No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, *et al.*,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, *et al.*,
Respondents.

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

BRIEF FOR THE STATES OF MISSISSIPPI, COLORADO, NEW MEXICO, NORTH DAKOTA, OREGON, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Indian tribes generally lack civil authority over the conduct of nonmembers, subject to two important exceptions set forth by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981). The first of those exceptions authorizes a tribe to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members . . . ." *Id.* at 565. This case presents a fundamental question about that exception: does it *ever* provide a basis for tribal courts to adjudicate tort claims against nonmembers?

This brief is filed by the States of Mississippi, Colorado, New Mexico, North Dakota, Oregon, and Washington.[1] Each has a clear interest in the resolution of the question presented because each is home to one or more federally recognized Indian tribes with whom it enjoys a strong and cooperative relationship.

The State of Mississippi is home to one federally recognized tribe, Respondent Mississippi Band of Choctaw Indians (the Tribe). The Tribe's citizens (over 10,000) are also Mississippi citizens, *see* 8 U.S.C. § 1401(b), and the State has a direct interest in their rights and welfare. The State also has a direct interest in respecting the ability of the Tribe to regulate the activity of those voluntarily doing business on Choctaw Reservation land. In Mississippi's view, reversing the decision below would not only constitute an unwarranted

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

assault on the Choctaw tribal court system, but also cast doubt on the inherent rights of all interdependent sovereigns like the State of Mississippi itself.

The State of Colorado is home to two federally recognized tribes, both of which have a tribal court system. *See Federal and State Recognized Tribes*, Nat'l Conf. of St. Legs., www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#co ("Federally Recognized Tribes").[2] Colorado and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, C.R.S. §§ 24-44-103(1)(a), (2)(e) (establishing Colorado Commission of Indian Affairs, whose duties and powers include coordinating intergovernmental dealings between tribes and the State and "address[ing] the needs of tribal governments and Indian peoples of [Colorado].").

The State of New Mexico is home to 23 federally recognized tribes and 22 tribal court systems. *See* Federally Recognized Tribes.[3] New Mexico and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, N.M. Stat. Ann. § 11-18-3 (encouraging state-tribal collaboration and communication).

The State of North Dakota is home to five federally recognized tribes, each of which has a tribal court

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[2] *See also Tribal Court*, Southern Ute Indian Tribe, http://www.southernute-nsn.gov/tribal-court/; *Tribal Law Gateway: Ute Mountain Tribe of the Ute Mountain Reservation*, N.I.L.L., http://www.narf.org/nill/tribes/ute_mtn_ute.html.

[3] *See also N.M. Tribal Courts and Judge's Directory*, N.M. Tribal-State Jud. Consortium (2014-2015), https://tribalstate.nmcourts.gov/index.php/component/docman/doc_download/Tribal%20Judges%20Directory%202014-2015.pdf (identifying New Mexico tribal courts).

system. *See Tribal Nations*, N.D. Indian Affairs Comm'n, http://www.nd.gov/indianaffairs/?id=18.[4] North Dakota and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, *Judicial*, N.D. Indian Affairs Comm'n, http://www.nd.gov/indianaffairs/?id=43.

The State of Oregon is home to nine federally recognized tribes, each of which has a tribal court system. *See Oregon's Indian Tribes*, Or. Blue Book, http://bluebook.state.or.us/national/tribal/tribal.htm. Oregon and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, O.R.S. § 182.164(1)(c)-(d) (encouraging state-tribal collaboration and communication).[5]

The State of Washington is home to 29 federally recognized tribes and 29 tribal court systems. *Washington State Tribal Directory*, Governor's Office of Indian Affairs, http://www.goia.wa.gov/Tribal-Directory/TribalDirectory20151005.pdf. Washington and its tribes have a relationship of mutual respect and cooperation. *See* Wash. Civ. R. 82.5 (addressing tribal jurisdiction and providing for enforcement of tribal court orders).

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[4] *See also North Dakota Tribal Child Welfare Services Directory*, Native American Training Institute, http://www.nativeinstitute.org/North%20Dakota%20Tribal%20Child%20Welfare%20Services%20Directory.pdf (identifying North Dakota tribal court systems).

[5] *See also* Executive Order No. EO-96-30, State/Tribal Government-to-Government Relations (Mar. 22, 1996), *available at* http://www.oregon.gov/LCD/docs/govtogov/eo96-30.pdf (requiring Cabinet level department heads to adopt policies and procedures in furtherance of the government-to-government relationship between the State and federally recognized tribes in Oregon).

According to Petitioners, tribal courts are universally prohibited from exercising jurisdiction over nonmembers in civil tort suits, no matter how strong the consensual relationship between that nonmember and the tribe and no matter how clear the nexus between that consensual relationship and the alleged tort.

As explained herein, the amici states respectfully disagree. There is no basis in law or logic to categorically limit a tribe's authority merely because "the mode of regulation is tort law." Cert. Reply Br. 4 n.5.

STATEMENT OF THE CASE

1. Dolgencorp, Inc. (Petitioner) operates a Dollar General store under a business license issued by the Tribe. J.A. 28. The store is located on Reservation land, and Dolgencorp leased the premises from a tribal entity. J.A. 28. In that lease, Dolgencorp directly acknowledges that it is operating on "land held in Trust by the United States of America for the [Tribe]." J.A. 48 (XXIX).

The lease requires Dolgencorp to "comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." J.A. 45 (XXVIII). It also expressly provides for jurisdiction in tribal courts and subjects the agreement to tribal laws, including "the Choctaw Tribal Tort Claims Act":

> This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi . . . . Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians.

> This agreement and any related documents is [sic] subject to the Choctaw Tribal Tort Claims Act.

J.A. 47-48 (XXVII).

In spring 2003, Dale Townsend, the store's non-Indian manager, agreed that Dolgencorp's store would participate in the "Youth Opportunity Program," J.A. 66 (deposition testimony), a formal program that places young tribal members in short-term positions (like an internship) with local businesses, J.A. 51.

2. John Doe (Respondent) is a citizen of Mississippi and a member of the Tribe. Pet. App. 3. In summer 2003, when Doe was 13, he worked at the store through the Youth Opportunity Program. Townsend was Doe's supervisor. J.A. 12 (Tribal Ct. Compl. ¶ II); *see* J.A. 60 (describing Townsend's responsibilities as a supervisor participating in the Youth Opportunity Program).

According to Doe, Townsend sexually molested him at the store in July 2003. Doe alleges that Townsend made multiple uninvited sexual advances, offered him money, grabbed him "in his crotch area" until Doe "escaped from his grasp," and continued to make sexually offensive remarks. J.A. 13 (Tribal Ct. Compl. ¶¶ IV-V). Doe claims to have suffered severe and prolonged trauma as a result of Townsend's attacks. J.A. 14 (Tribal Ct. Compl. ¶ VII).

In September 2003, the Choctaw Tribal Court entered an order (with Townsend's consent) excluding Townsend from the Reservation. J.A. 24.

3. In January 2005, Doe filed a complaint in the Civil Division of the Choctaw Tribal Court seeking compensatory and punitive damages from Townsend and Dolgencorp. J.A. 11-15. The complaint asserts claims

against Dolgencorp for vicarious liability and negligence in hiring, training, or supervising Townsend. J.A. 14. The complaint specifically alleges that Dolgencorp was on notice "of Townsend's propensity to harm children." J.A. 13 (Tribal Ct. Compl. ¶ IV).

The tribal court denied Petitioners' motion to dismiss for lack of jurisdiction. J.A. 22. On interlocutory appeal, the Choctaw Supreme Court affirmed, holding that the tribal court had jurisdiction under the exceptions articulated in *Montana* v. *United States*, 450 U.S. 544 (1981). Pet. App. 82-90.

Invoking *Montana*'s first exception, the Choctaw Supreme Court held that defendants had engaged in three qualifying "consensual relationships"—the lease, the business license, and the agreement to participate in the Youth Opportunity Program. Pet. App. 85-87. The court also identified a "considerable nexus between the alleged tort and [Dolgencorp's] commercial lease" because the perpetrator managed the leased premises and the victim was a "[t]ribal minor placed at the store by the Tribe to receive job training." Pet. App. 85-87. The court determined this was sufficient to support jurisdiction in tribal court.

4. Petitioners then sought injunctive relief in the United States District Court for the Southern District of Mississippi. J.A. 19-27. Following discovery, the district court granted Respondents' motion for summary judgment on the first *Montana* exception. Pet. App. 45-54. The court found that Petitioners' participation in the Youth Opportunity Program constituted a consensual relationship, and that Petitioners had "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." Pet. App. 45-46. The court also 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." Pet. App. 45-46 (citing *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001); *Montana*, 450 U.S. at 566).

5. A split panel of the Fifth Circuit affirmed. Pet. App. 1-2. Like the three courts before it, the Fifth Circuit identified an "obvious" nexus between Petitioners' consensual participation in the Youth Opportunity Program and Doe's tort claims.

According to the court of appeals, the tribal suit regulates "the safety of the child's workplace," and it is irrelevant that "the regulation takes the form of a tort duty that may be vindicated . . . in tribal court." Pet. App. 13. Dolgencorp could anticipate both having "to answer in tribal court for harm caused to the child in the course of his employment" and that a store manager sexually molesting an intern "would be actionable under Choctaw law." Pet. App. 13, 14 n.4. *See also* J.A. 87 (Dolgencorp's policy on sexual harassment).

After a divided court of appeals denied rehearing en banc, Pet. App. 93, Petitioners sought further review by this Court of the following threshold question: "[w]hether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulation the conduct of nonmembers who enter into consensual relationships?" According to Petitioners, the answer is an unqualified "no." *See, e.g.*, Pet. 18 ("Absent congressional authorization, tribal courts have no jurisdiction to adjudicate tort claims against nonmembers") (capitalization removed).

SUMMARY OF ARGUMENT

Indian tribes generally lack civil authority over the conduct of nonmembers. But that rule is subject to two important exceptions set forth by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981). The first (the Consensual Relationship Exception) authorizes a tribe to "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 (emphasis added).[6]

In this case, Petitioners urge the Court to hold that the Consensual Relationship Exception is categorically inapplicable to civil tort claims. According to Petitioners, *Montana* did not contemplate tribal courts *ever* participating in the regulation of nonmember conduct through the adjudication of tort claims—even when a nonmember purposefully engages in commercial activity with the tribe or its members and an ensuing tort arises directly out of that relationship. Pet. Br. 49.

The amici states respectfully disagree. There is no basis in law or logic to categorically limit a tribe's authority merely because "the mode of regulation is tort law." Cert. Reply Br. 4 n.5.

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[6] "[O]ther means" includes litigation. *See, e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001) ("*Montana* governed tribal assertions of [civil] adjudicatory authority" over non-member defendants) (citing *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997)). *See also Montana*, 450 U.S. at 465-66 (citing a case involving tribal court jurisdiction over a contract dispute in explaining the Consensual Relationship Exception).

ARGUMENT

The ability of tribal courts to resolve disputes is an essential attribute of tribal sovereignty. While the amici states agree that there are important limits to the jurisdictional reach of those courts, there is no basis for Petitioners' categorical rule: that, under *Montana*, tribal courts may *never* adjudicate civil tort suits against nonmembers, no matter how closely the nonmember voluntarily associated with the tribe or the clarity of the nexus between the consensual relationship and the alleged tort. As explained herein, Petitioners' narrow reading of the Consensual Relationship Exception would unnecessarily compromise the relationship of mutual respect between States and tribes as interdependent sovereigns.

I. The Consensual Relationship Exception of *Montana* Is Essential to Tribal Sovereignty.

The United States, the fifty states, and the 567 federally recognized Native American tribes are each interdependent sovereigns with natural rights on matters of self-government. *See, e.g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978) (explaining that Native American tribes are "distinct independent political communities, retaining their original natural rights in matters of local self-government").

Judicial autonomy is one such natural right. And it is of particular importance in the tribal context. Congress has acted deliberately to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government," *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974), and the development of justice systems has been recognized as essential to "eras[ing] old attitudes of paternalism," Lyndon Johnson, Special Message to

the Congress on the Problems of the American Indian, 1 Pub. Papers 335 (Mar. 6, 1968).

This Court's decisions reflect that reality. It has, for example, held that federal courts lack jurisdiction to hear claims under the Indian Civil Rights Act partly because tribes are independent sovereigns. *See Santa Clara Pueblo*, 436 U.S. at 55. It has required nonmembers to exhaust tribal remedies, in light of Congress' "policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). And it has specifically recognized that the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 16-17 (1987).

To be sure: tribes—including their judicial systems—generally lack civil authority over the conduct of nonmembers. *See, e.g.*, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (noting that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . .") (quoting *Montana*, 450 U.S. at 565, for the proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

But this Court in *Montana* set forth two important exceptions. The first, the Consensual Relationship Exception, authorizes a tribe to "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." 450 U.S. at 565.

The ability of tribes to regulate the conduct of nonmembers who enter into a consensual relationship with a tribe or its members is essential to tribal sovereignty. In the words of this Court:

> *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," 450 U.S., at 565, 101 S.Ct. 1245, allowing these to be regulated to the extent necessary "to protect tribal self government [and] to control internal relations," *id.*, at 564, 101 S.Ct. 1245. See *Big Horn Cty. Elec. Cooperative, Inc.* v. *Adams*, 219 F. 3d 944, 951 (C.A.9 2000) ("*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers" (internal quotations omitted; emphasis added)).

Plains Commerce Bank, 554 U.S. at 332.

As this Court has emphasized, the trigger for the Consensual Relationship Exception is the fact that "non-Indian activities on the reservation . . . had a discernable effect on the tribe or its members." *Ibid.* (further noting that "a Tribal Court's jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation" was the first of four cases cited "in explanation of *Montana's* first exception").

II. As This Case Reaches the Court, There Is No Dispute That the Alleged Torts Arose Directly from a Consensual Relationship.

As amici understand it, the following facts are not in dispute: Petitioners voluntarily established a presence on Reservation land and expressly agreed to conduct their business in accordance with the Tribe's rules, *supra* pp. 4-5. The torts alleged by Respondent (a young Tribe member) arose directly out of the business that Petitioner agreed to conduct on Reservation land in accordance with the Tribe's rules, *supra* p. 5. *See also* Br. in Opp. 14 (noting that, at oral argument before the Choctaw Supreme Court, Dolgencorp conceded that it employed Doe at its store through the Youth Opportunity Program and argued that it could not be liable in tort "due to the worker's comp. exclusive remedy"—an argument underscoring the "consensual relationship" between Petitioners and Doe).

Presented with those facts, four courts independently concluded that this case triggers the first *Montana* exception for relationships arising from "commercial dealings, contracts, leases, or other arrangements." *See* Pet. App. 3 (Choc. Tribal Ct.); Pet. App. 75-91 (Choc. Sup. Ct.); Pet. App. 39-54 (S.D. Miss.); Pet. App. 1-36 (5th Cir.). *Cf. Walls* v. *North Mississippi Medical Center & U.S. Fidelity & Guar. Co.*, 568 So.2d 712, 716 (Miss. 1990) (holding that relationship between a student intern and host institution was a "consensual relationship").[7]

[7] If tribes have the authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members," *Montana*, 450 U.S. at 565, then it is hardly surprising that the lower courts

In this Court, Petitioners do not challenge the lower courts' determination of a qualifying consensual relationship or its connection to the torts alleged. *See, e.g.*, Gov't Cert. Br. 8 ("Rather than repeat the arguments they advanced in the court of appeals, petitioners now contend that tribal courts universally 'lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress.'") (quoting Pet. 18).

III. The Categorical Rule Urged by Petitioners Is Unnecessary to Address Legitimate Concerns Regarding Fairness and Consent.

Petitioners urge this Court to adopt a rule uniformly excluding civil tort suits from tribal authority. *See, e.g.*, Pet. 18 ("Absent congressional authorization, tribal courts have no jurisdiction to adjudicate tort claims against nonmembers") (capitalization removed).

Such a categorical rule would disrupt the longstanding relationship of mutual respect and cooperation between the amici states and the tribes within their borders. *Cf. Darr* v. *Burford*, 339 U.S. 200, 204 (1950) (noting, in the federalism context, that "it would be unseemly in our dual system of government" for federal courts to proceed before "the courts of another sovereignty with concurrent powers . . . have had an opportunity to pass upon the matter").

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here all determined that the Choctaw tribal courts (as a branch of tribal self-government) are the appropriate forum for adjudication of this dispute. As the Fifth Circuit expressed the point: it is unremarkable to find it "within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees." Pet. App. 13.

Petitioners argue that some tribal courts are not fit to adjudicate tort suits against nonmembers. *See generally* Pet. Br. 2-9. And they argue that it would be especially unfair to hale nonmembers into such courts based on isolated or incidental contacts with the tribe. *See* Pet. Br. 53-54. But, as explained next, a categorical rule is unnecessary to protect nonmembers against unfair, *infra* pp. 14-16, or unsuspecting, *infra* pp. 16-19, exercises of tribal authority.

A. Concerns About *Some* Tribal Courts Do Not Warrant Removing *All* Tort Disputes From *Montana*'s Exception.

Amici have close relationships with tribal courts. Broadly speaking, those courts provide important remedies to tribal members while also providing meaningful safeguards for nontribal parties. Amici respect these courts as a legitimate and wholly sufficient forum for sovereign tribes to resolve matters concerning the tribe and to regulate conduct within their borders.

Mississippi's experiences with the tribal courts of Respondent are illustrative. Mississippi's longstanding governmental ties to the Tribe and its membership include extensive experience with the Choctaw tribal courts. Although many tribal court disputes concern only Mississippi citizens who are also Tribe members, a significant minority of cases involve nonmember citizens.[8] And, as with its own courts, Mississippi

[8] *See, e.g.*, *Williams-Willis* v. *Carmel Fin. Corp.*, 139 F. Supp. 2d 773 (S.D. Miss. 2001) (civil jurisdiction over action involving claim against nonmember arising from nonmember's alleged tortious activities on reservation lands presumptively lies in tribal courts, which must be given first opportunity to rule on jurisdiction); *Bank One, N.A.* v. *Lewis*, 144 F. Supp. 2d 640 (S.D. Miss. 2001) (credit card issuer required to exhaust tribal remedies).

carefully monitors the workings of all tribunals that regularly adjudicate the legal rights of its citizens.

Based on its experience, Mississippi has confidence in the Choctaw courts. The Choctaw courts' institutional framework with regard to such procedural protections as judges' qualifications,[9] ethical and procedural rules,[10] and limitations on jurisdiction[11] is sound, and they have consistently demonstrated the ability to fairly and competently adjudicate claims before them.[12]

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[9] Among many qualifications, all judges in the Civil Division of the Choctaw Tribal Court must be attorneys licensed to practice law in Mississippi. Choctaw Tribal Code § 1-3-3. All three judges on the Choctaw Supreme Court must be graduates of accredited law schools and have served at least two years as a judge or ten years as a tribal judge; the Chief Justice must have served at least three years as a judge, among other qualifications. *Id.* §§ 1-3-3, 1-3-4.

[10] Tribal judges are subject to comprehensive ethics provisions modeled on the American Bar Association's Model Code of Judicial Conduct, Choctaw Tribal Code § 1-5-7, and court clerks and other judicial-support personnel are subject to a separate code of ethics, *id.* at tit. I, ch. 8. The Choctaw Tribal Court Rules of Civil Procedure and Mississippi Band of Choctaw Indians' Rules Evidence mirror the corresponding Mississippi rules. *See id.* at tit. VI, chs. 1, 3.

[11] The Choctaw Tribal Code carefully limits the exercise of tribal jurisdiction over nonmembers to "civil cases in which at least the party presence, business dealings, or contracts, or other actions or failures to act, or other significant minimum contacts on or with the reservation" have given rise to civil obligations to Tribe members. Choctaw Tribal Code § 1-2-1.

[12] The Mississippi legislature has responded accordingly. *See, e.g.*, Miss. Code Ann. § 41-57-23(2)(a) (recognizing that tribal court has the same authority as chancery court to make changes to birth certificates and requiring State Board of Health to comply with tribal court decrees under this section).

Amici states are aware that there can be significant variation in the practices and experience of tribal court systems, which may cause concern for nonmembers. But as the United States and Respondents have already discussed in detail, there are adequate institutional protections both outside of and within individual tribal court systems to safeguard the rights of non-members. *See* Resp. Br. 47-49; Gov't Cert. Br. 19-20. Indeed, the Consensual Relationship Exception itself is a protection against potential overreach by a tribal court with regard to regulation of nonmember conduct, *infra* pp. 16-19.

Amici states believe that legitimate concerns about *some* tribal courts' ability to fairly and competently adjudicate tort claims involving nonmembers do not warrant stripping *all* tribal courts of their authority to adjudicate such claims. Amici have no reason to believe that tribal courts are categorically unfit to adjudicate civil tort disputes involving non-members, especially where those nonmembers have agreed to subject themselves to tribal jurisdiction. And Petitioners' contrary view is out of step with the amici states' broad experience with tribal justice systems—and their abiding respect for tribes' right to self-govern.

B. Concerns About Insufficient Consent Are Not Implicated Here.

Finally, Petitioners argue that it is distinctly unfair to force unsuspecting nonmembers to defend tort claims in tribal courts where the "consensual relationship" with the tribe is remote or tenuous. *See, e.g.*, Pet. Br. 53 ("[W]hen jurisdiction is founded on the tribal membership of an employee, or the tribal identification of a corporation, it may be difficult or impossible for a

business to know whether any particular transaction or course of conduct is governed by tribal law.").[13]

That concern is echoed by six amici states in support of Petitioners. *See, e.g.*, Br. for Okla. et al. 2 (describing a motorist who chooses a travel stop that "indiscernibl[y]" operates as a tribal business on a "tiny, isolated parcel of Indian land").

Amici states are sympathetic to those concerns. *See, e.g.*, Br. for States as Amici Curiae Supporting Petitioner, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (No. 07-411), 2008 WL 503594, at *19-20 (expressing view of North Dakota and Washington, among other amici, that requisite "consensual relationship" under first *Montana* exception cannot be inferred solely from dealings with corporation majority-owned by tribal members); Br. for States as Amici Curiae Supporting Petitioner, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001) (No. 00-454), 2001 WL 41036, at *16 (expressing view of Colorado, Mississippi, and North Dakota, among other amici, that nonmembers do not consent to tribal taxation merely by entering reservation under first *Montana* exception); Br. for States as Amici Curiae Supporting Respondents, *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872), 1996 WL 709324, at *22-24 (expressing view of Colorado, Mississippi, and Washington, among other amici, that nonmembers did not consent to tribal jurisdiction over automobile accident under first *Montana* exception by driving on highway within reservation).

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[13] *See also* Pet. Br. 54 ("While in some cases, a defendant may conduct business on a clearly marked reservation, in other cases a defendant may simply be passing through land difficult to identify as tribal.").

But those concerns are simply not implicated here. Unlike the hypotheticals posed by Petitioners and their amici, or the circumstances that have troubled Colorado, Mississippi, North Dakota, and Washington in the past, there was no accidental or unsuspecting contact between Petitioners and the Tribe in this case. No one stumbled onto tribal land or into a tribal business. And no one was haled into tribal court on the happenstance that a counterparty turned out to be a tribal member.

On the contrary, amici states understand Dolgencorp to be a sophisticated party that knowingly established a for-profit commercial relationship with the Tribe. According to its own papers, Dolgencorp voluntarily entered into multiple legal agreements with the Tribe, including a business license, a separate lease agreement, and yet another agreement to participate in the Youth Opportunity Program. And it was fully informed before entering those relationships, including (in the case of its lease) by an express agreement that tribal law would govern and "jurisdiction" would vest in the tribal court. J.A. 47-48 (Provision XXVII).

As the United States has noted, "Petitioners do not dispute that they had a consensual relationship with the Tribe." Gov't Cert. Br. 12. "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.'" Gov't Cert. Br. 8.

Amici do not believe that this case presents a suitable vehicle for grappling with the outer boundaries of the "consensual relationship" test. Petitioners have not pressed the issue, and the lower courts have determined

that this case falls squarely within the heartland of *Montana*'s Consensual Relationship Exception. Exactly what suffices to show a "consensual relationship" under that exception is too important to be decided in this case, where the nonmember's tribal interaction is repeated, express, and deliberate. Amici states respectfully ask this Court to leave those critical questions about the boundaries of tribal jurisdiction to a future case, in which they can be meaningfully addressed by all stakeholders.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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