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 THE CHEROKEE NATION, THE CHICKASAW NATION, THE CHOCTAW NATION OF OKLAHOMA, THE MUSCOGEE (CREEK) NATION, THE SEMINOLE NATION OF OKLAHOMA, AND THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation of Oklahoma, the Muscogee (Creek) Nation, and the Seminole Nation of Oklahoma—each of which is a federally recognized Indian tribes, 80 Fed. Reg. 1942 (Jan. 14, 2015)—as well as the Inter-Tribal Council of the Five Civilized Tribes, the members of which are representatives from the five individual amicus tribes. Each tribe exercises jurisdiction within the boundaries of the State of Oklahoma. Each tribe's constitution establishes a system of independent courts that, in accordance with applicable tribal and federal law, resolve disputes arising in tribal territory involving members and nonmembers. The question presented in this case concerns the scope of those courts' jurisdiction. Amici thus have an interest in the Court's resolution of that question.[1]

SUMMARY OF ARGUMENT

I. This Court has repeatedly recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997). Consistent with that recognition, the Court has held that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). Under this precedent, which

[1] The parties have filed blanket letters of consent with the clerk. This brief was not authored in whole or in part by counsel for any party, and no party or person other than amici, its members, and its counsel provided any monetary contribution to fund the preparation or submission of this brief.

relied on this Court's landmark decision in *Williams* v. *Lee*, 358 U.S. 217 (1959), it is clear that the tribal courts of respondent Mississippi Band of Choctaw Indians have jurisdiction to hear the tort claim brought in this case by a tribal member against a nonmember company for injury inflicted by the company's employee while working on tribal land.

Arguing the contrary, petitioners rely in part on various treaties. But the fact that those treaties do not explicitly grant tribal courts jurisdiction to hear civil claims against nonmembers does not help petitioners because tribes' retained inherent authority provides a sufficient independent basis to establish jurisdiction. *Strate*, 520 U.S. at 449-450 (discussing *Montana*). In any event, the treaties affirmatively support the existence of tribal court jurisdiction over civil claims against nonmembers arising from activities on tribal land.

II. The amicus brief filed by Oklahoma and other States makes sweeping yet strikingly unsupported attacks on tribal judicial systems. Those attacks should be disregarded—as the Court has previously done with similar attacks. *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18-19 (1987). Contrary to the States' assertions, amici's judicial systems (like those of many other tribes) are quite similar to federal and state judicial systems: They are independent; operate according to rules of civil procedure; adhere to a code of judicial conduct; apply constitutional, statutory, and common law; provide for appellate review; and publish their decisions. Indeed, the judicial system of the leading state amicus (Oklahoma) itself accords full reciprocal faith and credit to decisions by tribal courts. There is no basis to conclude that tribal courts generally cannot ensure a fair proceeding for nonmembers, such that *all* tribal courts should be deprived of jurisdiction over claims like the one here.

ARGUMENT

I. TRIBAL COURTS HAVE JURISDICTION OVER CIVIL DISPUTES BETWEEN MEMBERS AND NONMEMBERS THAT ARISE FROM ACTIVITIES ON TRIBAL LAND

The tribal court in this case asserted jurisdiction based on the so-called first *Montana* exception to the general rule that tribes lack jurisdiction over nonmembers' activities. That exception provides that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). The Fifth Circuit correctly sustained the tribal court's exercise of jurisdiction here, and this Court—both under its precedent and as a matter of first principles—should do so as well. Tribes have inherent authority to assert civil jurisdiction over claims between members and nonmembers that arise out of activity on tribal land. The contrary arguments advanced by petitioners and their state amici lack merit.

A. Indian Tribes Have Inherent Sovereignty To Exercise Tribal Court Jurisdiction Over Claims By Members Against Nonmembers For Torts Arising On Tribal Land

Despite their incorporation into the United States, Indian tribes "retain their inherent power … to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564. Although "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers" generally, *id.* at 565, this Court has held that that "[t]ribal authority over the activities of non-Indians *on reservation lands* is an important part of tribal sovereignty," *Strate* v. *A-1 Contractors*, 520

U.S. 438, 451 (1997) (emphasis added). Accordingly, this Court has held, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Montana*, 450 U.S. at 565. The first *Montana* exception is one embodiment of that retained jurisdictional power.[2]

In *Williams* v. *Lee*, 358 U.S. 217 (1959), this Court addressed "the type of activities [it] had in mind" in subsequently crafting the *Montana* exceptions. *Strate*, 520 U.S. at 457. Specifically, the Court held in *Williams* that the right of Indian tribes "to make their own laws and be ruled by them" includes exclusive jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. 358 U.S. at 220; *see also Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008). That holding was driven by the Court's recognition that "the exercise of state jurisdiction" in such a case "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223.

Williams thus makes clear that although this Court has not explicitly decided "the question of tribal-court jurisdiction over nonmember defendants in general," *Nevada* v. *Hicks*, 533 U.S. 353, 358 n.2 (2001), a tribal court's authority to adjudicate disputes between Indians and non-Indians that arise in tribal territory is in fact an aspect of the tribes' right "to make their own

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[2] The second *Montana* exception is that a "tribe may … exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566.

laws and be ruled by them," 358 U.S. at 220. *Williams* also established that this rule holds regardless of whether the plaintiff is an Indian and the defendant a non-Indian, or vice-versa. *See id.* at 223 ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there."); *see also Hicks*, 533 U.S. at 358 n.2 (observing that the ultimate question is whether the tribe "possess[es] authority to regulate the activities of nonmembers," because where it does, "civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," regardless of whether the suit involves "nonmember plaintiffs [or] nonmember defendants").[3] The relevant consideration under *Williams* is simply the connection between the activities at issue, a member of the tribe, and tribal land.

The principles underlying *Williams* and the *Montana* exceptions remain sound. The exercise of tribal jurisdiction over disputes between members and nonmembers arising on tribal land is essential to providing the rule of law that guides the expectations of all people residing in, working in, and visiting tribal territory. Tribal courts serve that vital function by interpreting tribal enactments, making common law, and applying federal law. Their ability to serve this function is especially important in a case like this, where the nonmember defendant's employee allegedly sexually assaulted an Indian child while working on tribal land. More generally, tribal court jurisdiction is critical to the protection of the individual rights guaranteed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, as tribes

[3] Indeed, the interference with tribal self-government is *greater* if tribal members cannot rely on tribal courts to resolve their claims against nonmembers arising on Indian lands.

have exclusive civil jurisdiction over claims brought under that statute by members and nonmembers alike, *see Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59-72 (1978) (declining to imply a federal cause of action to enforce the ICRA, and relying on tribal forums to enforce its terms).

Importantly, this Court has never found tribal court civil jurisdiction lacking where the dispute arose from a nonmember's activities on tribal land and involved a member. In contrast, the Court in *Strate* found no tribal court jurisdiction where "the Tribes were strangers to the accident": the "dispute [was] distinctly nontribal in nature, arising between two non-Indians involved in a run-of-the-mill highway accident" on land that was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 440, 454, 457; *cf. Hicks*, 533 U.S. at 355, 358 n.2, 364, 370 (given "the State's interest in pursuing off-reservation violations of its laws," tribal court lacked jurisdiction "over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation").

In short, this Court's case law—and the principles on which those cases rest—demonstrate that tribal courts have jurisdiction to hear claims brought, as in this case, against a nonmember for tortious conduct committed on tribal land against a member.

B. Petitioners' Treaty-Based Responses Lack Merit

Petitioners' arguments against jurisdiction are meritless. In particular, petitioners claim (Br. 16, 23-30) that, notwithstanding the first *Montana* exception,

various treaties "make clear that tribes … have been divested of the inherent authority to subject nonmembers to civil suit in tribal court." That argument was neither pressed nor passed upon below; nor was it presented in the petition for certiorari. In any event, the argument fails because, irrespective of the treaties, tribal civil jurisdiction may—and does—exist as a function of inherent authority under *Montana*. Even if that were not the case, the treaties themselves support the existence of tribal civil jurisdiction.

1. The treaties are irrelevant to jurisdiction under *Montana*

Citing *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), petitioners assert (Br. 23-24) that the Mississippi Choctaw courts lack civil jurisdiction here because such jurisdiction is foreclosed by treaties. Petitioners' suggestion that a jurisdictional grant under treaties is necessary for jurisdiction to exist, i.e., that the absence of such a grant is sufficient to defeat jurisdiction, reflects a misunderstanding of the relationship between the *Montana* exceptions, treaties, and retained inherent authority.

Inherent sovereignty is based on the tribes' original rights of self-government, *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978), and is not dependent on a treaty grant. To be sure, this Court stated in *National Farmers* that determining "a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-856. But the Court subsequently clarified that this "careful examination" of trea-

ties and statutes determines only whether the terms of those treaties and statutes are sufficient to establish the jurisdiction that the tribe claims, and that the *Montana* exceptions provide a separate and independent basis for tribal jurisdiction:

> The Court's recognition in *National Farmers* … of the need to inspect relevant statutes, treaties, and other materials[] does not limit *Montana*'s instruction. As the Court made plain in *Montana*, the general rule and exceptions there announced govern only *in the absence of a delegation of tribal authority by treaty or statute*. In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained why those measures did not aid the Tribe's case. See 450 U.S. at 557-563. Only after and in light of that examination did the Court address the Tribe's assertion of "inherent sovereignty," and formulate, in response to that assertion, *Montana*'s general rule and exceptions to it.

Strate, 520 U.S. at 449-450 (emphasis added); *see also Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 649-650 (2001) ("*For powers not expressly conferred them by federal statute or treaty*, Indian tribes must rely upon their retained or inherent sovereignty." (emphasis added)). Accordingly, although the tribe in *Strate* "refer[red] to no treaty or statute authorizing" tribal jurisdiction over the tort suit, 520 U.S. at 456, the Court nonetheless considered whether such jurisdiction could be sustained under one of the *Montana* exceptions. *Id.* ("To prevail here, petitioners must show that Fredericks' tribal-court action against nonmembers qualifies under one of Montana's two exceptions."). Similarly, in *South Dakota* v. *Bourland*, after determining that a

federal statute had "abrogated" the tribe's treaty-based jurisdiction, 508 U.S. 679, 687-691 (1993), the Court expressly recognized the *Montana* exceptions as a separate potential source of tribal jurisdiction, and left their applicability to be resolved on remand, *id.* at 695-696.

Put simply, "controlling provisions in treaties and statutes" and "the two [*Montana*] exceptions" constitute independent bases for *establishing* tribal court jurisdiction, *Strate*, 520 U.S. at 453, not, as petitioners argue (Br. 16, 47), for *denying* it—much less for denying it to all tribes in all circumstances. To defeat tribal jurisdiction, petitioners must show that neither basis is available.

2. The treaties that petitioners cite support rather than undermine the existence of tribal civil jurisdiction

Petitioners cite a number of treaties involving the Choctaw and Chickasaw Nations, including the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830) ("1830 Treaty") and the Treaty with the Choctaws and Chickasaws, 11 Stat. 611 (1855) ("1855 Treaty").[4] But those treaties—besides being wholly irrelevant to the Mississippi Choctaw's jurisdiction, as they deal with tribal authority over the Choctaw Nation's lands in Oklahoma, not Mississippi—preserve rather than extinguish tribal civil jurisdiction over nonmembers.

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[4] The rights held by the Choctaw Nation under the 1830 Treaty were subsequently secured to the Chickasaw Nation by Article 1 of the Treaty Between the Choctaws and Chickasaws, 11 Stat. 573, 573 (1837). *See Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995).

a. The 1830 Treaty recognizes tribal civil jurisdiction over nonmembers

Citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), petitioners argue (Br. 25) that the 1830 Treaty supports their assertion that Indian tribes lack civil jurisdiction over nonmembers. That is meritless.

The Court in *Oliphant* concluded—based on a "treaty provision 'express[ing] a wish that Congress may grant to the Choctaws the right of *punishing* by their own laws any white man who shall come into their nation, and infringe any of their national regulations'"—that "the Choctaws did not have *criminal* jurisdiction over non-Indians absent congressional authority." 435 U.S. at 197, 199 (emphases altered). In all other respects, however, the treaty "guaranteed to the Tribe 'the jurisdiction and government of all the persons and property that may be within their limits.'" *Id.* at 197; *see also supra* n.4 (noting that the Chickasaw Nation has also been a beneficiary under the treaty since soon after the treaty's adoption). "[T]he broad terms of this governmental guarantee," *id.* at 197, thus affirmed that the Choctaw and Chickasaw Nations retained *civil* jurisdiction over non-Indians. And even if there were doubt about the matter, it would have to be resolved pursuant to Article 18 of the treaty, which provides that "in the construction of this Treaty whenever well founded doubt shall arise, it shall be construed most favorably towards the" Nations. 1830 Treaty art. 18, 7 Stat. 336.

Oliphant's holding accords with the Court's more general recognition that "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings." *Strate*, 520 U.S. at 449; *see also Duro* v. *Reina*, 495 U.S. 676, 687 (1990); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers*, 471

U.S. at 853-856. It also accords with the conclusion the U.S. Attorney General reached about the 1830 Treaty—in an opinion this Court has looked to repeatedly. Congress, the Attorney General opined, "has legislated … by taking jurisdiction in criminal matters, and *omitting to take jurisdiction in civil matters*. … By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation." 7 Op. Att'y Gen. 174, 180-181 (1855) (emphasis added), *quoted in National Farmers*, 471 U.S. at 855, *and cited in Oliphant*, 435 U.S. at 199. The Attorney General also confirmed that a predecessor's opinion similarly concerned only tribes' *criminal* jurisdiction over nonmembers. *See* 7 Op. Att'y Gen. at 184 (citing 2 Op. Att'y Gen. 693 (1834)); *see also* Treaty with the Cherokee Indians art. 13, 14 Stat. 799, 803 (1866) ("[T]he judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.").[5]

Petitioners also claim (Br. 27) that Article VII of the 1830 Treaty shows that "the Federal Government would resolve all aspects of any disputes between the tribes and American citizens." Even a glance at Article VII belies petitioners' sweeping assertion. That article pertains to criminal (and specifically prosecutorial) jurisdiction, providing that "acts of violence committed

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[5] Relying on *Alberty* v. *United States*, 162 U.S. 499 (1896), petitioners claim (Br. 29) that the Cherokee Nation "disavowed any civil or criminal jurisdiction over even nonmembers who married citizens of the Nation." But it is a tribe's prerogative to decline to exercise jurisdiction within its sovereign authority.

upon persons or property of the people of the Choctaw Nation either by citizens of the U.S." or other tribes "shall be reffered [sic] to … the President" to "see that every possible degree of justice is done." Indeed, petitioners' reading of Article VII is inconsistent with *Williams* v. *Lee*; as discussed, there this Court held that tribal civil jurisdiction existed over an action brought by a non-Indian against an Indian, notwithstanding Article I of the Treaty with the Navajo Indians, 15 Stat. 667, 667-668 (1868)—which, like the 1830 Treaty, provides for the United States to punish the wrongdoer where one sovereign's citizen wrongs the person or property of a citizen of the other sovereign. *See* 358 U.S. at 221 (discussing treaty of 1868).

b. The 1855 Treaty protects civil tribal jurisdiction over persons residing in, working in, or visiting tribal territory

Petitioners contend (Br. 26-27) that Article 7 of the 1855 Treaty specifically excludes tribal jurisdiction over nonmembers. That is true, but petitioners ignore the fact that the article *also* excepts from that exclusion nonmembers residing in, working in, or visiting tribal territory. Article 7 first provides broadly that "the Choctaws and Chickasaws shall be secured in the … full jurisdiction, over persons and property, within their respective limits." 11 Stat. 612-613. It next excludes from this jurisdiction "all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe." *Id.* at 613. But then it exempts from this exclusion—i.e., places back within the tribes' jurisdiction—"[s]uch individuals … peacefully travelling, or temporarily sojourning in the country or trading there-

in, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes." *Id.*[6] And again, any doubt about the meaning of this language—that is, about the extent of this exception to the exception—must be resolved in favor of the tribes, because "Indian treaties are to be interpreted liberally in favor of the Indians," with "any ambiguities … resolved in their favor." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

c. The treaty-indemnification provisions that petitioners cite are irrelevant

Even further afield is petitioners' attempt (Br. 28) to characterize Article 14 of the 1855 Chickasaw and Choctaw Treaty, and Article 18 of the 1856 Creek and Seminole Treaty, as "provid[ing] indemnification for certain injuries suffered by Indians at the hands of citizens, affording a remedy akin to civil tort damages." These indemnification provisions are not tort-like at all; they relate only to the United States' promise to "protect the [tribes] from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws upon the same principle." 1855 Treaty art. 14, 11 Stat. 614-615; Treaty with the Creeks and Seminoles art. 18, 11 Stat. 699, 704 (1856). The provisions say nothing about tribal jurisdiction over civil suits against nonmembers.

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[6] Article 15 of the 1856 Creek and Seminole Treaty contains virtually identical language, 11 Stat. 699, 703-704, which defeats petitioners' reliance on that treaty (Br. 27) as well.

C. This Court Has Already Rejected The State Amici's Other Arguments Against Tribal Jurisdiction

Petitioners' state amici advance several other arguments in hopes of avoiding the clear implications of this Court's precedents. But those arguments have already been rejected by this Court.

1. The States contend (Br. 8-12) that tort claims are not a valid means of regulation under the first *Montana* exception. That claim is refuted by *Plains Commerce*, which makes clear that the application of tort law through the exercise of civil jurisdiction *is* a "form of regulation" under *Montana*. 554 U.S. at 331-332 ("tribal tort law … regulates the substantive terms on which the Bank is able to offer its fee lands for sale"). Imposing tort liability for the sexual molestation of a minor, as alleged in this case, also falls squarely within "[t]he logic of *Montana*[, which] is that certain activities [even] on non-Indian fee land (say, a business enterprise employing tribal members) … may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities … may be regulated." *Id.* at 334-335. Non-Indian activity on tribal lands that affects the well-being of minor tribal members in the way alleged here a fortiori intrudes on internal tribal relations. And denying the Mississippi Choctaw (or any tribe) the right to protect its minor members in its own courts gravely threatens self-rule.[7]

[7] The States note (Br. 2) that tribal land and businesses are often interspersed with non-tribal land and businesses, and they profess concern about the possibility of different legal regimes applying depending on whether a rest stop to which a non-Indian traveler on a highway happens to go is owned by an Indian or a non-Indian. But similar scenarios can arise throughout the coun-

2. The States also argue (Br. 16) that express consent should be required for tribal tort jurisdiction to exist because of the "opaqueness of tribal tort law." But there is nothing "opaque" or otherwise surprising about the possibility of tort liability based on the sexual molestation of a minor. To the contrary, such misconduct is proscribed everywhere in the United States. And this Court has recognized that a nonmember may consent to the imposition of tribal law "either expressly *or by his actions*." *Plains Commerce*, 554 U.S. at 337 (emphasis added). There is no basis to depart from that precedent, again certainly not in the context of the conduct alleged here.

3. Finally, the States contend (Br. 12-14) that tribes' power of exclusion cannot support the exercise of tribal jurisdiction over tort claims involving nonmembers. But they concede (Br. 14) what this Court recognized in *Plains Commerce*: that the power of exclusion "forms one of the bases for the *Montana* exceptions." 554 U.S. at 335. That power applies here because this case, like *Williams*, arises from conduct on tribal (trust) land, *see* Resp. Br. 8. And on such land, "in accord with *Montana*, … tribes retain considerable control over nonmember conduct." *Strate*, 520 U.S. at 454. Through that power, tribes can regulate nonmembers by conditioning their entry onto tribal lands on the use of reasonable care in interacting with minors and

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try, where borders between States are frequently not marked and travelers thus do not know precisely what legal regime they are subject to at every moment. The scenario that appears to so worry the States, moreover, could just as easily occur in the reverse, with an Indian traveler on the same highway unknowingly patronizing a non-Indian-owned business. The States surely would not agree that that is a basis to deprive *their* courts of jurisdiction over tort claims brought by *their* citizens against such a traveler.

the avoidance of intentional harm to minors. The application of tort law through the exercise of tribal adjudicative jurisdiction simply enforces such conditions.

II. AMICI HAVE DEVELOPED INDEPENDENT JUDICIAL SYSTEMS, AND THEIR COURTS FAIRLY RESOLVE DISPUTES INVOLVING MEMBERS AND NONMEMBERS

Much of the States' argument against tribal jurisdiction here rests on a sweeping indictment of all tribal judicial systems. With strikingly few citations, the States broadly condemn tribal courts as biased and lacking independence, and tribal law as mysterious, inaccessible, and indeed all but incoherent. Based on this far-reaching attack, the States—despite asserting (Br. 9, 11) that "tribal court systems vary wildly," and contrary to their argument that "[t]his Court should not impose a one-size-fits-all rule"—urge the Court to deprive *every* tribal court in the country of jurisdiction over civil tort claims like the one asserted here.

That argument is wholly unfounded. Contrary to the States' expansive (yet, as noted, remarkably citation-free) claims, the tribes submitting this brief, like many others, have sophisticated judicial systems—similar in many ways to those of the United States and most if not all States—that fairly and efficiently resolve disputes involving members and nonmembers.

This Court has "rejected similar attacks on tribal court jurisdiction in the past," *LaPlante*, 480 U.S. at 19, and it should do so again here. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo*, 436 U.S. at 65. Denying tribal jurisdiction based on concerns about "local bias and incompetence," the Court has said, "would

be contrary to the congressional policy promoting the development of tribal courts." *LaPlante*, 480 U.S. at 18-19. "Moreover, the [ICRA] provides non-Indians with various protections against unfair treatment in the tribal courts." *Id.* at 19.

To ensure that the Court's decision in this case is not influenced by the highly distorted picture of tribal courts that appears in the States' brief, amici describe their systems in detail.[8]

Amici's judicial systems closely resemble those of the United States and the States. Under each amicus's constitution, for example, the judiciary is one of three independent branches of government. *See* Cherokee

[8] The States' arguments here, including the suggestion that their own courts are somehow superior to tribal courts, conflicts with what their counsel has argued elsewhere. The States assert (Br. 17) that their courts "have always provided an adequate and fair forum" for the resolution of tort claims between members and nonmembers. But in *Oklahoma Water Resources Board* v. *United States*, No. 110375 (Okla.), the Oklahoma Attorney General—counsel of record on the States' amicus brief—asserted that the trial courts of his own State are *not* an adequate forum for disputes between Indians and non-Indians. There, the Attorney General petitioned the Oklahoma Supreme Court to assume original jurisdiction over an action that names the United States as trustee for the Chickasaw and Choctaw Nations, and seeks to determine the Nations' water rights. The Attorney General argued that the state high court needed to take original jurisdiction so as to "avoid important matters affecting the entire State from being decided by local judges, who are subject to local political pressures." Application to Assume Original Jurisdiction 4 (Feb. 10, 2012). (The United States subsequently removed that action to federal court. *See Oklahoma Water Res. Bd.* v. *United States*, No. 12-275 (W.D. Okla. Mar. 12, 2012).) The Attorney General cannot have it both ways.

Const. art. V[9]; Chickasaw Const. art. V[10]; Choctaw Const. art. V[11]; Muscogee Const. art. VII, § 1[12]; Seminole Const. art. XVI.[13] Each tribal judicial system is headed by a constitutionally established Supreme (or Constitutional) Court, with ultimate authority to interpret the tribal constitution and laws. *See* Cherokee Const. art. VIII, § 4; Chickasaw Const. amend. V, § 1; Choctaw Const. art. XIII, § 1; Muscogee Const. art. VII, § 1; Seminole Const. art. XVI, § 2. The justices of these courts are either elected in regular, popular elections, Chickasaw Const. amend. V, § 3, or appointed by the executive and confirmed for set terms by the tribal legislature, Cherokee Const. art. VIII, § 2; Choctaw Const. art. XII, § 3; Muscogee Const. art. VII, § 2; Seminole Const. art. XVI, § 4.

Amici also have legislatively established lower courts that exercise original jurisdiction within their territories. Cherokee Const. art. VIII, §§ 1, 6; Chicka-

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[9] Constitution of the Cherokee Nation, *available at* http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf.

[10] Constitution of the Chickasaw Nation, *available at* https://www.chickasaw.net/Documents/Long-Term/CN_Constituion_Amended2002.aspx.

[11] Constitution of the Choctaw Nation of Oklahoma, *available at* http://s3.amazonaws.com/choctaw-msldigital/assets/158/constitution_1983_original.pdf.

[12] Constitution of the Muscogee (Creek) Nation, *available at* http://www.creeksupremecourt.com/index.php/mcn-constitutiion.

[13] Constitution of the Seminole Nation of Oklahoma, *available at* http://sno-nsn.gov/Government/GeneralCouncil/CodeofLaws/2015/00%20Seminole%20Nation%20Constitution%20%282013%29.pdf.

saw Nation Code § 5-201.1[14]; An Act Establishing a Court of General Jurisdiction for the Choctaw Nation of Oklahoma ("Choctaw Courts Act") § 1.101[15]; Muscogee Code tit. 26, § 2-101[16]; Seminole Code tit. 5, § 101.[17] Decisions of the lower courts can be appealed to either the tribal Supreme Court, *see* Cherokee Const. art. VIII, § 4; Chickasaw Const. amend. V, § 4; Muscogee Code tit. 26, § 2-101, or to a tribal Court of Appeals, *see* Choctaw Code Civ. P. § 952.[18] Lower-court judges are either appointed to regular terms by the tribe's Supreme Court, *see* Chickasaw Nation Code § 5-202.3, appointed by the executive and approved by the legislature, *see* Cherokee Code tit. 20, §§ 12-13[19]; Choctaw Courts Act § 1.104; Muscogee Code tit. 26, § 3-101(C), or nominated by a Judicial Review Committee, submitted by the executive, and then selected by the legislature, Seminole Code tit. 5, § 103. Judges must generally be licensed attorneys. *See* Cherokee Code tit. 20, § 12; Choctaw Courts Act § 1.103; Muscogee Code tit. 26, § 3-101(A);

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[14] Chickasaw Nation Code, *available at* https://www.chickasaw.net/Our-Nation/Government/Chickasaw-Code.aspx.

[15] Uncodified Choctaw Nation laws are available by request from the Nation's judicial system. Codified Choctaw Nation laws are available at http://www.choctawnation.com/government/tribal-court/.

[16] Muscogee (Creek) Nation Code, *available at* http://www.creeksupremecourt.com/index.php/mcn-code.

[17] Seminole Nation of Oklahoma Code of Laws, *available at* http://sno-nsn.gov/government/codeoflaws.

[18] Choctaw Nation of Oklahoma Code of Civil Procedure, *available at* http://s3.amazonaws.com/choctaw-msldigital/assets/1275/codeofcivilprocedure_original.pdf.

[19] Cherokee Code, *available at* http://www.cherokee.org/attorneygeneral/TribalCode.aspx.

Chickasaw Code § 5-202.2(3); Seminole Code tit. 5, §§ 102(a), 203(a).[20] And they may be removed from office only for cause, such as for violations of judicial canons, conviction of certain crimes, disbarment, gross incompetence, or negligence. *See* Cherokee Code tit. 20, § 17; Choctaw Courts Act § 2-104; Chickasaw Nation Code § 5-202.10; Muscogee Code tit. 26, § 3-101(D); Seminole Code tit. 5, §§ 110, 210. Amici's courts must meet on a regular basis. *See* Cherokee Code tit. 20, § 21; Chickasaw Nation Code §§ 5-101.3, 5-202.6(2); Choctaw Courts Act § 1.114; Muscogee Const. art. VII, § 4; Muscogee Code tit. 26, § 2-103; Seminole Code tit. 5, §§ 106(b), 207(b).

Tribal law also imposes rules of judicial conduct. *See* Cherokee Code tit. 20, § 59; Cherokee Code tit. 20, app. I, R. 161; Cherokee Code tit. 20, app. II, R. 60-62; Chickasaw Nation Code § 5-101.6; Choctaw Courts Act § 2-104(A)(1); Muscogee Creek Code tit. 26, ch. 4; Seminole Code tit. 5, §§ 111, 211. Those codes require judges to maintain the independence of the tribal judiciary, avoid impropriety and the appearance of impropriety in all their activities, conduct the business of the court with proper dignity, disqualify themselves in cases of conflicts of interest, and avoid political activity and other outside activities that might call their independence into question. Violations of judicial canons are punishable by removal from office, under procedures set by tribal law. Chickasaw Nation Code § 5-202.10; Choctaw Courts Act § 2-104(B)-(C). Tribal law imposes addition-

[20] Alternatively, the Chickasaw Nation allows a non-licensed attorney to serve as a judge if he or she meets certain criteria, including having graduated from an ABA-approved law school or tribally approved paralegal program and having practiced as a lay advocate before the Nation's courts for five years. Chickasaw Nation Code § 5-202.2(4).

al burdens on judges to disqualify themselves from cases in which they have a conflict of interest, and sets the legal procedures by which disqualification must occur. *See* Cherokee Code tit. 20, § 59 (Supreme Court Justices); *id.* app. I, R. 161; *id.* app. II, R. 60-62 (district court judges); Chickasaw Nation Code tit. 5, ch. 1, arts. D-E (Supreme Court Justices); *id.* § 5-202.11 (district court judges); Choctaw Courts Act § 2-102 (district court judges); *id.* § 2-103 (appellate court judges); Muscogee Code tit. 26, § 4-103(C); Seminole Code tit. 5, § 111 (district court judges); *id.* § 211 (Supreme Court Justices).

Amici also have detailed (and published) rules of civil procedure that govern all aspects of a civil case and protect the procedural rights of litigants. *See* Cherokee Code tit. 20, app. I & II; Chickasaw Nation Code tit. 5, ch. 2; Choctaw Code Civ. P.; Muscogee Code tit. 27, app. 1; Seminole Code tit. 3. These comprehensive provisions parallel the Federal Rules of Civil Procedure in many respects. *Compare, e.g.*, Chickasaw Nation Code tit. 5, ch. 2, arts. I-J, *with* Fed. R. Civ. P. tit. III & IV (pleadings and parties); *compare* Chickasaw Nation Code tit. 5, ch. 1, art. K, *with* Fed. R. Civ. P. tit. V (disclosures and discovery); *compare* Choctaw Code Civ. P. ch. 2A, R. 13, *with* Fed. R. Civ. P. 56 (summary judgment); *see also In re: Amend. & Adoption of Dist. Ct. R. & Pro.*, SC-AD-13-04 (Cherokee 2013) (order of Cherokee Nation Supreme Court adopting Federal Rules of Civil Procedure and Evidence as guidance for district court proceedings).

Amici's courts—again like those of the United States and most States—apply statutory and common law as recorded in their constitutions, laws, and case law. *See, e.g.*, Cherokee Code tit. 20, § 11; Chickasaw Nation Code § 5-201.6 (district courts); *id.* § 5-102.7 (Supreme Court); Choctaw Code Civ. P. § 2; Muscogee

Code tit. 27, § 1-102(B); Seminole Code tit. 5, § 7. When these are in doubt or inapplicable, the courts are permitted to apply tribal customs and usages to determine the meaning of the law, *see* Chickasaw Nation Code §§ 5-102.7, 5-201.6; Muscogee Code tit. 27, § 1-104; Seminole Code tit. 5, § 7, or fill in gaps in the law, *see* Choctaw Code Civ. P. § 2, just as federal and state judges do. And if there is doubt about tribal customs and usages, the courts are allowed to consider the advice of elders, Muscogee Code tit. 27, § 1-104; Seminole Code tit. 5, § 7, or legislators familiar with the customs and usages, Chickasaw Nation Code § 5-208.11(D), to determine how they ought to be applied. Additionally, when none of these sources addresses the issue at hand, the Chickasaw and Seminole Nations' courts may apply applicable federal or state law, or Department of Interior regulations. *See* Chickasaw Nation Code §§ 5-102.7, 5-201.6; Seminole Code tit. 5, § 7. The Muscogee Code tit. 27, § 1-103(C), and the Seminole Code tit. 5, § 7, also allow the application of Oklahoma law in limited circumstances.

None of this is remarkable; reliance on elders to inform a tribal court's judgment on questions of tribal custom, for example, is substantively no different from reliance on expert testimony in federal court under Federal Rule of Evidence 702—or, indeed, this Court's consideration of amicus filings under its Rule 37. Yet the States assail tribal courts' option to rely on tribal custom in making the common law. In particular, they assert (Br. 10) that "tribal courts may consult with elders or councilors in different quantities, with different frequencies, and with little opportunity for advocates to argue or be informed about how such elders decide what customs should apply in a given case." But they cite nothing to support that contention, apparently ex-

pecting this Court to blindly credit their every claim. There is no basis for the Court to do so.

Indeed, while reliance on tribal elders' testimony to determine tribal customs appears to be of particular concern to the States, this Court and other federal courts have relied on such testimony for more than a century. *See, e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 25-26, 31-32 (1899) (relying on testimony of tribal members to determine tribal inheritance practices); *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1236-1237 (E.D. Wash. 1997) (treating tribal elder as the "ultimate expert" on tribal understanding of treaty's terms at time it was signed), *aff'd sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). That is hardly surprising, given that tribal elders are often the most authoritative sources in their areas of knowledge. *See United States* v. *Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash.) ("An additional method of locating tribal fishing locations subsequent to entering into treaties was established in these proceedings, upon the credible testimony of tribal elders who speak from personal experience or data acquired from other sources."), *aff'd sub nom. Puget Sound Gillnetters Ass'n* v. *United States Dist. Ct. W. Dist. Wash.*, 573 F.2d 1123 (9th Cir. 1978), *vacated on other grounds sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Amici's judicial systems also allow for appeals, which are governed by rules of appellate procedure. *See* Cherokee Code tit. 20, app. I; Chickasaw Nation Code tit. 5, ch. 1, art. B; Choctaw Code Civ. P. app. I; Muscogee Code tit. 27, ch. 3; *id.* tit. 27, app. II; Seminole Code tit. 1. And—contrary to the state amici's bald assertion (Br. 3) that "even if the tribal court issued published opinions …, one cannot simply do a

Westlaw search for those opinions"—the decisions of the Chickasaw and Choctaw Nations' Supreme Courts, along with Chickasaw district court decisions, are published in the Oklahoma Tribal Court Reports, which is available on Westlaw (Okla. Trib.), going back decades. Similarly, the Cherokee Nation's Supreme Court decisions are published in West's American Tribal Law Reporter, which has been produced since 1997 and is also available on Westlaw (Am. Tribal Law); the Cherokee Nation also publishes its Supreme Court opinions, and some district court opinions, on its Judicial System's website.[21] The Muscogee (Creek) Supreme Court likewise posts its opinions on its website.[22] Some Muscogee (Creek) district court and Supreme Court opinions are also published in the Oklahoma Tribal Court Reports.[23]

Finally, the States argue (Br. 18) that the decision below "undermines Congress's policy—embodied in 28 U.S.C. § 1441—of favoring adjudication in neutral tribunals by allowing a defendant sued in the courts of a sovereign to which the plaintiff belongs and the defendant does not to remove the case to a court of a sov-

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[21] http://www.cherokeecourts.org/SupremeCourt/SupremeCourtCaseOpinionsandInformation.aspx; http://www.cherokeecourts.org/DistrictCourt/DistrictCourtDecisions.aspx.

[22] http://www.creeksupremecourt.com/index.php/case-law.

[23] The States argue (Br. 4-5 & n.5) that tribal "appellate courts are typically housed in the same location as the trial court." The suggestion that such physical proximity has any bearing on the integrity of courts' operation is absurd. Indeed, the federal system frequently employs the same approach. For example, the D.C. Circuit is housed in the same building as the D.C. District Court, the Federal Circuit is housed in the same building as the Court of Federal Claims, and the Moakley Courthouse in Boston hosts both the First Circuit and the District of Massachusetts.

ereign to which both parties belong." But a federal forum is available to challenge tribal jurisdiction after exhaustion of tribal remedies, *see National Farmers*, 471 U.S. at 857; *LaPlante*, 480 U.S. at 18-19, and, as discussed immediately below, Oklahoma's own courts determine whether to grant full faith and credit to a tribal court judgment in a tort case (or any other). Further, in determining whether to grant full faith and credit to a tribal court judgment, the tribal court's jurisdiction may be challenged. *Barrett* v. *Barrett*, 878 P.2d 1051, 1054 (Okla. 1994).

The States' denigration of tribal courts is particularly perplexing to amici given that Oklahoma, by both statute and court rule, gives full faith and credit to the judgments of amici's tribal courts—a step one would hardly expect if those courts were the deeply flawed institutions the States try to depict. In 1992, Oklahoma enacted a statute affirming the power of its supreme court to give full faith and credit to the court records and proceedings of tribes that reciprocally recognize Oklahoma state court judgments. 12 Okla. Stat. § 728. Two years later, the Oklahoma high court exercised this authority by issuing a rule that requires Oklahoma courts to give full faith and credit to judgments of tribal courts that reciprocate. R. Dist. Ct. Okla. 30(B), 12 Okla. Stat. ch. 2, app. That rule further requires the Administrative Office of the Courts to maintain a list of the tribal courts granting full faith and credit. R. Dist Ct. Okla. 30(C). All of the amici tribes are on that list. Oklahoma State Courts Network, *Full Faith and Credit of Tribal Courts* (updated July 21, 2015), *at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214. Oklahoma's own conduct in dealing

with amici's courts, then, belies its arguments about those courts here.[24]

In short, contrary to the States' portrayal, amici's courts closely resemble federal and state courts: They are established by (publicly available) constitutions and laws; their structure, personnel, and procedures are set by (publicly available) tribal laws; they apply published tribal statutes and the common law to decide disputes; and their decisions are publicly available, including on the Internet. There is no reason to conclude that they are not as capable as federal and state courts of adequately adjudicating cases and of fully protecting the rights of nonmembers in all cases, including cases raising claims like the one here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[24] Indeed, all three branches of Oklahoma government have recognized the propriety of tribal forums for the adjudication of certain torts. *See Sheffer* v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 367 (Okla. 2013) (holding—based on governor's representations about the intent of the model tribal gaming compact, which the governor had negotiated with tribes and which the legislature had enacted into state law (3A Okla. Stat. § 281 pt. 6)—that under the compact, "tribal courts and tribally designated forums have exclusive civil-adjudicatory jurisdiction over all compact-based tort or prize claim lawsuits.").

Respectfully submitted,

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