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

BRIEF FOR RESPONDENTS

NEAL KUMAR KATYAL
COLLEEN E.R. SINZDAK
EUGENE A. SOKOLOFF
FREDERICK LIU
HOGAN LOVELLS US LLP
555 Thirteenth St. NW
Washington, DC 20004
(202) 637-5600

C. BRYANT ROGERS
Counsel of Record
CAROLYN J. ABEITA
VANAMBERG, ROGERS, YEPA, ABEITA, GOMEZ & WORKS, LLP
P.O. Box 1447
Santa Fe, NM 87504
(505) 988-8979

MELISSA T. CARLETON
Acting Attorney General
N. CHERYL HAMBY
MISSISSIPPI BAND OF CHOCTAW INDIANS
P.O. Box 253
Choctaw, MS 39350
(601) 656-4507

RIYAZ A. KANJI
PHILIP H. TINKER
KANJI & KATZEN, PLLC
303 Detroit Street, Ste. 400
Detroit, MI 48104
(734) 769-5400

Counsel for Respondents
(Additional counsel listed on signature page.)

QUESTION PRESENTED

Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND TREATIES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 13-1496

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

BRIEF FOR RESPONDENTS

INTRODUCTION

This case arises from allegations that the manager of a store located on trust land within the Mississippi Choctaw Reservation sexually molested a thirteen-year-old Choctaw child under his supervision. The child worked in the store as part of the Tribe's Youth Opportunity internship program in which the store had expressly agreed to participate, and the store was operating under a lease agreement and a business license with the Tribe. The question before this Court is whether the Choctaw child may seek civil redress through the Tribe's court system for injuries that arose directly from these consensual relationships with the Tribe and its members.

Four successive tribunals—the Tribe's civil court, the Tribe's supreme court, a federal district court,

and a federal court of appeals—have agreed that the suit may proceed in the Choctaw courts. They have based their decisions on a straightforward application of this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), which permits tribes to exercise civil jurisdiction over nonmembers engaged in consensual relationships with the tribe or its members on tribal land if there is a nexus between the nonmember's relationship with the tribe or tribal members and the claims pled.

Petitioners now ask this Court to deny the tribal plaintiffs in this case a tribal forum to vindicate their rights. Even worse, they invite this Court to bar tribal jurisdiction over *all* civil suits against nonmembers based on *Oliphant* v. *Suquamish*, 431 U.S. 191 (1978), which limited a tribe's criminal jurisdiction to its members. But this Court already declined that invitation when it held, more than thirty years ago, that "*Oliphant* does not apply" in the civil context. *Nat'l Farmers Union* v. *Crow Tribe of Indians*, 471 U.S. 845, 854 (1985). Petitioners offer nothing close to the extraordinarily compelling rationale necessary to justify overturning this precedent.

Instead, petitioners rely primarily on suspect inferences gleaned from inapplicable treaties and superseded statutes from more than a century ago. And they set forth policy arguments drawn from that same historical period, contending that tribal law and tribal courts are simply unfit for nonmembers.

This Court should once again decline to establish limits on tribal civil jurisdiction grounded in a mercifully bygone era. The ability to exercise adjudicative authority over nonmembers who have implicitly or explicitly consented to jurisdiction is essential to the

"right of the Indians to govern themselves." *Williams* v. *Lee*, 358 U.S. 214, 223 (1959). The tribes have retained this power, and the Court should not strip it from them now.

STATEMENT

A. The Choctaw Court System

The Mississippi Band of Choctaw Indians (the "Tribe") is the only federally recognized Indian tribe in Mississippi. *See* 80 Fed. Reg. 1942, 1944 (Jan. 14, 2015). Its 10,000-plus members include descendants of those Choctaw Indians who avoided forcible relocation west of the Mississippi River under the federal government's Indian-removal policies of the 1830s. Carl Waldman, *Encyclopedia of Native American Tribes* 71 (3d ed. 2006). The Tribe's initial reservation was established in Mississippi in 1944, and the Mississippi Band of Choctaw Indians was recognized as a separate tribe in 1945. *See United States* v. *John*, 437 U.S. 634, 638-647 (1978); 8 Jeffrey Jackson & Mary Miller, *Encyclopedia of Mississippi Law* § 72:1, at 374 (2001).

The Tribal Constitution establishes a representative, democratic form of government. It guarantees equal protection and due process to "any person within its jurisdiction." Choctaw Const. art. X, § 1(h). There are three branches of the Choctaw government. The Constitution establishes a Tribal Council of seventeen elected representatives (the legislature) and an elected Tribal Chief (the executive). *See id.* arts. IV, V, VIII, IX. A separate judiciary was established by the Tribal Council 30 years ago, as authorized by the Constitution. *Id.* art. VIII. "The Tribal government carries out functions similar to local, state and federal governments, and is respon-

sible for providing Tribal members and other persons on the reservation with education, health care, job training, housing, police and fire protection, Tribal courts, utilities and other community infrastructure." 8 Jackson & Miller, *supra*, § 72:5, at 379; *see also* Office of the Tribal Chief, Mississippi Band of Choctaw Indians, *Tribal Profile* (2014).[1]

The Tribe's judicial branch is highly developed:

> The Mississippi Band of Choctaw Indians has created a vibrant economy, and one of the underpinnings of its success is its court system. Organized independently of elected leadership, the court provides an arena for the fair, reliable resolution of disputes. * * * Through its structure and rulings, the court is able to provide assurance to business interests, tribal citizens and families, and neighboring communities that the Band and its judicial institutions are fair and equitable to all.

Harvard Project on American Indian Economic Development, *Constitutions and Fundamental Government Reform: Lessons in Excellence in the Governance of American Indian Nations* 11, 13 (2010).[2]

The Choctaw Tribal Court System has four divisions: civil court, criminal court, youth court, and peacemaker court. Choctaw Tribal Code § 1-3-1. A three-justice Choctaw Supreme Court reviews civil and criminal appeals and is the final interpreter of

---

[1] *Available at* http://www.choctaw.org (last visited Oct. 14, 2015).

[2] *Available at* http://goo.gl/qo9SRr (last visited Oct. 14, 2015).

Tribal law. *Id.* § 1-3-2; 8 Jackson & Miller, *supra*, § 72:7, at 381-382.

The Tribe's laws delineate requirements for admission to legal practice, Choctaw Tribal Code §§ 1-4-1 to -3, and for judicial service, *id.* §§ 1-3-3, -4. The judiciary is governed by a Code of Ethics, which recognizes that "[a]n independent and honorable judiciary is indispensable to justice on the Choctaw Indian Reservation." *Id.* § 1-6-7, Canon 1. Judicial nominees are vetted by the Committee on Judicial Affairs and Law Enforcement of the Tribal Council. *Id.* § 1-3-3(3). And the Tribal Code requires that civil-court judges have graduated in good standing from accredited law schools and be members of the Mississippi state bar. *Id.* § 1-3-3(2). Justices of the Choctaw Supreme Court must have two years' experience as judges in state, federal, or Tribal court—three years in the case of the Chief Justice. *Id.* § 1-3-4.

The Choctaw Courts are charged with providing "an effective means of redress in civil cases" that arise from a defendant's "presence, business dealings, or contracts, or other actions or failures to act, or other significant minimum contacts on or with the Reservation." *Id.* § 1-2-1. In general, the Choctaw Courts exercise subject-matter jurisdiction over civil causes of action occurring on reservation lands that involve the interests of the Tribe or its members. *Id.* § 1-2-5; *see also id.* § 1-2-2(3) (limited extraterritorial jurisdiction); *id.* § 1-2-3(2)(g) (long-arm statute asserting jurisdiction over any person who commits torts on tribal lands subject to the *Montana* limitations); *id.* § 1-5-4 (sovereign immunity); *id.* § 1-5-10 (authorizing suits to enjoin unlawful conduct of the Tribe or Tribal officials in violation of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1301 *et*

seq., or other federal or tribal law); 8 Jackson & Miller, *supra*, § 72:9, at 383-387.

The Choctaw Courts apply federal, state, and Tribal law. In the first instance, the Tribal Code directs the courts to follow any "applicable laws of the United States and authorized regulations of the Secretary of the Interior." Choctaw Tribal Code § 1-1-4; 8 Jackson & Miller, *supra*, § 72:12, at 389 ("Where there is applicable federal law, federal law controls."). Where pertinent, the courts may also apply the "ordinances, customs, and usages of the Tribe." Choctaw Tribal Code § 1-1-4. And if neither federal nor Tribal law applies, the court applies "the laws of the State of Mississippi." *Id.* As a result, Choctaw common law includes a blend of Tribal and state law sources. *See* 8 Jackson & Miller, *supra*, § 72:12, at 390. Choctaw tort suits, in particular, typically borrow from state law.

Civil actions under Choctaw law display many features familiar to state practitioners. The Tribe has promulgated rules of civil procedure and evidence modeled after Mississippi's rules. Choctaw Tribal Code tit. VI; *see* 8 Jackson & Miller, *supra*, § 72:12, at 390. And civil actions in Tribal courts are circumscribed by a statute of limitations. Choctaw Tribal Code § 1-5-6. The Tribe has also enacted a wide range of substantive statutes governing everything from taxation, *id.* tit. XIV; to sales and other commercial transactions, *id.* tit. XXVI; to labor organizations, *id.* tit. XXX. And it has adopted several articles of the Uniform Commercial Code. *See id.* tit. XXVI; 8 Jackson & Miller, *supra*, § 72:14, at 391. The Tribe's Constitution, Bylaws, and Tribal Code

are readily accessible online.[3] And copies of the Code and "all laws or rules which are incorporated by reference from other jurisdictions into the Tribal Code" are available for public inspection at the Tribal Court, along with copies of civil case files. Choctaw Tribal Code §§ 1-5-1, -2.

Nonmember litigants routinely appear before—and prevail in—the Choctaw Courts. The Tribe has surveyed the Choctaw Tribal Court records and determined that, between January 1, 2013, and September 21, 2015, almost 5,000 cases involving nonmembers were adjudicated in the Choctaw courts. Many of these were actually suits initiated by nonmembers to collect debts from tribal members and to satisfy judgments through the garnishment of wages. Over 85% of the suits involving nonmembers resulted in a settlement or a win for the non-Indian party.[4]

The Choctaw court system is highly advanced, but it is hardly anomalous. Most modern tribal judiciaries are based not on traditional Indian dispute-resolution systems, but rather on Western-style tribunals. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1-2 (1997). All litigants in tribal courts benefit from the procedural protections of the ICRA. These include guarantees of due process and equal protection, as well as a bar on *ex post facto* laws and bills of attainder. *See* 25 U.S.C. § 1302(a)(8), (9). In applying these protections, tribal courts typically look to "settled federal or state case law." Matthew

---

[3] *Available at* http://goo.gl/jB3eQF (last visited Oct. 14, 2015).

[4] These data are drawn from publicly available case files at the Office of the Clerk, Choctaw Tribal Courts.

L. M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data* (2008) (manuscript at 7);[5] *see also* Matthew L. M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Col. L. Rev. 59, 91 (2013) (tribal courts depart from federal- and state-law norms when tribal law provides "stronger guarantees of fundamental fairness"). And tribal courts consistently enforce these protections in cases involving members and nonmembers alike. *See, e.g.*, *Miss. Band of Choctaw Indians* v. *Peeples*, No. SC-2008-05 (Choc. Sup. Ct. 2009) (noting jurisdiction over suits filed by any person against tribal officials to enjoin violations of ICRA or other applicable federal and tribal law); *In re A.P.* v. *Tuba City Family Ct.,* 6 Am. Tribal Law 660 (Nav. Sup. Ct. 2005) (vacating exclusion order against nonmember minor on due process grounds).

B. Factual Background

Since 2000, petitioners Dollar General Corp. and Dolgencorp, LLC (collectively, "Dollar General") have operated a Dollar General variety retail store on the Choctaw Reservation. Pet. App. 76; J.A. 28. Petitioners' store sits in the Choctaw Town Center, a shopping plaza located within the boundaries of the Reservation, on tribal land.[6] Pet. App. 76.

---

[5] *Available at* http://goo.gl/YPyRMu (last visited Oct. 14, 2015).

[6] Throughout this brief, "reservation land" refers to all land within the boundaries of a Tribe's "Indian country," *see Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 526-527 (1998), including nonmember-owned fee lands. By contrast, "tribal land" refers to land that is both Indian country and is also either owned by the tribe or its members, or held in trust for the tribe or its members by the federal government. There

Dollar General holds a long-term commercial lease agreement with the Choctaw Shopping Center Enterprise, an entity wholly owned by the Tribe. *Id.* Among the lease provisions is a forum-selection clause in which the parties agree that "[e]xclusive jurisdiction and venue" for any lease-related disputes lie with the Tribal Court of the Mississippi Band of Choctaw Indians. J.A. 48. Petitioners also maintain a valid Tribal business license to engage in commercial activities, as required by the Tribal Code. Pet. App. 76; *see* Choctaw Tribal Code § 14-1-4(1).

For nearly thirty years, the Tribe has run a voluntary job-training initiative known as the Youth Opportunity Program ("YOP"). J.A. 51; Pet. App. 2-3; 40. The program is designed to place Tribal youth in short-term positions with local businesses to help them develop job and life skills. *See* J.A. 51. Each year, YOP administrators survey local employers to gauge their interest in participating and to help match participating youth to jobs that meet their interests. *Id.* at 57. Because the YOP pays the young Tribal members' wages, participating businesses benefit from this free labor. *Id.* at 52-53. Some *four hundred* school- and college-aged youth participated in the YOP at the time of the events that gave rise to this suit. *Id.* at 56.

In 2003, Dale Townsend, the manager of the Dollar General store on the Choctaw Reservation, agreed on petitioners' behalf that the Dollar General Store would participate in the YOP. *Id.* at 66; *see* Pet. App.

---

is no dispute that the underlying lawsuit arises out of conduct that took place on tribal lands, here reservation trust lands. *See* Pub. L. No. 106-228, § 1(a), 114 Stat. 462 (2000).

45-46. That summer, the Tribe placed respondent John Doe, then a thirteen-year-old member of the Tribe, and several other Choctaw students, in the Dollar General store under Townsend's supervision. Pet. App. 3; *see* J.A. 60 (describing the supervisor's responsibilities).

Doe alleges that, during this placement, Townsend sexually molested him. In connection with these allegations, the Choctaw Attorney General's office brought an action in Tribal Court to exclude Townsend from the Reservation. Pet. App. 77; *see* Choctaw Tribal Code §§ 20-1-1 to -5. Townsend did not oppose the action, and the Tribal Court approved the Tribe's request. Pet. App. 77-78.

C. Procedural History

In 2005, Doe filed suit by and through his parents in Choctaw Tribal Court against petitioners and Townsend. J.A. 11. The suit alleged that Townsend had sexually molested Doe during his YOP assignment at the Dollar General store. *Id.* at 13. Specifically, Doe alleged that Townsend had on two occasions subjected him to unwanted sexual advances and offensive touching. *Id.* He charged that Townsend had followed him into the store's stockroom and made sexual advances, which Doe had rebuffed. *Id.* On another occasion, Townsend allegedly "grabbed [Doe] in his crotch area and stopped only when [Doe] escaped from his grasp." *Id.* Doe alleged that, after this encounter, Townsend continued to make sexually offensive remarks and advances. *Id*.

In addition to asserting claims for assault and battery against Townsend directly, Doe claimed that Dollar General was vicariously liable for Townsend's acts. *Id.* at 12-13. He also alleged that Dollar Gen-

eral negligently hired, trained, or supervised Townsend. *Id.* at 14. And he claimed that he had suffered severe mental trauma and sought medical treatment as a result of Townsend's actions. *Id.* The complaint sought compensatory and punitive damages. *Id.*

Doe's complaint also alleged the following jurisdictionally relevant facts, which are not in dispute as this case comes to the Court: (1) that Doe is a member of the Tribe; (2) that he was assigned through the YOP to work at the Dollar General store in the Choctaw Town Center; and (3) that all of the alleged conduct occurred in that store on Tribal land. *Id.* at 12-13.

1. Proceedings in the Choctaw Tribal Courts

Dollar General and Townsend moved to dismiss Doe's claims for lack of subject-matter jurisdiction. Pet. App. 3, 78; *see* Choctaw R. Civ. P. 12(b)(1). The Choctaw Civil Court denied the motions to dismiss, and the defendants exercised their right to seek interlocutory review before the Choctaw Supreme Court. Pet. App. 3; *see* Choctaw Tribal Code § 7-1-10. In February 2008, with the issues fully briefed and argued, the Tribe's high court granted the defendants' motion for permission to appeal. Pet. App. 78-80. The Choctaw Supreme Court concluded that the lower court's exercise of subject-matter jurisdiction was proper, relying on several opinions of this Court, including *Montana* v. *United States*, 450 U.S. 544 (1981). Pet. App. 82-90.

The Choctaw high court's opinion focused on the consensual relationship that arose from Dollar General's lease and business license with the Tribe, Dollar General's agreement to participate in the Tribe's

YOP, and the nexus between those relationships and the alleged torts. Pet. App. 85-87. After holding that there was jurisdiction based on these facts, the Choctaw Supreme Court remanded Doe's case to the trial court for further proceedings. *Id.* at 91.[7]

2. Proceedings in the U.S. District Court

Dollar General and Townsend then filed a complaint in the U.S. District Court for the Southern District of Mississippi against the Tribe, the Tribal Court, Tribal Court Judge Christopher A. Collins, and John Doe. J.A. 19-27. Dollar General claimed the Tribal Court lacked jurisdiction to adjudicate Doe's claims and sought a temporary restraining order and preliminary injunction. Pet. App. 4. In December 2008, the District Court denied Dollar General's motion.[8] *Id.*

After discovery, the parties filed cross-motions for summary judgment. *Id.* at 5. Respondents agreed to stay Tribal Court proceedings until there was a final district court order on the motions. C.A. App. 313-314, 392.

In December 2011, the District Court granted respondents' motion and denied Dollar General's. Pet.

---

[7] Sensitive to due process considerations, the Choctaw Supreme Court stayed proceedings on remand until the Tribe's Attorney General's office could indicate whether it would consent to a modification of Townsend's exclusion order that would permit him to enter the Reservation to defend or testify in Doe's suit. Pet. App. 81-83, 91.

[8] The District Court granted Townsend's motion, holding that the Tribal Court lacked jurisdiction over him because he had no independent consensual relationship with the Tribe. Pet. App. 5. Respondents have not appealed that ruling, and Townsend is no longer a party to the litigation.

App. 54. The District Court found that it was undisputed that Townsend had agreed to participate in the YOP on petitioners' behalf, and to have Doe placed under his direct supervision. *Id.* at 45. Although "Doe did not thereby become an employee" of Dollar General, he "functioned as an unpaid intern or apprentice, receiving job training from [Dollar General] and in turn provided free labor to [Dollar General] for the period of his assignment." *Id.* at 45-46.

Through this business arrangement, the court determined, Dollar General "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* at 46. Because Doe's tort claims of sexual molestation arose "directly from this consensual relationship," the complaint satisfied "the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority." *Id.* (citing *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001); *Montana*, 450 U.S. at 566).

3. The Decision Below

Dollar General appealed. Petitioners claimed that the District Court had misapplied *Montana*'s consensual-relationship exception. Pet. App. 8. But they did not argue that there were disputed questions of material fact. *Id.* In October 2013, a divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed. *Id.* at 2.[9]

---

[9] The panel withdrew its original opinion and substituted a revised opinion, with minor changes, affirming the District Court's judgment. Pet. App. 1-2.

The panel majority's analysis centered on the framework established in *Montana* and its progeny. As the majority explained, this Court has identified "two exceptions to the general rule that Indian tribes cannot exercise civil jurisdiction over non-members." *Id.* at 4 n.1. Under the first *Montana* exception, "a tribe may regulate conduct that has a nexus to some consensual relationship between the non-member and the tribe or its members." *Id.*; *see id*. at 8-11. The majority readily identified a consensual relationship: Dollar General's agreement to participate in the YOP program, under which Doe was "essentially an unpaid intern, performing limited work in exchange for job training and experience." *Id.* at 12. There was, moreover, an "obvious nexus" between the conduct regulated through Doe's suit (Dollar General's placement of a manager in a business on Tribal land, who allegedly sexually assaulted an individual working there) and the consensual relationship (Dollar General's participation in the Tribe's YOP). *Id.* at 13. Ultimately, the Tribe was "attempting to regulate the safety of the child's workplace" and "protecting its own children on its own land." *Id.* at 13.

The majority also rejected Dollar General's claim that this Court's decision in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), had engrafted new jurisdictional prerequisites on *Montana*'s first exception. It refused to "require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.'" Pet. App. 16 (quoting *Plains Commerce Bank*, 554 U.S. at 335) (alterations in original). It explained that under *Plains Commerce Bank*, it was enough that the suit

implicated the Tribe's general sovereign right to "regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land." *Id.*

Judge Smith dissented. *Id.* at 22. He argued that the relationship between Doe and Dollar General could not serve as a basis for tribal jurisdiction unless the relationship itself affected tribal self-government or internal relations. *Id.* at 24-25. Moreover, Judge Smith maintained, Dollar General could not have anticipated that its relationship with Doe would have subjected the company to "any and all tort claims actionable under tribal law," in the "unfamiliar forum" of the tribal courts. *Id.* at 31.

The Fifth Circuit denied petitioners' request for rehearing *en banc*. *Id.* at 93. Judge Smith filed a dissent joined by two other judges, in which he reiterated the arguments from his panel dissent. *Id.* at 93-94. This Court granted certiorari.

SUMMARY OF ARGUMENT

Thirty-four years ago, in its pathmarking decision in *Montana* v. *United States*, 450 U.S. 544 (1981), this Court affirmed that Indian tribes retain inherent sovereign authority to exercise a measure of civil jurisdiction over nonmembers. In the years since, this Court has clarified that nonmembers may be subject to a tribe's authority at least when two conditions are met: First, the exercise of jurisdiction must "stem from" the tribes' retained rights to "set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. Second, the nonmember must have "consented [to jurisdiction] either expressly *or through his actions*." *Id.* (emphasis added).

This Court has further clarified that where a nonmember enters reservation land and engages in a "consensual relationship with the tribe or its members," those actions indicate consent to the exercise of tribal civil jurisdiction over disputes or claims with a "nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656. And, while *Montana* addressed civil regulatory jurisdiction, this Court has since confirmed that the case also "govern[s] tribal assertions of [civil] adjudicative authority." *Id.* at 652. That makes good sense given that sovereigns require an adjudicatory mechanism to effectively enforce their civil regulations, and given that tort claims, like those at issue in this case, are themselves a "form of regulation." *Plains Commerce Bank*, 554 U.S. at 332.

There is no real question that the Tribe's assertion of adjudicative jurisdiction in the underlying case is within the limits of a tribe's civil authority under *Montana*. The underlying litigation arises from allegations that petitioners' employee—the manager of a business located on Choctaw Reservation trust lands —sexually molested a Choctaw child working under his supervision as part of the Choctaw Youth Opportunity Program in which petitioners voluntarily agreed to participate. Those claims indisputably implicate the Tribe's sovereign interest in protecting its members on its land. And by agreeing to participate in that tribal program, petitioners consented to the exercise of tribal jurisdiction over a workplace sexual assault suit arising directly from that participation.

Petitioners offer only a token argument for why this case does not fit within the recognized bounds of the tribes' retained authority. Instead, petitioners devote the majority of their brief to the remarkable

assertion that tribes lack *all* adjudicative authority over nonmembers, based on this Court's holding that tribes lack *criminal* adjudicative jurisdiction over nonmembers in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). That argument is not even properly before the Court because petitioners did not raise it before the tribal courts and did not seek certiorari as to whether tribal adjudicative jurisdiction over nonmembers is completely foreclosed. In any event, this Court long ago held that "*Oliphant* does not apply" in the civil context. *Nat'l Farmers Union*, 471 U.S. at 854.

Criminal jurisdiction, the Court has explained, "involves a far more direct intrusion on personal liberties" than civil jurisdiction. *Duro* v. *Reina*, 495 U.S. 676, 688 (1990). Thus, while the Court has deemed the exercise of criminal jurisdiction to conflict with the overriding sovereign interests of the United States, a nonmember's consent suffices to avoid that conflict in a civil case. The "tribal courts" therefore retain the power to "resolve civil disputes involving nonmembers," *id.*, so long as the nonmember has "consented, either expressly or by his actions," *Plains Commerce Bank*, 554 U.S. at 337.

Petitioners provide nothing close to the compelling rationale required to overturn this settled precedent. *See Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014). They point primarily to inapposite treaties and long-superseded congressional pronouncements—sources *Oliphant* itself found insufficient to independently support its holding. The remainder of petitioners' arguments fare little better.

Petitioners worry that tort suits in particular will expose nonmembers to a host of esoteric and unpre-

dictable forms of tribal law. But under this Court's *Montana* framework and nexus requirement, a nonmember is subject only to tribal jurisdiction that he could reasonably anticipate, putting such fears to rest. And petitioners' concerns ring hollow in this case, where petitioners can hardly claim to have been unaware that their voluntary participation in a youth job-training program might expose them to suit for a sexual assault by their manager on a participating child under straightforward tort principles of negligence and supervisory liability.

In the end, petitioners' argument is predicated on the baseless assertion that tribal courts are unfit for nonmembers. The Choctaw Courts are representative in their commitment to providing every litigant with due process and a fair outcome. And, even if some other tribal court might fall short of these goals in a particular case, nonmembers have resort to a panoply of procedural safeguards. Most notably, state and federal courts may decline to enforce tribal judgments that infringe upon nonmember rights. *See, e.g.*, *Bird* v. *Glacier Elec. Coop., Inc.,* 255 F.3d 1136, 1152 (9th Cir. 2001) (refusing to enforce $2 million tribal court judgment against nonmember due to plaintiffs' "appeal[] to historic racial prejudices" during trial). And litigants may challenge tribal jurisdiction in federal court where a tribal court has asserted jurisdiction in "bad faith" or where that court is unable to offer the nonmember an "adequate opportunity" to litigate its claims. *Nat'l Farmers Union*, 471 U.S. at 856 n.21.

Because the Tribe's assertion of civil jurisdiction here falls comfortably within the limits this Court has articulated, and because petitioners have offered no compelling reason to overturn entrenched prece-

dent and alter those limits, the judgment of the Fifth Circuit should be affirmed.

ARGUMENT

I. TRIBAL COURTS HAVE CIVIL ADJUDICATIVE JURISDICTION OVER NONMEMBERS WITHIN THE LIMITS RECOGNIZED BY *MONTANA* AND ITS PROGENY.

A. Under *Montana*, Tribes Retain A Measure of Civil Jurisdiction Over Nonmembers.

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester* v. *Georgia*, 31 U.S. 515, 557 (1832)). As "'a separate people, with the power of regulating their internal and social relations,'" the tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978) (quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886)); *see also Mazurie*, 419 U.S. at 558 ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations").

In its "pathmarking" decision in *Montana* v. *United States*, this Court confirmed that the tribes' retained powers include the right to "exercise some forms of civil jurisdiction over [nonmembers] on their reservations, even on non-Indian fee land." 450 U.S. at 565. Just three years earlier, in *Oliphant*, the Court had announced that tribes have been divested of their inherent authority to exercise criminal jurisdiction over nonmembers. The *Montana* Court acknowledged *Oliphant*'s holding, but concluded that the

tribes enjoy a broader range of inherent authority over nonmembers in the civil context. *Id.*

Subsequent case law has clarified that tribes may exercise authority over nonmembers when two conditions are met.

First, a tribe's authority derives from its rights "to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. A tribe's exercise of civil authority over a nonmember must therefore "stem from" one of these retained sovereign powers.

This condition is satisfied where a nonmember's conduct occurs on tribal land, because the tribe's jurisdiction is then rooted in its authority to set conditions on entry to that land. *See, e.g.*, *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997) ("readily agree[ing] that tribes retain considerable control over non-member conduct on tribal land"). And even where the conduct occurs on reservation land that is not owned by the tribe, this requirement is met when the exercise of tribal civil jurisdiction is necessary to preserve "tribal self-government" or to control "internal relations." *Plains Commerce Bank*, 554 U.S. at 337; *see also id.* (tribes may regulate activity on reservation land owned by non-Indians in order to vindicate the tribe's "sovereign interests in protecting its members and preserving tribal self-government").

Second, to avoid any conflict with the overriding sovereignty of the United States, a tribe may exercise civil jurisdiction over a nonmember "if the nonmember has consented, either expressly or by his actions." *Id.*

Montana described one of the primary ways in which a nonmember's "actions" may demonstrate consent to civil jurisdiction. The *Montana* Court explained that when a nonmember enters reservation land and engages in "consensual relationships with the tribe or its members," 450 U.S. at 565, that action indicates consent to any exercise of tribal jurisdiction that has a "nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656; *cf. Nevada* v. *Hicks*, 533 U.S. 353, 372 (2001) (*Montana*'s first exception covers "private individuals who voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) enter[] into").[10]

That makes good sense: A nonmember who enters into an agreement with a tribe or tribal member that involves the nonmember engaging in activity on reservation land should reasonably anticipate that the tribe will exercise authority over conduct related to that agreement.[11]

---

[10] *Plains Commerce Bank* suggested that nonmembers may also consent to civil jurisdiction where they engage in "noxious uses [of reservation land] that threaten tribal welfare or security," or in "conduct on the land that does the same." 554 U.S. at 336.

[11] *Montana* primarily concerned a tribe's authority to regulate nonmember conduct on reservation land that is *not* owned by the tribe. 450 U.S. at 566. By contrast, the Court "readily agree[d]" that the tribe *could* impose the hunting and fishing regulations at issue in that case on nonmembers who were on the tribe's own land. *Id.* at 557. *Montana* thus suggests that a nonmember may consent to a broader range of tribal jurisdiction when he enters land owned by the tribe than when he enters land owned by non-Indians within the reservation. *Cf. Hicks*, 533 U.S. at 360 ("ownership status of the land * * * may sometimes be a dispositive factor" in determining whether a

For example, in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court held that nonmembers could be subject to a tribal oil and gas tax imposed several years after the nonmembers entered into mineral lease agreements with the tribe. The Court rejected the assertion that the tax was invalid because the nonmembers had not explicitly consented to it in the lease agreements. *Id.* at 145-148. Rather, the tax was a legitimate exercise of the tribe's sovereign power over its land. *Id.* In other words, the nonmembers should have anticipated that by entering into the mineral leases, they were exposing themselves to assertions of tribal sovereignty over conduct related to those agreements. *See also Atkinson Trading Co.*, 532 U.S. at 649 (explaining that *Merrion* is best understood as a straightforward application of *Montana*).

B. *Montana* Governs Assertions Of Civil Adjudicative Jurisdiction Over Nonmembers.

While *Montana* itself concerned civil regulatory jurisdiction, this Court has since confirmed that "*Montana* [also] governs tribal assertions of [civil] adjudicative authority" over nonmember defendants. *At-*

---

tribe has jurisdiction over a nonmember); Gov't Cert. Br. 11 (arguing that an exercise of tribal authority need not fit within one of the two *Montana* circumstances where the regulated conduct occurs on land owned by the tribe). Although the nonmembers' conduct in this case occurred on tribal land, the Court does not have to decide the question raised by the Solicitor General to affirm because respondents have (following the lead of the Choctaw Supreme Court, Pet. App. 84-87) otherwise established that tribal civil jurisdiction is warranted under *Montana's* first exception.

kinson Trading Co., 532 U.S. at 652 (citing *Strate*, 520 U.S. at 453); *see also Hicks*, 533 U.S. at 380 (Souter, J., concurring) ("In *Strate*, we expressly extended the *Montana* framework, originally applied as a measure of a tribes' civil regulatory jurisdiction, to limit tribes' civil adjudicatory jurisdiction.").

That is hardly surprising. Even before *Montana*, this Court suggested that a nonmember's decision to enter tribal land and interact with tribal members could entail consent to tribal adjudicative jurisdiction. In *Williams* v. *Lee*, 358 U.S. 218 (1959), the Court held that a nonmember storeowner doing business on tribal land could sue to collect on debts from his Indian customers only in tribal court. To be sure, the nonmember in *Williams* was a plaintiff. Nonetheless, the Court's holding meant that the nonmember could avoid tribal court jurisdiction only by forgoing the ability to vindicate his rights entirely. *Williams* thus foreshadowed *Montana* in its determination that a nonmember's conduct on tribal land could indicate consent to submit related disputes with tribal members to the tribal courts.[12]

---

[12] Petitioners argue that *Williams* v. *Lee* is irrelevant because it involved a "Court of Indian offenses, established and ultimately controlled by the Federal Government," rather than a purely tribal court. Pet. Br. 51 n.34. Petitioners are simply wrong. *Williams* did not turn on (or even mention) the type of tribal court at issue. It relied instead on the "right of the Indians to govern themselves." 358 U.S. at 223. And this Court has reaffirmed the *Williams* holding in two later cases that involved tribes with tribally established courts. *See Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984) ("*Wold I*") ("permit[ting] North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians" would "intrude impermissibly on tribal self-government"); *Kennerly* v. *District*

Nor would it make sense for *Montana* to govern regulatory, but not adjudicative, jurisdiction. A tribe's ability to regulate will frequently depend on its ability to adjudicate. *See, e.g.*, *Wheeler*, 435 U.S. at 332 ("[T]ribal courts are important mechanisms for protecting significant tribal interests."). Tribal courts are the primary means of enforcing tribal laws and regulations. And, like their state and federal counterparts, tribal courts participate directly in the process of regulating by giving content to common law rules and offering authoritative interpretations of the legislative enactments they apply. *See Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Absent the power to adjudicate when they have the power to regulate, tribes would be forced to resort to the courts of another sovereign to give effect to their own laws, a situation inconsistent with any known conception of sovereignty.

Further, given the extent to which regulatory and adjudicative jurisdiction overlap, it is illogical to assume that a nonmember's actions might indicate consent to one form of jurisdiction but not the other. That is particularly so with respect to tort law because tort litigation is a "form of regulation." *Plains Commerce Bank*, 554 U.S. at 332; *see also Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008).

Thus, while this Court has never had reason to affirm a tribal court's exercise of adjudicative jurisdic-

---

Court, 400 U.S. 423, 426-428 (1971) (holding that *Williams* precluded Montana from exercising jurisdiction in case brought by nonmember against tribal defendants).

tion over a nonmember defendant, its cases nevertheless stand for the "unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)).

That is, tribes generally have the right to exercise civil adjudicative jurisdiction over a nonmember if that jurisdiction "stem[s] from the tribe's inherent sovereign authority" and the nonmember's "actions" indicate consent under the *Montana* framework. *Plains Commerce Bank*, 554 U.S. at 337.

II. THE UNDERLYING TORT SUIT FITS COMFORTABLY WITHIN *MONTANA*'S LIMITS.

Respondent Doe's lawsuit against petitioners falls within the heartland of tribal adjudicative jurisdiction under *Montana* and its progeny. Dollar General established a business on Tribal land pursuant to a lease agreement with the Tribe, and under a business license issued by the Tribe. It then agreed to take on a number of young tribal members as unpaid interns as part of an employment training program administered by the Tribe. Respondent Doe sued in Tribal Court because Dollar General's manager allegedly sexually assaulted him on the business premises during the course of this internship. If this case

does not fall within *Montana*'s limits, little, if anything, can.[13]

A. The Tribe's Assertion of Civil Jurisdiction Stems From Its Inherent Sovereign Powers.

There is no serious question that the Tribe's assertion of civil jurisdiction in this case is directed at "nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis omitted).

First, the acts alleged in Doe's complaint took place on tribal land. The Dollar General store in question occupied a leased lot in a tribally owned and managed shopping center on Choctaw Reservation trust land. *See* J.A. 28. And the complaint alleged that the assaults took place inside the store. *Id.* at 12-13.

Conduct on tribally owned land directly implicates a tribe's inherent sovereign interest in governing its territory. *See Plains Commerce Bank*, 554 U.S. at 332 (suggesting that regulations may be justified by a tribe's interest in controlling activities on the land it owns); *Mazurie*, 419 U.S. at 557 (tribes retain inherent "sovereignty over both their members and their *territory*" (emphasis added)). *Montana* itself recognized that a tribe may have the authority to place conditions on nonmembers' entry onto tribally owned land, over and above the authority tribes have

---

[13] *Montana* also recognized that a tribe may exercise civil jurisdiction "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." 450 U.S. at 566. Respondents do not rely upon *Montana*'s second exception in this case.

to regulate nonmember conduct on reservation land in general. 450 U.S. at 557.

Tribal civil jurisdiction over nonmembers is therefore at its zenith when the tribe acts both as a landowner and a sovereign. *Merrion,* 455 U.S. at 144-151. For example, in *Strate*, this Court "'readily agree[d],' in accord with *Montana*, that tribes retain considerable control over non-member conduct on tribal land." 520 U.S. at 454 (citation omitted). The Court went on to hold that the tribe had no jurisdiction over the underlying litigation only after concluding that the accident that gave rise to the lawsuit occurred on land over which the tribe lacked "a landowner's right to occupy and exclude," and *Montana*'s limits were not otherwise satisfied. *Id.* at 456.

Similarly, in *Hicks*, the Court observed "there was little doubt that the tribal court [in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999)] had jurisdiction over [tribal tort] claims" arising from a nonmember's mining operations on tribal land. 533 U.S. at 368; *see Neztsosie*, 526 U.S. at 482 n.4 (distinguishing *Strate* on the ground that "the events in question here occurred on tribal lands"); *cf. id.* at 488 (remanding to permit the district court to determine whether plaintiffs' claims were preempted by federal statute).

The fact that Doe's complaint revolves around conduct that occurred on tribal land thus makes it very clear that the Tribe's sovereign interests are at stake.

Second, even if the underlying sexual assault had taken place on *non*-Indian land within the reservation, the Tribe's sovereignty would still be deeply affected. In *Plains Commerce Bank,* the Court ex-

plained that "[t]he logic of *Montana* is that certain activities on non-Indian fee land (*say, a business enterprise employing tribal members*) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated." 554 U.S. at 334-335 (emphasis added).

That describes this case. *See* Pet. App. 13 (treating Doe as a "quasi-employ[ee]"); C.A. App. 320 (arguments of counsel for Dollar General that Doe's intern status was analogous to employment). The Choctaw government would be a toothless one indeed if it could not regulate working conditions for tribal members and protect those members, including its most vulnerable youth, against blatant acts of sexual assault in the workplace. *See* 25 U.S.C. §3601(5) ("Tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."); *Miss. Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 49 (1989) ("'There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.'" (quoting 25 U.S.C. § 1901(3))).

Moreover, *Plains Commerce Bank* also states that, even with respect to non-Indian fee land, a tribe "may quite legitimately seek to protect its members from noxious uses [of the land] that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." 554 U.S. at 336. That is precisely what the Tribe is doing in this case: exercising jurisdiction to enforce a tort law designed to protect its members from threats to their welfare from both members and nonmembers alike.

The Choctaw Courts' adjudication of Doe's claims thus implicates the core of the Tribe's "'inherent [sovereign] powers * * * which ha[ve] never been extinguished.'" *Wheeler*, 435 U.S. at 322 (quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1945)).

B. Petitioners' Actions Indicate Consent To Tribal Civil Jurisdiction.

Petitioners do not seriously dispute that this case implicates the Choctaw's significant sovereign interests. Instead, petitioners claim "there is no basis" to conclude that Dollar General "consented, expressly or by implication, to the tribal jurisdiction asserted in this case." Pet. Br. 45. That is false.

As explained, entering into a consensual relationship with the tribe is enough to indicate consent to an exercise of civil jurisdiction with a "nexus" to that consensual relationship. *Atkinson Trading Co.*, 532 U.S. at 656. Under that test, petitioners "voluntarily submitted" themselves to Tribal Court adjudication of the YOP-related claims in Doe's complaint. *See Hicks*, 533 U.S. at 372.

1. Petitioners' relations with the Choctaw Tribe and Doe himself encompassed several written and oral agreements. Most important was petitioners' agreement to take Doe on as an unpaid intern through the YOP.

Petitioners' participation in the YOP was precisely the kind of consensual arrangement *Montana* contemplates: Doe provided Dollar General with uncompensated labor. Pet. App. 5, 45-46. And, in exchange, petitioners agreed to supervise and train Doe, giving him valuable job skills and helping the Tribe advance its broader goal of providing for its

young people. *Id.* Had petitioners properly screened and supervised their manager, the arrangement would presumably have benefited petitioners' reputation and standing in the Choctaw community, as well.

Petitioners protest that "there was no contract governing Dollar General's acceptance of Doe's placement in the store." Pet. Br. 45. That is both irrelevant and misleading. First, *Montana* is not limited to contracts; it contemplates a range of consensual relationships, including "commercial dealing, contracts, leases, *or other arrangements*." 450 U.S. at 565 (emphasis added); *Hicks*, 533 U.S. at 372.

Second, the record shows that the parties *had* a contract, even if it was not in writing. First, the District Court found that petitioners' manager agreed on petitioners' behalf to participate in the YOP. *See* Pet. App. 45-46; J.A. 66 (deposition testimony). The record thus shows that the parties had an express oral contract regarding Dollar General's participation in the YOP. *See, e.g.*, Restatement (Second) of Contracts § 4 (1981). Moreover, the parties' actions gave rise to a hornbook example of an implied contract no less binding than an express agreement. *See Hercules Inc.* v. *United States*, 516 U.S. 417, 423-424 (1996); 1 *Williston on Contracts* § 1:5 (4th ed.). After the manager "agreed to participate in the YOP," the Tribe assigned Doe and other Tribal students to report for work there. Pet. App. 3, 5; J.A. 66. Petitioners' manager supervised Doe and the other interns and was responsible for evaluating their performance. J.A. 60, 72. The Tribe, in turn, assisted in oversight, conducting on-site visits, reviewing Dollar General's timesheets for the interns, and counseling the interns on their job performance. J.A. 62, 72-73;

C.A. App. 927-931. In other words, the parties agreed to be bound as surely as if they had executed a written agreement.

2. Petitioners' voluntary participation in the YOP implied their consent to tribal jurisdiction over claims like Doe's. In *Plains Commerce Bank*, this Court suggested that the requisite nexus to support implied consent exists if the nonmember could "reasonably have anticipated" that entering into the consensual relationship would subject him to the exercise of tribal jurisdiction in question. 554 U.S. at 338. Petitioners cannot seriously argue that they were unable to anticipate that, by agreeing to take on a Tribal youth to work in a store operating on Tribal land through a Tribal program, they might face Tribal jurisdiction for the alleged sexual assault of that child by their employee. *See* J.A. 87 (setting forth petitioners' policy on sexual harassment).

Moreover, petitioners' agreement to take Doe on as an intern was just one of several arrangements with the Tribe. Petitioners possessed a Tribal business license and paid a business tax as a condition of carrying on their business on the Reservation. Pet. App. 76-77; Choctaw Tribal Code § 14-1-4(1). And petitioners' lease agreement with the Tribe included choice-of-law and forum-selection clauses expressly consenting to Tribal jurisdiction for lease-related disputes. *See* J.A. 47-48 ("Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians."). The lease also expressly stated that Dollar General "acknowledges that the demised premises and the afore-mentioned ground lease *are upon land held in Trust by the United States of America for the Mississippi Band of Choctaw Indians*." *Id.* at 49 (emphasis added).

While the Court need not decide whether the license or the lease themselves support the exercise of jurisdiction in this case, at a minimum they demonstrate petitioners' willingness to submit to Tribal regulation in connection with their business operations, and petitioners' deliberate decision to conduct business on tribal trust land.

Moreover, because petitioners agreed that Tribal law would govern their lease-related disputes, they cannot reasonably argue that they were unaware of the contents of the Choctaw Tribal Code, which includes—for example—a provision extending the Tribal Court's jurisdiction over any individual or business entity "commit[ting] a tortious act or engag[ing] in tortious conduct within the Choctaw Indian Reservation, either in person or by an agent or representative." Choctaw Tribal Code § 1-2-3 (1), (2)(g). And petitioners' agreement to the lease's forum-selection clause shows that the petitioners had no general objection to the fairness or integrity of the Choctaw courts. Indeed, if petitioners actually believed the invective that permeates their brief, they should presumably have pursued their counsel for malpractice in connection with the lease's forum-selection provisions.

In short, by establishing a Tribally licensed business on Tribal property and agreeing with the Tribe to take Doe on as an intern at the Tribe's expense, petitioners manifested their consent to Tribal jurisdiction over claims that the agent charged with supervising Doe's work sexually assaulted him on store premises during business hours. *See* J.A. 13-14.

Respondents' claims thus satisfy the two major requirements for an exercise of tribal civil jurisdiction

over a nonmember under *Montana's* first exception: The jurisdiction arises from the Tribe's retained sovereign authority to regulate nonmember conduct on tribal lands, and the nonmembers' actions there indicate consent to jurisdiction.

III. FOR DECADES, THIS COURT HAS HELD THAT THE CIVIL JURISDICTION OF TRIBAL COURTS IS BROADER THAN THEIR CRIMINAL AUTHORITY AND THESE DECISIONS SHOULD NOT BE OVERRULED.

Faced with the overwhelming difficulty of proving that this case does not support tribal jurisdiction under *Montana*, petitioners instead make an even bolder claim. They argue that "the same * * * considerations of the United States' overriding sovereignty that led this Court to conclude that tribal courts lack *criminal* jurisdiction over nonmembers in *Oliphant* * * * make clear that tribes likewise have been divested of the inherent authority to subject nonmembers to *civil* suit in tribal court." Pet. Br. 16.

But this Court has *already held* that *Oliphant*'s bar on tribal criminal jurisdiction does not extend to civil cases. Probably for that reason, petitioners did not make this broad claim when challenging jurisdiction in the tribal courts. Nor did they seek certiorari review on the question of whether tribes retain any civil adjudicative authority over nonmembers. Instead, in the tribal courts petitioners argued only that this case did not fit within parameters of tribal jurisdiction under *Montana* and its progeny. *See* C.A. App. 134-143. And before this Court, petitioners presented only the question of "whether Indian tribal courts

have jurisdiction to adjudicate civil *tort* claims against nonmembers * * * ." Pet. i (emphasis added).

Petitioners may not change horses midstream. Nonmembers are required to exhaust all of their arguments against tribal jurisdiction in the tribal courts. *See, e.g.*, *Nat'l Farmers Union*, 471 U.S. at 856; *Iowa Mutual Ins. Co.* v. *LaPlante,* 480 U.S. 9, 16-17 (1987). Moreover, this Court has refused to hear arguments raised in an attempt to alter the question presented, cautioning that permitting counsel "who appear before us to alter these questions" would interfere with "the integrity of the process of certiorari." *Taylor* v. *Freeland & Konz*, 503 U.S. 638, 646 (1992).

Even if the contention that *Oliphant* bars all civil adjudicative jurisdiction over nonmembers was properly before the Court, it would still fail. It is directly contrary to this Court's precedent and petitioners offer no convincing reason why the Court should revisit its prior holding.

A. This Court Has Considered And Rejected Petitioners' Argument That *Oliphant* Extends To Civil Jurisdiction.

Six years after *Oliphant*, this Court was asked to extend *Oliphant*'s limitations to civil adjudication. It declined. Instead, the Court held that "the power to exercise civil subject-matter jurisdiction over non-Indians * * * is not automatically foreclosed, as an extension of *Oliphant* would require." *Nat'l Farmers Union*, 471 U.S. at 855. Lest there be any doubt, the Court reiterated two years later that, "[a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction

is not similarly restricted." *Iowa Mutual*, 480 U.S. at 15 (citation omitted; emphasis added).

That conclusion was necessary to the judgments in both cases. Both *National Farmers Union* and *Iowa Mutual* concerned whether a nonmember defendant in a tort suit must exhaust her remedies in tribal court before challenging the tribe's jurisdiction in federal court. The Court recognized that "if [it] were to apply the *Oliphant* rule * * * , it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians." *Nat'l Farmers Union*, 471 U.S. at 854. The Court's holding that exhaustion was required thus relied on its conclusion that "*Oliphant* does not apply." *Id.*

The Court more fully articulated the rationale for its exhaustion holdings in *Duro*. It was obvious to the *Duro* Court that "our decisions recognize broader retained tribal powers outside the criminal context," including the power of tribal courts to "resolve civil disputes involving nonmembers." 495 U.S. at 687. Tribal civil adjudicative authority is broader, *Duro* explained, because "[c]riminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe." It therefore represents a "far more direct intrusion on personal liberties" than civil jurisdiction does. *Id.* at 688. Thus, while *Duro* deemed tribal criminal jurisdiction over nonmembers to conflict with the sovereign interests of the United States, civil jurisdiction within *Montana*'s limits does not. *Id.*

In the face of precedent directly rejecting their main premise, petitioners point to a footnote in *Hicks* observing that this Court has "never held that a

tribal court had jurisdiction over a nonmember defendant," and a statement in *Strate* cautioning against an overly broad reading of the exhaustion precedent. Pet. Br. 23-24.

The footnote in *Hicks* merely states a fact: this Court has not yet had occasion to explicitly affirm an exercise of tribal adjudicative jurisdiction over a nonmember defendant.[14] That is because, since *National Farmers Union* and *Iowa Mutual*, this Court has confronted challenges to a tribe's adjudicative authority only in cases in which either the tribe lacked the authority to regulate the underlying nonmember activity, or a federal statute stripped the tribe of jurisdiction. *See Plains Commerce Bank*, 554 U.S. at 330 ("the Tribal Court lacks jurisdiction * * * because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land"); *Hicks*, 533 U.S. at 374 ("because the [tribe] lacked legislative authority [to regulate the conduct of a state officer within the reservation] * * * they also lacked adjudicative authority); *Neztsosie,* 526 U.S. at 482 n.4, 487-488 (recognizing that the tribe likely had jurisdiction over tort claims arising from nonmember's uranium enrichment activities on tribal land, but holding that jurisdiction might have been removed by federal statute); *Strate*, 520 U.S. at 456-459 (rejecting tribe's assertion of adjudicative authority in a

---

[14] Of course, the Court has affirmed the right of a tribal court to exercise exclusive jurisdiction over nonmember *plaintiffs*, without expressing any reservations about the counterclaims that would be adjudicated against nonmembers in tribal courts as a result. *See Williams*, 358 U.S. at 223; Part I.B, *supra*, at 23-25. *Cf.* Choctaw R. Civ. P. 13(a)-(f) (articulating Choctaw counterclaim rules).

suit arising from nonmember activity on a public right of way through reservation land because it failed to "qualif[y] under one of *Montana*'s exceptions").

Thus, the *Hicks* statement is true as far as it goes, which is not far at all. After all, *National Farmers Union* and *Iowa Mutual* are predicated on the holding that tribal adjudicative jurisdiction is proper in appropriate cases. Indeed, *Strate* itself explained that the exhaustion cases stand for "the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 453 (internal quotation marks omitted).

National Farmers Union and *Iowa Mutual* were decided almost thirty years ago. This Court would scarcely have condemned three decades of nonmember defendants to toil in tribal courts (which, if anything, were less developed then) if those courts were categorically incapable of exercising jurisdiction. Indeed, this Court has repeatedly observed that exhaustion is not required where "it is plain" the tribal courts lack jurisdiction. *Hicks*, 533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459). Yet exhaustion remains the default rule precisely because—in the civil context—the absolute jurisdictional bar of "*Oliphant* does not apply." *Nat'l Farmers Union*, 471 U.S. at 854.

B. Petitioners Offer No Convincing Rationale For Upsetting This Court's Settled Precedent.

Because this Court has already determined that *Oliphant* is no obstacle to civil jurisdiction, petition-

ers must offer an extraordinarily compelling reason to adopt a contrary rule. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2028 (declining to change course on a question of Indian sovereignty on *stare decisis* grounds).

This Court approaches any reassessment of its precedent "with the utmost caution." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). And "'any departure' from the doctrine" of *stare decisis* "'demands special justification.'" *Bay Mills*, 134 S. Ct. at 2036 (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)). That is all the more true where, as here, "Congress exercises primary authority in this area and 'remains free to alter what [the Court] has done'—another factor that gives 'special force' to *stare decisis*." *Id.* (quoting *Patterson* v. *McLean Credit Union,* 491 U.S. 164, 172-173 (1989)). Petitioners thus bear the heavy burden of showing that the rule the Court adopted in *National Farmers Union* and *Iowa Mutual*, and reiterated in *Duro*, has "produce[d] unworkable law," and could be abandoned without "substitut[ing] disruption, confusion, and uncertainty for necessary legal stability." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008). They have not come close.

1. Petitioners begin with a lengthy examination of treaties and statutes from the nineteenth century, which they claim support their argument by implication. These sources were, of course, available to the Court when it decided the exhaustion cases, so they hardly qualify as compelling reasons for revisiting that precedent. And the Court specifically distinguished much of the same evidence in *National Farmers Union*, noting that both the executive materials and statutes relied on in *Oliphant* differentiat-

ed between civil and criminal jurisdiction. *See* 471 U.S. at 854-855.

Petitioners nevertheless argue that *National Farmers Union* endorsed their foray into amateur law-office history when it noted that "the existence and extent of a tribal court's jurisdiction will require a * * * detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-856. But it is clear in context that this language describes the inquiry a tribal court (or later a federal court) must undertake to assess a tribe's jurisdiction in a particular case. That is, the tribal courts must on a case-by-case basis "evaluate the factual and legal bases" for each challenge to their jurisdiction. *Id.* at 856. *National Farmers Union* was certainly not articulating a general analysis to be completed once, in the abstract, with the conclusion that no tribe has any civil jurisdiction whatsoever. After all, the Court in that very case undertook that general analysis and reached the opposite conclusion.[15]

Treaties and statutes are therefore relevant to this case only to the extent they establish whether or not the respondent Tribe has been stripped of jurisdiction over the claims at issue. And petitioners have

---

[15] Inexplicably, throughout their discussion of the historical sources, petitioners cite Justice Souter's concurrence in *Hicks*. But that concurrence reaffirmed that tribes *do* have civil adjudicative authority within *Montana*'s limits. *See*, *e.g.*, *Hicks*, 533 U.S. at 379 & n.3 (citing, *inter alia*, *Montana*'s consensual relationship exception, as the reason "it is true that tribal courts' civil subject matter jurisdiction over non-Indians is not automatically foreclosed, as an extension of *Oliphant* would require" (internal quotation marks omitted)).

not identified any source that deprives this Tribe of civil jurisdiction over this case.

a. It is self-evident that treaties bind only their signatories. Petitioners identify *no* treaty with the Mississippi Choctaw that withdraws their civil jurisdiction, and there is none. Instead, petitioners misleadingly refer (at 24-26) to several "Choctaw" treaties, executed with a *different* tribe.

The United States entered into the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1831), and the treaties that followed, with the tribe known today as the Choctaw Nation of *Oklahoma*. *See generally United States* v. *John*, 437 U.S. 634, 638-647 (1978); *Winton* v. *Amos*, 255 U.S. 373 (1921). The respondent Tribe is the *Mississippi* Band of Choctaw Indians, which comprises Choctaws who resisted removal to the western territories in the nineteenth century and who eventually achieved recognition as a separate tribe in 1945. *See supra* 3; *John*, 437 U.S. at 642-646; Act of June 21, 1939, 53 Stat. 851 (1939) (providing for acquisition of trust lands). Respondents are strangers to the Choctaw treaties cited by petitioners. Indeed, the last time a party argued to this Court that the 1830 treaty defines the rights of the *Mississippi* Band of Choctaw Indians, the Court remarked that the "argument may seem to be a cruel joke to those familiar with the history of the execution of that treaty, and of the treaties that renegotiated claims arising from it." *John*, 437 U.S. at 653.

In any event, petitioners' argument that the treaties never "implicitly granted tribes civil jurisdiction" gets the inquiry exactly backwards. Pet. Br. 26. The tribes retain "those aspects of sovereignty *not withdrawn* by treaty or statute, or by implication as a

necessary result of their dependent status." *Wheeler*, 435 U.S. at 322-323 (emphasis added). Petitioners point to nothing that withdraws this Tribe's sovereign civil authority.

b. Petitioners' statutory evidence suffers from the same flaw. This Court recently reiterated that "unless and until Congress acts, the tribes retain their historical sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). At the same time, it emphasized that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 2032. But petitioners point to *no* statute, currently in force, that withdraws the tribes' civil adjudicative power.

Whatever Congress may have intended in the brutal years of Indian removal and westward expansion, the consistent federal policy of the last 80 years has been to recognize and reinforce inherent tribal sovereignty. *See, e.g.* Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*; Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*; Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601, *et seq*.; Indian Tribal Justice and Technical Assistance Act of 2000, 25 U.S.C. § 3651, *et seq*.; Tribal Law and Order Act of 2010, tit. II, Pub. L. No. 111-211.

In fact, when this Court held that *Oliphant* bars criminal jurisdiction over nonmember *Indians*, *see Duro*, 495 U.S. at 684, Congress quickly passed legislation recognizing that "Indian tribes" have the "inherent power * * * to exercise criminal jurisdiction over all Indians," including nonmembers. 25 U.S.C. § 1301(2); *see also United States* v. *Lara*, 541 U.S. 193, 197-198 (2004). And Congress has expressly abrogated *Oliphant* in domestic violence cases, explain-

ing that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over *all* persons." 25 U.S.C. § 1304(b)(1) (emphasis added). Given Congress' willingness to limit *Oliphant*'s effect on tribal *criminal* jurisdiction, it is hard to swallow petitioners' assertion that Congress nevertheless understands a tribe's inherent *civil* jurisdiction to be limited to its members.

In the end, *Oliphant* concluded that the treaties and statutes it examined "would probably not be sufficient to remove criminal jurisdiction over non-Indians if the [Suquamish Tribe] otherwise retained such jurisdiction." 435 U.S. at 208. Rather, the Court held that the Suquamish lacked criminal jurisdiction over nonmembers primarily because that jurisdiction "conflicted with the interests of [the federal government's] overriding sovereignty." Petitioners' even weaker historical evidence regarding tribal civil jurisdiction fares no better.

2. Petitioners' next gambit is to argue that civil adjudicative jurisdiction *also* conflicts with the United States' "overriding sovereignty." Petitioners face an uphill battle, given that the United States Government (which undoubtedly has the most authoritative understanding of its own sovereignty) filed an amicus brief at the certiorari stage *supporting* tribal jurisdiction in this case. Petitioners rely primarily on this Court's opinion in *Duro*. *See* Pet. Br. 41-46. But, as noted, *Duro* itself observed that tribes retain the power to "resolve civil disputes involving nonmembers" because civil jurisdiction represents a far

less "direct intrusion on personal liberties" than does criminal. 495 U.S. at 686-688.[16]

Moreover, the *Plains Commerce* Court considered the very factors that had earlier led the Court to conclude that tribal criminal jurisdiction is incompatible with the sovereign interests of the United States—that Tribes are sovereigns operating outside the "basic structure of the Constitution," to whom the "Bill of Rights does not apply." 554 U.S. at 337. But the Court held that, in the civil context, these concerns do not obtain where the nonmember has "consented" to the tribe's jurisdiction "either expressly or by his actions." *Id*.

In the end, petitioners do not even deny that a tribe may exercise civil jurisdiction over a nonmember who has consented, something that would presumably be impossible if the exercise of such jurisdiction were truly at odds with the sovereignty of the United States. Petitioners allege only that any consent

---

[16] Petitioners intimate that where a civil suit involves punitive damages, this distinction is invalid. Pet Br. 19. Not so. The *Duro* Court observed that criminal adjudications represent a greater intrusion on personal liberties because they expose the defendant to the "prosecuting power of the tribe." 495 U.S. at 688. Civil suits between private parties do not implicate the same concern; that is one of the main reasons the Eighth Amendment does not apply to punitive damages. *See BFI, Inc.* v. *Kelco Disposal Inc.*, 492 U.S. 257, 275 (1989); *see also*, *e.g.*, *In re Winship*, 397 U.S. 358, 367 (1970) (observing that the "stigma" of a criminal conviction is part of the reason that the reasonable doubt standard is required in criminal—but not civil—trials). In any event, petitioners' argument would at most suggest that tribal courts lack the power to impose punitive damages on nonmembers; it would not foreclose tribal adjudicative jurisdiction altogether.

must be "unambiguous." Pet Br. 23. But petitioners have no rationale for this requirement, which runs contrary to *Montana* and all of this Court's subsequent case law holding that an "action[]"—including the act of entering into a "consensual relationship" with the tribe or its members—is sufficient to indicate consent to tribal civil jurisdiction over suits which have a nexus to that action.

This precedent, unlike petitioners' novel proposal, has a clear rationale: When a nonmember engages in a consensual relationship with the tribe on reservation land (and particularly on tribal land) the nonmember has fair notice that he may be subject to tribal jurisdiction on matters having the requisite nexus to that relationship and should reasonably anticipate it. Indeed, this is analogous to basic principles underlying the *International Shoe* "minimum contacts" test applicable to interstate jurisdiction, *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), although tribal jurisdiction under the *Montana* framework is more limited. *Plains Commerce Bank,* 554 U.S. at 337.

3. As a last resort, petitioners contend that this Court should extend *Oliphant* for some policy reasons. They observe that Congress can always confer civil adjudicative authority on tribes, if it so chooses, and Congress can adopt a more tailored approach than this Court. Pet. Br. 41-42. While there is no question that Congress could confer civil adjudicative authority on tribes, that authority already exists. And Congress does not need a ruling from this Court to enact the jurisdictional limitations that petitioners suggest (at 40-41). Congress has not done so, despite the fact that this Court declined to extend *Oliphant* to the civil context almost thirty years ago. Its si-

lence speaks volumes, particularly when compared to the speed with which Congress *expanded* tribal criminal jurisdiction when it viewed the Court's holding in *Duro* as overly restrictive. *See Lara*, 541 U.S. 193, 197-198.

In short, petitioners have offered nothing close to the extraordinarily compelling rationale necessary to persuade this Court to overturn its holding that *Oliphant* does not apply in the civil context.

C. The Existence of *Oliphant* Counsels In Favor Of Maintaining Tribes' Civil Adjudicative Jurisdiction.

Contrary to petitioners' claims, the fact that *Oliphant* deemed criminal jurisdiction over non-Indians to be implicitly divested is a reason to carefully guard the limited civil adjudicative powers that tribes do possess. This Court has long held that the right to "make their own laws and be ruled by them" is central to the tribes' retained sovereign powers. *Hicks*, 533 U.S. at 361 (citing *Williams*, 358 U.S. at 220). This right is seriously threatened where tribes are unable to offer a forum in which their members may obtain relief when nonmembers transgress the tribe's laws. *See, e.g.*, 25 U.S.C. § 3601(5) ("Tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.")

Petitioners argue that there is no affront to tribal sovereignty because tribes may simply rely on the courts of other sovereigns in order to enforce their laws and regulations. Petitioners are wrong. Because courts interpret and apply laws as they enforce them, under petitioners' proposal, the meaning and application of tribal laws will differ depending on

whether or not a defendant is a member of the tribe. This unequal enforcement will undermine the integrity of tribal law in general. Moreover, forcing injured tribal members to leave their home communities to seek redress against nonmembers in the courts of an entirely separate sovereign inevitably undermines the tribal government's ability to enforce its own laws.

Petitioners' proposed solution also forces a tribal member who has already been harmed by a tribal outsider to seek relief outside the reservation, potentially exacerbating his injury and making it more likely he will forgo redress altogether. This case dramatically illustrates the problem: Sexual assault victims, and particularly minor victims, are understandably reluctant to press suit because the adjudicative process frequently forces a painful confrontation with the aggressor. The minor victim in this case may therefore have chosen to litigate only because he was able to do so within the familiar forum of his Tribal Court.

Nor is it clear that a tribe will always be able to enforce its laws against nonmembers in state or federal court. While these courts may have the power to apply tribal law in cases that otherwise come under their jurisdiction, there will inevitably be cases that can meet neither federal nor state jurisdictional requirements.

Petitioners contend that a tribe's power to exclude can fill this gap. But if a tribe is reduced to excluding every nonmember who transgresses tribal law, reservation lands may quickly be emptied of many nonmembers. Or—more likely—nonmembers, and in particular nonmember businesses, will be able to

commit all but the most severe violations of tribal law with impunity, free in the knowledge that the tribe is unlikely to jeopardize its economic welfare by expelling them entirely.

Thus, the fact that *Oliphant* deemed tribes divested of criminal jurisdiction over non-Indians means it is all the more important that tribes retain some civil adjudicative authority in that realm. Otherwise, the tribes will be unable to fully vindicate their undisputed right to "make their own laws and be governed by them." *Hicks*, 533 U.S. at 362.[17]

IV. PETITIONERS' REMAINING ARGUMENTS ARE UNAVAILING.

A. Tribes May Regulate Nonmember Conduct Through Tort Law.

As a fallback, petitioners contend that tort law is not a permissible means of regulating nonmember conduct under *Montana*. Pet. Br. 47-54. That contention, too, runs headlong into this Court's precedent, which has assumed that tort law is no different from other forms of tribal regulation. *See Plains Commerce Bank*, 554 U.S. at 331-332; *Hicks*, 533 U.S. at 368 (noting there was "little doubt that the tribal court" in *Neztsosie* "had jurisdiction over [tribal] tort claims" against nonmembers); *Neztsosie*, 526

---

[17] That is not to say that a tribe or its members should be precluded from bringing suit in state or federal court. *See Wold I*, 467 U.S. at 148-149 ("As a general matter, tribal self-government is not impeded when a state allows an Indian to enter its court on equal terms with other persons to seek relief against a non-Indian."). But, to avoid the impingement on tribal sovereignty, the choice must be in the hands of the tribe or its members.

U.S. at 482 n.4 (assuming that tribal courts would have jurisdiction to hear tribal tort claims against nonmembers for conduct on tribal land).

Undeterred by this precedent, petitioners claim that nonmembers cannot implicitly consent to tort jurisdiction because tort law is typically unwritten and it is difficult to determine its precise contours *ex ante*. If that were true, much of state tort law would be invalid. The Due Process Clause mandates that "all regulated parties should know what is required of them so they may act accordingly." *FCC* v. *Fox*, 132 S. Ct. 2307, 2317 (2012) (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)). Yet state tort law has survived because, while it is uncodified, parties are typically able to predict how to adjust their behavior in order to avoid tort liability.

To the extent petitioners are suggesting that tribal tort law in particular is unpredictable, that concern is already accounted for in this Court's precedent. As noted, under the nexus requirement, a nonmember's agreements with the tribe indicate consent only to an exercise of tribal jurisdiction that he can reasonably anticipate. If a nonmember were asked to defend himself against an entirely novel tribal tort with no analogue in the Anglo-American system, *then* the nonmember *might* be able to demonstrate that consent was absent. *Cf. Plains Commerce Bank*, 554 U.S. at 338 (questioning the defendant's ability to anticipate the "novel" tribal tort at stake). But that is not a reason to bar tribal tort jurisdiction in general.

Nor is it a reason to bar jurisdiction in this particular case. Petitioners must have been aware that tribal law might impose a duty to protect the tribe's minor intern from sexual assault by his manager.

The claims against petitioners are the stuff of 1L Torts. *See* Restatement (Second) of Torts § 18 (1965) (Battery: Offensive Contact); *id.* at § 21 (Assault); *id.* at § 46 (Outrageous Conduct Causing Severe Emotional Distress); *id.* at § 317 (Duty of Master to Control Conduct of Servant). Indeed, respondent Doe's claims were borrowed directly from Mississippi law pursuant to Section 1-1-4 of the Choctaw Tribal Code, which mandates that state law will apply in the absence of on point tribal or federal law.

Petitioners' only other rationale for excluding tort law from tribal jurisdiction is their contention that, unlike other forms of regulation, tort law is pervasive. Pet. Br. 55. Whether or not that is true, it is irrelevant. A nonmember will not be subjected to the full panoply of tribal tort law. Rather, a nonmember is subject to tort law only to the extent the requirements set out in *Montana* and its progeny are satisfied. And again, there is no question those requirements are satisfied by *this* exercise of tort jurisdiction: It has a clear nexus to petitioners' consensual relationships with the tribe and its members, and it involves the regulation of nonmember conduct that took place on tribal land and that implicates the Tribe's core right to protect its members.

B. Petitioners' Unfounded Attacks On Tribal Courts Ignore The Numerous Procedural Safeguards Available To Litigants.

Ultimately, petitioners' objection to tribal jurisdiction over Doe's claims rests on little more than a facial attack on the competence of tribal courts. This Court has soundly rejected similar arguments as contrary to federal policy. *See Iowa Mut.,* 480 U.S. at 19. And it has "repeatedly" recognized tribal courts

"as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978); *see Wheeler*, 435 U.S. at 332 ("[T]ribal courts are important mechanisms for protecting significant tribal interests."); *Fisher* v. *Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 387-388 (1976) (per curiam). Indeed, those forums are the first line of defense in the protection of litigants' due process rights. *See Martinez,* 436 U.S. at 67-72.

1. Congress, too, has recognized the central importance of the tribal courts and taken steps to build their capacity and expand their authority. For example, in 1993 Congress passed the Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq*., which created the Office of Tribal Justice Support and provided federal funding to assist in training and providing support to tribal judiciaries. The Act's statutory findings explained that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." *Id*. § 3601(5). They further noted that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." *Id*. § 3601(6). And the Senate Report accompanying the Act explained that this language "was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and *non-Indian individuals*." S. Rep. No. 103-88, at 8 (July 15, 1993) (emphasis added).

Congress expanded on the 1993 Act with the Indian Tribal Justice and Technical Assistance Act of 2000, 25 U.S.C. § 3651, *et seq.*, which further contributed to the courts' institutional capacity and encouraged their integration into regional and national networks of judicial professionals, and again with the Tribal Law and Order Act of 2010, tit. II, Pub. L. No. 111-211.

Congress has expressed support for tribal adjudicative authority in other ways, as well. Significantly, it has required State and federal courts to grant full faith and credit to certain tribal court orders, *including orders involving nonmembers*. *See* 18 U.S.C. § 2265(e) (recognizing that tribal courts may issue protective orders against "any person," and that such orders may be enforced through "civil contempt proceedings," and are entitled to full faith and credit in state courts); 25 U.S.C. § 1911 (tribal courts have exclusive jurisdiction over certain custody proceedings involving Indian children, and orders relating to such proceedings entitled to full faith and credit); 25 U.S.C. § 3106 (granting full faith and credit to tribal court judgments regarding trespass to tribal lands, including with respect to non-Indian defendants, *see* 25 C.F.R. 163.29, and providing for concurrent jurisdiction with the federal courts).

In 2013, Congress also authorized tribal courts to extend their *criminal* jurisdiction over non-Indian perpetrators of domestic violence in Indian country, asserting that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons." 25 U.S.C. § 1304(b)(1). Congress has thus consistently recognized the power of tribal

courts to exercise their adjudicative authority over members and nonmembers alike.

Given that the Solicitor General has also rejected petitioners' policy concerns about tribal courts, *see* Gov't Cert. Br. 19-20, petitioners' contention that the weakness of the tribal courts should foreclose jurisdiction over nonmembers is directly contrary to the determinations of *both* political branches.

Finally, it is notable that petitioners do not allege that *they* were deprived of due process or suffered any other unjust treatment at the hands of the Choctaw courts. Nor could they. Petitioners enjoyed full and fair proceedings in the Tribal justice system, which operates under a constitution that guarantees equal protection and due process to "any person within its jurisdiction." Choctaw Const. art. X, § 1(h). Their objections to the Tribe's jurisdiction were heard in the first instance by a law-trained judge applying the protections of the Indian Civil Rights Act. They then exercised their right to interlocutory review before the Tribe's Supreme Court, which rendered a thorough, fair, and thoughtful opinion applying this Court's precedents. Pet. App. 75-91.

2. Petitioners therefore raise only the specter that *other* tribal courts may not be so sophisticated or fair. But there are already a range of procedural protections in place should that specter materialize.

First, this Court has stated that a nonmember need not even exhaust his tribal remedies if "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Nat'l Farmers Union*, 471 U.S. at 856 n.21 (internal quotation marks omitted). The same is true if the litigant can demon-

strate that the tribal court is unable to provide "an adequate opportunity to challenge" tribal jurisdiction, *id.*, in which case the defendant may challenge tribal court jurisdiction directly in the federal courts.

Second, statutory full faith and credit restrictions provide another layer of protection against judgments tainted by procedural unfairness. If a tribal court issues a decision that does not comport with due process or equal protection requirements, state or federal courts may decline to enforce it. *See, e.g.*, *Bird,* 255 F.3d at 1152 (declining to enforce multimillion dollar judgment against nonmember because trial was infected by racial prejudice); *MacArthur* v. *San Juan County,* 497 F.3d 1057, 1067 (10th Cir. 2007) ("[A] tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law."); *Starr* v. *George,* 175 P.3d 50, 55 (Alaska 2008) (similar); *Langdeau* v. *Langdeau,* 751 N.W.2d 722, 734 (S.D. 2008) (requiring proof that tribal court "order or judgment was obtained by a process that assures the requisites of an impartial administration of justice").

For example, under Michigan state law, tribal court judgments are "presumed to be valid," but that presumption may be overcome if the party resisting enforcement can show that the tribal judgment "(a) was obtained by fraud duress, or coercion, (b) was obtained without fair notice or a fair hearing, (c) is repugnant to the public policy of the State of Michigan, or (d) is not final under the laws and procedures of the tribal court." Mich. Ct. R. 2.615(C). Many other states have similar laws. *See*, *e.g.*, Ariz. Rules of Procedure for the Recognition of Tribal Court Civil Judgments, Rule 5(c) (applying presumption of valid-

ity, subject to review for procedural and substantive fairness); Mich. Ct. R. 2.615(C) (same); Wash. Sup. Ct. R. 82.5(c) (same, provided that tribe recognizes state court judgments); Wyo. Stat. Ann. § 5-1-111 (according full faith and credit, subject to review for compliance with ICRA)); Wis. Stat. Ann. 806.245.4(f) (same)).

Finally, nonmembers remain free to manage their exposure to liability by contract. Nothing prevents businesses like petitioners' from insisting on binding arbitration clauses or state forum-selection and choice-of-law clauses, along with waivers of tribal sovereign immunity, as a condition of doing business on tribal lands. *See, e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (arbitration clause with tribe constituted waiver of sovereign immunity); *Rush Creek Solutions, Inc.* v. *Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004) (enforcing contractual forum-selection clause against tribe); *Bradley* v. *Crow Tribe of Indians*, 67 P.3d 306 (Mont. 2003) (same); *Warm Springs Forest Prods. Indus.* v. *Emp. Benefits Ins. Co.*, 716 P.2d 740, 742 (Or. 1986) (enforcing a choice-of-law provision against tribal plaintiff suing non-member insurer).

What businesses may *not* do is enter tribal land, engage in extensive interactions with the tribe and its members, and then seek to avoid repercussions for the harm inflicted on one of the tribe's members based on spurious legal arguments and unfounded attacks on tribal justice.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

NEAL KUMAR KATYAL
COLLEEN E.R. SINZDAK
EUGENE A. SOKOLOFF
FREDERICK LIU
HOGAN LOVELLS US LLP
555 Thirteenth St. NW
Washington, DC 20004
(202) 637-5600

MELISSA T. CARLETON
Acting Attorney General
N. CHERYL HAMBY
MISSISSIPPI BAND OF
CHOCTAW INDIANS
P.O. Box 253
Choctaw, MS 39350
(601) 656-4507

TERRY L. JORDAN
ATTORNEY AT LAW
P.O. Drawer 459
Philadelphia, MS 39350

C. BRYANT ROGERS
Counsel of Record
CAROLYN J. ABEITA
VANAMBERG, ROGERS, YEPA,
ABEITA, GOMEZ & WORKS, LLP
P.O. Box 1447
Santa Fe, NM 87504
(505) 988-8979

RIYAZ A. KANJI
PHILIP H. TINKER
KANJI & KATZEN, PLLC
303 Detroit Street, Ste. 400
Detroit, MI 48104
(734) 769-5400

BRIAN D. DOVER
ATTORNEY PLLC
915 South Main Street
Jonesboro, AR 72401

Counsel for Respondents

October 2015