and the Court found "no 'consensual relationship' of the qualifying kind." 520 U.S. at 457-58. In *Hicks*, the Court required a "*private consensual* relationship," 533 U.S at 359 n.3, reflecting the nonmember's "arrangements" with the tribal nation show the nonmember "voluntarily submitted" to tribal regulatory jurisdiction, *id.* at 372 (emphasis added).

Atkinson Trading Co. held that a nonmember trader and hotel operator was not required to collect and remit Navajo hotel occupancy tax by virtue of its acquiring a federal Indian trader license: "Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'" 532 U.S. at 657.[7] Most recently, *Plains Commerce Bank*, the Court reversed the Eighth Circuit's conclusion, an error repeated by the Fifth Circuit here, that a consensual relationship can be found based only on a "preexisting commercial relationship." *Id.* at 323 (internal quotation marks and citation omitted).

The Court's cases reflect *Montana*'s first exception is satisfied, not by a "relationship" alone, but by "commensurate consent."[8] Clear and unequivocal

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[7] The Court has formulated the *Montana* consent requirement with respect to taxation consistently, concluding "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Atkinson Trading Co.*, 532 U.S. at 656 (citation omitted). That conclusion compels the requirement that nonmembers' consent be to the specific subject matter of the jurisdiction asserted.

[8] *Plains Commerce Bank*'s statement that a nonmember can consent to tribal jurisdiction "either expressly or by his actions," 554 U.S. at 337, does not conflict with the rule proposed here. The sentence following that quotation suggests tribal jurisdiction

consent to the tribal civil adjudicatory jurisdiction in issue should be required.

C. Experience Under the *Montana* Rule and Its Exceptions Counsels a More Definite Rule Governing Tribal Civil Adjudicatory Jurisdiction over Nonmembers.

The decision below reflects a pattern of lower court decisions finding *Montana*'s "consensual relationship" requirement satisfied despite the absence of clear consent to the tribal court jurisdiction asserted—or even finding tribal jurisdiction exists despite the nonmember's and its contracting parties' affirmatively rejecting tribal court jurisdiction in favor of off-reservation dispute resolution. Consequently, nonmembers cannot predict confidently whether they will be subject to tribal civil adjudicatory jurisdiction and, once there, what law will apply or what rights they will have. The proposed rule, consistent with the Court's longstanding Indian law jurisprudence requiring more than a mere consensual relationship, will end this uncertainty.

1. The Decision Below Exemplifies Lower Courts' Misunderstanding of the *Montana* Rule.

The Fifth Circuit departed from this Court's guidance, as have other lower courts, by finding the first *Montana* exception satisfied based upon its view of a "consensual relationship," ignoring the absence of clear consent. The Fifth Circuit majority thought that,

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could be supported by the tribe's inherent power to exclude. If the tribe communicates its conditions with sufficient clarity, a nonmember's actions arguably could reflect knowing and voluntary consent to those conditions.

under *Montana*'s first exception, "the tribe may only regulate activity having a logical nexus to *some consensual relationship* between a business and the tribe or its members." Pet. App. 17 (emphasis added). This conception led the Fifth Circuit to find the first *Montana* exception satisfied by a consensual relationship between the Tribe and Petitioner based only upon the "nexus between the *alleged* misconduct and the consensual action of Dolgencorp in participating in the YOP [youth opportunity program]." Pet. App. 14-15.[9] The majority identified no express agreement to Tribal Court or Tribal law; instead, it disclaims seeking specific consent: "entering certain consensual relationships with Indian tribes, a nonmember may implicitly consent to jurisdiction in a tribal court that operates differently from federal and state courts." Pet App. 22. In this regard, the Fifth Circuit ran afoul of this Court's teaching that "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe *have a nexus to the consensual relationship itself*." *Atkinson Trading Co.*, 532 U.S. at 656 (emphasis added). Reflecting the incongruity of the courts' application of *Montana*, the courts below held the alleged perpetrator of the abuse not subject to tribal court jurisdiction, while his employer remains potentially liable, leaving difficult issues of proof and indemnity that unconsented-to tribal court jurisdiction engender.

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[9] The United States makes much of the language of the lease between Petitioner's affiliate and the Tribe. Brief for the United States as Amicus Curiae 2-3, 12 (May 12, 2015). Yet, the Fifth Circuit correctly did not rely on the lease for its conclusion that a consensual relationship existed. *See* Pet. App. 14 n.4. And for good reason—the lease referenced tribal court and tribal law only with respect to the lease "agreement and any related documents." Pet. App. 63; *see Atkinson Trading Co.*, 532 U.S. at 656.

All parties agree the scope of *Montana*'s second exception is not in issue here. Nonetheless, by focusing on the "safety of the child's workplace," and the "harm caused to the child," Pet. App. 13, 14, the Fifth Circuit improperly injected into its analysis the concerns motivated by *Montana*'s second exception, *i.e.*, non-member conduct that significantly threatens "the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This Court has rejected such a broad reading of *Montana*'s second exception: "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. at 457-58. The Fifth Circuit's expansion of *Montana*'s first exception to incorporate aspects of the second "severely shrinks" the bedrock principle that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," *Plains Commerce Bank*, 554 U.S. at 328, by failing to require clear consent to the suit at hand as a prerequisite to tribal court jurisdiction.

2. Other Lower Courts Similarly Misapply *Montana*'s First Exception.

Other federal circuit courts have expanded the consensual relationship exception beyond reasonable limit. For example, in *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997), the Second Circuit failed to analyze whether the nonmember had expressed consent to dispute resolution in tribal court, focusing instead on a "relationship" with a tribe or tribal member. *Basil Cook* found that a nonmember company that engaged in a course of business dealings with a tribe had a consensual

relationship sufficient to subject it to tribal adjudicative jurisdiction, even though no tribal court existed at the time the agreements were formed. *Id.* at 64. The nonmember party to the contract did not contemplate, much less consent to, tribal civil adjudicatory jurisdiction, for the simple reason that the tribe had no tribal court when the relationship was formed, and no subsequent acts by the nonmember demonstrated consent. *Id.* at 63-64.

First Specialty Insurance Corp. v. Confederated Tribes of the Grande Ronde Community of Oregon, No. 07-05-KI, 2007 U.S. Dist. LEXIS 82591 (D. Or. Nov. 2, 2007), illustrates the "procedural nightmare" that can be caused by the lack of clear jurisdictional rules. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). In *First Specialty*, the Tribes filed securities claims against their financial and investment advisor in state court, even though the relevant agreement required arbitration. 2007 U.S. Dist. LEXIS 82591, *3. The state court ruled all parties were subject to binding arbitration, and the arbitration panel dismissed the Tribes' claims, and awarded the investment company $1.4 million in attorneys' fees and costs, plus interest. *Id.* at *3-*4. The Tribes then succeeded in having a portion of that award set aside in tribal court. *Id.* at *4. When the advisor sought relief in federal court, the federal district court found the tribal court had jurisdiction under *Montana*'s first exception, because the very contract containing the arbitration agreement and the dealings under that agreement formed a "consensual relationship" with the Tribes. *Id.* at *9-*10; *see also Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 401 F. Supp. 2d 952, 958 (N.D. Iowa 2005) (requiring exhaustion of tribal remedies, despite arbitration clause and agreement

that any dispute about arbitrability would be submitted first to a federal court). A rule requiring clear and unequivocal consent to establish tribal court jurisdiction under *Montana*'s first exception is required to prevent agreements not clearly contemplating tribal court jurisdiction, or even contemplating non-tribal court dispute resolution, from subjecting nonmembers to tribal courts.

3. Failure to Heed This Court's Decisions Regarding the Effect of Land Status Further Complicates Jurisdictional Determinations.

This Court's guidance is needed because lower federal courts, and some tribal courts, have improperly cabined *Montana*'s application to disputes arising from actions on fee land, or the equivalent of non-Indian fee land. Of concern to AAR members is the United States' injecting this misunderstanding into this proceeding, contending, apparently without reference to the *Montana* exceptions, 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." Brief for the United States as Amicus Curiae 11 (May 12, 2015). The United States' proposal would subject all nonmembers who happen to have longstanding leases and/or licenses to tribal court jurisdiction *without regard to the presence or absence of express consent to jurisdiction in such documents*. This standard is broader than *Water Wheel Camp Recreational Area v. Larance*, 642 F.3d 802, 814, 819 (9th Cir. 2011), the case the United States cited in support, which appears to address only the power to exclude a nonmember

who had no arguable basis for continued presence on the reservation, a circumstance far afield from the present case. AAR's members, like many other businesses, have little choice but to operate on tribal nations' lands pursuant to appropriate, generally long-term, agreements. The suggestion that such a circumstance supports *per se* tribal court jurisdiction turns the Court's jurisprudence on its head.

In *EXC, Inc. v. Kayenta District Court*, 2010 Navajo Sup. LEXIS 4, *22 (Navajo Nation Sup. Ct. 2010), the Navajo Nation Supreme Court stated that "the *Montana* test is only relevant within the Navajo Nation on non-Indian owned fee land." The Navajo Supreme Court alternatively stated that, even if it assumed *Montana* applied, a consensual relationship was formed by the operator's repeatedly doing business on Navajo lands and was implied under a tour operator permitting regime. In the operator's federal court challenge to tribal court jurisdiction, the Ninth Circuit held that *Montana*'s first exception did not apply "because the unsigned permit agreement—even if binding on Appellees—did not provide sufficient notice that EXC would be subject to tribal court jurisdiction on U.S. Highway 160 to be a basis for imputing consent." *EXC, Inc. v. Jensen*, 588 Fed. App'x 720, 722 (9th Cir. 2014) (unpublished), *writ filed*, *Jensen v. EXC, Inc.*, Case No 15-64 (July 13, 2015) (response ordered and due October 9, 2015).

These positions directly contradict *Hicks* and *Plains Commerce Bank*.[10] *Hicks*, in reversing the Ninth

[10] *Water Wheel* also conflicts with opinions of other circuit courts that have applied *Montana* without regard to land status. *See, e.g.*, *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) ("*Montana*'s analytic framework now sets the outer limits of

Circuit's ruling that *Montana* does not apply to actions arising on tribally owned lands, explained that "the general rule of *Montana* applies to both Indian and non-Indian land." *Hicks*, 533 U.S. at 360; *id.* at 387 (O'Connor, J., concurring) ("Today, the Court finally resolves that *Montana* . . . governs a tribe's civil jurisdiction over nonmembers regardless of land ownership."). The Court reaffirmed this principle in *Plains Commerce Bank*: "This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians . . . ." 554 U.S. at 328. Those decisions reflect the Court's gradual, considered determinations that the unique circumstances of tribal courts require application of the *Montana* exceptions as a prerequisite to tribal court jurisdiction without regard to land status

Nonmembers should not be subject to tort or other civil claims in tribal court simply because they are present, perhaps unpredictably or unpreventably, on tribal land when a dispute arises. The Court should reaffirm *Montana*'s presumption that tribal courts lack civil adjudicatory jurisdiction over nonmembers without regard to land ownership.[11] Requiring clear

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tribal civil jurisdiction-both regulatory and adjudicatory-over nonmember activities on tribal and nonmember land."); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1069-70 (10th Cir. 2007) (stating *Hicks* "put to rest" any dispute about whether *Montana* applied to tribal land, and "the only relevant characteristic for purposes of determining *Montana*'s applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority").

[11] *Williams v. Lee*, 358 U.S. 217 (1959), does not change this analysis. *Montana* limits the exercise of jurisdiction by a tribal

and unequivocal consent to tribal court jurisdiction over the matter asserted appropriately balances tribal and nonmember interests regarding civil adjudicatory jurisdiction and will assist courts, and parties, in determining where disputes should be resolved without multi-court litigation to determine the proper forum.

II. THE STATUS OF TRIBAL NATIONS IN THE FEDERAL SYSTEM REINFORCES THE NEED FOR CLEAR AND UNEQUIVOCAL CONSENT TO TRIBAL CIVIL ADJUDICATORY JURISDICTION OVER NONMEMBERS.

The unique substantive and procedural backdrop against which tribal courts function within the federal system compels the conclusion that tribal nations should not have civil adjudicatory jurisdiction over nonmembers absent clear and unequivocal consent. Of the 566 federally recognized tribal nations in the United States, many have no publicly available law or identifiable courts, and some tribal court decisions are subject to review by the tribe's executive and legislative branches, even when the actions of those branches are at issue. Given this setting, Justice Kennedy's observation in *Duro v. Reina*, which held a tribal nation could not assert criminal jurisdiction over a nonmember Indian, applies with full force:

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court over a nonmember defendant. *Williams*, in contrast, considered whether a state court had jurisdiction over a tribal defendant. As the Tenth Circuit stated in *MacArthur*, the relevant inquiry under *Montana* is not *where* the action to be regulated occurred, but "the membership status of the individual or entity over which the tribe is asserting authority." 497 F.3d at 1069-70.

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms. It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.

495 U.S. 676, 693 (1990) (internal quotation marks and citations omitted). Congress enacted criminal legislation regarding nonmember Indians, but not non-Indians, in response to *Duro*, and this Court considered the effect of that legislation, and deferred to it, in *United States v. Lara*, 541 U.S. 193, 205-07 (2004). Although many tribal nations are strengthening their tribal courts, the structural concerns Justice Kennedy identified, and others, still pervade Indian country court systems and threaten to prejudice nonmember litigants. These structural concerns are present at all phases of the litigation, including the composition of juries, the adequacy of procedure, and the magnitude of judgments. *See, e.g.*, *Simmonds v. Parks*, 329 P.3d 995, 1003 (Alaska 2014) (noting the Minto Tribal Court does not allow attorneys to speak to the court).

Clear and unequivocal consent for a nonmember to be subject to tribal civil adjudicatory jurisdiction should be required because it is impossible for a nonmember to evaluate risks of laws that often cannot be identified with reasonable certainty. Even tribal nations with substantial written and reported law and well-developed court systems, like the Navajo Nation, apply unwritten customary or traditional law. The Navajo Nation Supreme Court, despite the Nation's multi-volume tribal code, relied on unwritten Navajo traditional law, holding, contrary to a ruling of the Ninth Circuit Court of Appeals in *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1996), that a 40-year-old lease provision exempting a power plant from certain Navajo regulations is invalid and unenforceable as it relates to tribal employment regulation. *Thinn v. Navajo Generating Station, Salt River Project*, No. SC-CV-25-06, slip op. at 2, 6-10 (Navajo Nation Sup. Ct. Oct. 19, 2007). Nonmembers should be entitled to address the risk that unwritten tribal law, customs, traditions, and norms may factor prominently in civil actions litigated in tribal court.

Unpredictable changes in tribal laws or governments may affect the law and personnel of tribal courts. *See, e.g.*, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1199 (9th Cir. 2013) (while arbitration pursuant to a contract was proceeding, the tribal council changed the law to permit the tribe to seize by eminent domain the nonmember's contractual interest that it advanced in the arbitration); *Anderson v. Duran*, 70 F. Supp. 3d 1143, 1148 (N.D. Cal. 2014) (two factions of a tribal government each set up a tribal court and issued contradictory orders to a nonmember); *Vacco v. Harrah's Operating Co., Inc.*, 661 F. Supp. 2d 186, 196-97 (N.D.N.Y. 2009) (enforcing

a settlement agreement signed six years prior, after a new tribal council extended a statute of limitations in order to enforce a previously-entered tribal court judgment against a nonmember).

Tribal civil adjudicatory jurisdiction over nonmembers presents particular forum-based concerns given risks that local passions may unfairly prejudice outsiders. *See, e.g.*, *Burlington N. R. R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997), *as amended* (Apr. 9, 1997) (majority opinion held the defendant had not exhausted tribal remedies, over dissent highlighting lack of due process protections for the nonmember defendant and "[s]erious questions cast[ing] a shadow over the tribal court judgment"), *judgment vacated sub nom. Burlington N. R. R. Co. v. Estate of Red Wolf*, 522 U.S. 801 (1997).[12] This concern is ameliorated in state courts by the federal courts' diversity jurisdiction and removal authority, *see* 28 U.S.C. § 1441, and this Court's ability to review state court decisions that conflict with federal law, *see* 28 U.S.C. § 1257. Those important limitations on "home court" advantage are inapplicable to the courts of tribal nations because the United States Constitution generally does not apply to tribal nations or tribal courts, and the Congressionally prescribed alternative remedy to ensure fundamental fairness, the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, is substantially unenforceable outside tribal courts, councils, or executives. The unique insulation of tribal courts from constitutional and statutory guarantees of fairness otherwise applicable to federal and state court litigants in the federal system, *see*

[12] The $250 million tribal court verdict was reduced voluntarily by counsel for the tribal court plaintiffs, apparently out of concern over reactions to the verdict. *But see* Pet. Br. 9. The tribal court denied a motion to reduce or set aside the verdict.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 & nn.3-4 (1978), requires clear nonmember consent to tribal court jurisdiction.

The lower federal courts also lack jurisdiction to review tribal court actions that wrongly decide federal issues or violate federal rights. While a federal court has federal question jurisdiction to determine whether a tribal court has subject matter jurisdiction over a nonmember, *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985), the Court has not recognized lower federal court jurisdiction to examine any other issue decided by the tribal court.[13] While the ICRA imposes certain Constitution-like limitations on tribal governments, the lower federal courts have interpreted *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), to deprive federal courts of jurisdiction over injunctive, declaratory, or damage actions under the ICRA (beyond habeas corpus), or to rectify a deprivation of ICRA rights, even after exhaustion of tribal court procedures. *See, e.g.*, *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011-12 (10th Cir. 2007).

Perhaps contrary to this Court's intent in *Martinez*, "there remain a sizeable number of tribes that do not [waive ICRA immunity]. This means that the assertion of the sovereign immunity defense keeps many ICRA suits from ever being litigated in tribal court." Angela R. Riley, *Good (Native) Governance*, 107 Colum.

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[13] Lower courts are not encouraging on this point. *See, e.g.*, *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("[F]ederal courts may not re-adjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." (Citation omitted.)).

L. Rev. 1049, 1111 (2007); *see also* U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act* 72 (1991). Recognizing that ICRA decisions are subject only to tribal review, some tribal courts have opined that ICRA duties are optional. *See, e.g.*, *In re Batala,* 4 Am. Tribal Law 462, 468 (Hopi App. Ct. 2003) ("[T]he Hopi Tribe is not bound by the provisions of the Indian Civil Rights Act."). Though Congress likely did not intend the ICRA to create unenforceable rights, the existing federal remedial vacuum counsels strongly for requiring clear and unequivocal consent before a nonmember may be compelled to defend in tribal court. The absence of review of federal questions arising from the merits determinations of tribal courts or juries contradicts fundamental precepts underlying American dispute resolution. *See* U.S. Const., Art. III, § 2 ("The judicial power [of the United States] shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties . . . .").

Contrary to claims of the United States' and Respondent's certiorari stage briefs, citing *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997), and *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001), a nonmember may not be able to effectively challenge tribal court errors and excesses in an action to enforce a tribal court judgment in federal or state court. *See* Brief of Respondents Mississippi Band of Choctaw Indians 30 (Aug. 21, 2014); Brief for the United States as Amicus Curiae 20 (May 12, 2015). First, even if a challenge to enforcement on due process grounds were arguably effective, it would entail the expense and prejudice of litigating fully through tribal courts before such a remedy may be available. Second, the remedy in those cases, for a nonmember defendant deprived of due process, provides little, if any, comfort to defendants who lost on

other grounds, including erroneous federal question rulings. Finally, when a tribal court judgment can be enforced through injunctive relief or levy against on-reservation personnel or assets, there remains no non-tribal remedy at all. A clear jurisdictional rule is necessary, not a remedy allowed in two decisions by a single court of appeals that is a poor substitute for reliable relief.

III. AMERICA'S RAILROADS REFLECT THE NEEDS OF INTERSTATE BUSINESS FOR A CLEAR RULE.

The lack of a clear jurisdictional rule, and the structurally-based uncertainties arising from the unique status of tribal nations, present particular difficulties for AAR's member railroads. Railroads do not enjoy the same freedom as other businesses to choose whether to do business with tribal nations and their members or on tribal lands. Many railroads operate on century-plus old federally granted rights-of-way or easements through tribal lands, which cannot be abandoned without federal approval. Through treaties, land grant and right-of-way granting statutes, and rail regulatory legislation, the United States has proclaimed broad federal policies reinforcing the necessity of interstate rail transportation and a nationally uniform regulatory structure insulating rail carriers from inconsistent local laws.

Even before the Civil War, the United States began ensuring that railways could pass through reservations by the various treaties that Congress entered into with tribes, which excepted the railroads from tribal authority. For instance, Article 10 of the Treaty of 1855 with the Confederated Tribes of the Umatilla Indian Reservation provides:

> The said confederated bands agree that, whenever in the opinion of the President of the United States the public interest may require it, that all roads highways and railroads shall have the right of way through the reservation herein designated or which may at any time hereafter be set apart as a reservation for said Indians.

12 Stat. 945 (June 9, 1855). In the 1868 Treaty with the Navajos, that tribal nation agreed not to "oppose" the construction of railways and for the United States to pay damages for injuries during construction:

> They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.

15 Stat. 667, 669-70 (June 1, 1868).

Congress reinforced this federal policy of railway passage with a series of statutes granting rights-of-way to railroads between 1862 and 1899. *See, e.g.*, Act of July 1, 1862, ch. 120, §§ 1-20, 12 Stat. 489; Act of July 2, 1864, ch. 216, §§ 1-22, 13 Stat. 356; General Right-of-Way Act of 1875, 18 Stat. 482, *as amended*, 43 U.S.C. § 934; Act of March 2, 1899, ch. 374, § 1, 30 Stat. 990, *as amended*, 25 U.S.C. § 312 ("A right of way for a railway . . . through any Indian reservation in any

State or Territory . . . is hereby granted to any railroad company . . . .").

Congress' intent that railroads be subject to federal, not tribal, jurisdiction is evidenced by congressional actions. In 1887, less than ten years after the Navajo Treaty, Congress enacted the Interstate Commerce Act, 24 Stat. 379, 49 Cong. Ch. 104 (Feb. 4, 1887), and began the long history of creating national and exclusive regulation over railways in federal agencies. Congress passed the Federal Railroad Safety Act (FRSA) with the express purpose of promoting safety "in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA confirms Congress' intent to ensure that "laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). Similarly, the Interstate Commerce Commission Termination Act (ICCTA) governs railroad operations and explicitly provides that the remedies contained in the ICCTA are exclusive with respect to rail transportation. 49 U.S.C. § 10501(b).

The FRSA and ICCTA include express preemption provisions which preempt claims in state or federal court based on subject matter related to rail safety and regulated by government agencies so long as the railroad complied with the regulation. However, they do not expressly address whether tribal courts may entertain claims for relief that would be preempted in state or federal court. *See* 49 U.S.C. §§ 10501; 49 U.S.C. § 20106(a)(2). Consequently, the absence of express preemption of conflicting tribal law provisions parallel to those applicable to state law or courts creates uncertainty about whether tort claims, which federal law preempts in state and federal court, but asserted

in tribal court against railroads, are preempted.[14] AAR maintains that such claims would be preempted, but uncertainty regarding tribal jurisdiction over non-members could necessitate extensive litigation, at the expense of all stakeholders' time and resources, and would controvert Congress' multiple and unequivocal mandates that the laws governing railroads be uniform in order to protect the Nation's interest in efficient and effective rail transportation. *See El Paso Natural Gas. Co. v. Neztsosie*, 526 U.S. 473, 485-86 (1999) ("The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation."); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) ("The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce . . . .").

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[14] America's railroads are not the only industry subject to statutes that preempt claims in federal or state court, and which do not expressly preempt tribal law or jurisdiction. *See, e.g.*, *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473, 484-85 (1999) (Tribal exhaustion inapplicable to claims arising under Price-Anderson Act because by its preemption provisions "Congress . . . expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested."). *Compare Coppe v. Sac & Fox Casino Healthcare Plan*, No. 14-2598-RDR, 2015 U.S. Dist. LEXIS 20992, *8-*9 (D. Kan. March 13, 2015) (ERISA preempts the field with respect to enforcement for nongovernmental plans), *with MacDonald v. Ellison*, No. SC-CV-44-96, 7 Navajo Reporter 429, 431-34 (Navajo Nation Sup. Ct. 1999) (concluding first that ERISA did not apply to the case before it, and second, if it did, it did not preempt the tribal court action).

Despite these congressional directives that federal law govern America's railroads, uncertainty continues to exist given that railroads have little choice but to have a variety of agreements with tribal nations, tribal entities, and tribal members, ranging from federally authorized easements or rights-of-way, to maintenance, supply, or personnel-related agreements. As this Court has held, congressionally granted rights-of-way, like those over which America's railroads on tribal lands predominately run, are the equivalent of non-Indian fee land and subject to *Montana*'s general rule. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

Requiring clear and unequivocal consent to tribal court civil adjudicatory jurisdiction and, if applicable, tribal law, whether on tribal lands, federally granted rights-of-way, or on-reservation non-Indian fee land would have the beneficial effect of allowing nonmember businesses, tribes, and tribal members to fashion their agreements and conduct to efficiently afford the dispute resolution mechanism they intend. Indeed, the absence of tribal court jurisdiction where such consent has not been given does not present hardship to erstwhile tribal court plaintiffs, because state or federal courts will be available to address any claim. *See Strate*, 520 U.S. at 459.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street SW
Suite 1000
Washington, DC 20024
(202) 639-2500

LYNN H. SLADE
Counsel of Record
BRIAN K. NICHOLS
DEANA M. BENNETT
SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.C.
500 Fourth Street NW
Suite 1000
Albuquerque, NM 87102
(505) 848-1800
lynn.slade@modrall.com

Counsel for Amicus Curiae

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