

IN THE
Supreme Court of the United States

OCT. 22, 2015

DOLLAR GENERAL CORPORATION, ET AL.,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.,
Respondents.

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

**BRIEF OF AMICI CURIAE NATIONAL
CONGRESS OF AMERICAN INDIANS, ET AL.,*
IN SUPPORT OF RESPONDENTS**

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<i>Miodowski v. Miodowski</i> , No. 8:06CV443, 2006 WL 3454797 (D. Neb. Nov. 29, 2006)..	15
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>
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Poarch Band of Creek Indians Code of Ordinances, <i>available at</i> https://www.municode.com/library/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances : Tit. 40 ch. 5, § 40-5-1	20
Pokagon Band of Potawatomi Indians Child Safety Zone Act, <i>available at</i> http://www.pokagon.com/government/codes-and-ordinances : Ch. 4.....	20
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Skokomish Tribal Civil Trespass Ordinance, <i>available at</i> http://www.skokomish.org/ skokomish-codes-and-ordinan ordinances/:	
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§ 3.07.002	7
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OTHER AUTHORITIES	Page(s)
<i>After a Court Fight, Old Totems Return to an Alaskan Village</i> , N.Y. TIMES, Oct. 17, 1994, http://www.nytimes.com/1994/10/17/us/after-a-court-fight-old-totems-return-to-an-alaskan-village.html	10
President George W. Bush, Proclamation 8313: National American Indian Heritage Month (Oct. 30, 2008), http://www.presidency.ucsb.edu/ws/index.php?pid=84752	31
Sierra Crane-Murdoch, <i>On Indian Land, Criminals Can Get Away With Almost Anything</i> , THE ATLANTIC, Feb. 22, 2013, http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/	12
Troy A. Eid, <i>Beyond Oliphant: Strengthening Criminal Justice in Indian Country</i> , 54-APR FED. LAW. 40 (March/Apr. 2007)	22
Samuel E. Ennis, Comment, <i>Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant</i> , 57 U.C.L.A. L. REV. 553 (2009)	22
Gary Fields, <i>On U.S. Indian Reservations, Criminals Slip Through Gaps: Limited Legal Powers Hobble Tribal Nations; Feds Take Few Cases</i> , WALL ST. J., June 12, 2007, http://www.wsj.com/articles/SB118161297090532116	12

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	Page(s)
Carole Goldberg, <i>Illegal Dumping in Indian Country</i> in U.C.L.A. INSTITUTE FOR THE ENVIRONMENT, SOUTHERN CALIFORNIA ENVIRONMENTAL REPORT CARD 2004 (Ann E. Carlson ed., 2004)	8, 9
Carole Goldberg & Duane Champagne, <i>Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last</i> , 38 CONN. L. REV 697 (2006).....	12, 22
Carole Goldberg, Duane Champagne & Heather Valdez Singleton, FINAL REPORT; LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW (2007)	22
<i>Indian Country Priorities for the 114th Congress: Oversight Hearing Before the S. Comm. on Indian Affairs</i> , 114th Cong. (2015), available at http://www.ncai.org/attachments/Testimonial_gwiAHQgGtXVytDaptlvWsMoWXsUfuzSXjeIZFPsQnNINVJDKXWs_Final%20NCAI%20Testimony%20-%20Priorities%20for%20the%20114th%20Congress%2001%2029%2015%20Revised.pdf	5
Leslie Macmillan, <i>Regulations for Native American ‘artifacts’ auctions may still be too lax</i> , HIGH COUNTRY NEWS (Nov. 18, 2013), https://www.hcn.org/blogs/goat/regulating-native-american-artifacts-auctions	10

TABLE OF AUTHORITIES—Continued

	Page(s)
North Dakota Legislative Council, <i>Three Affiliated Tribes – Oil and Gas Agreement and Oil Tax Allocations</i> (July 2014), available at http://www.legis.nd.gov/files/resource/committee-memorandum/15.9220.02000.pdf?20151013012911	20
Kathleen O'Halleran, <i>Contemporary Social Pressures Facing American Indians</i> , in AMERICAN INDIANS AT RISK (Jeffery I. Ross ed., 2014)	22
President Barack Obama, Remarks at the White House Tribal Nations Conference (Dec. 5, 2012), http://www.presidency.ucsb.edu/ws/index.php?pid=102735	31
Steven W. Perry, <i>American Indians and Crime, A BJS Statistical Profile 1992-2002</i> , U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics (NCJ 203097, Dec. 2004)	11, 12
S. Rep. No. 112-265 (2012)	12
Lauren Straub, <i>Dumping at Reservation Blocked</i> , L.A. TIMES, Aug. 5, 1994, http://articles.latimes.com/1994-08-05/local/me-23817_1_reservation-blocked	8
Kevin K. Washburn, <i>American Indians, Crime, and the Law</i> , 104 MICH. L. REV. 709 (2006)...	22
U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEP'T OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010)	12

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INTEREST OF *AMICI CURIAE*¹

Amicus National Congress of American Indians was established in 1944 and is the oldest and largest American Indian organization in the United States, representing more than 250 Indian Tribes and Alaskan Native villages.

Amicus United South and Eastern Tribes, Inc. is an intertribal organization comprised of 26 federally recognized Indian Tribes in the southern and eastern United States.

Amicus Inter Tribal Association of Arizona is an intertribal organization comprised of 21 federally recognized Indian Tribes with lands located in Arizona, California, New Mexico, and Nevada.

Amicus California Association of Tribal Governments is the tribally chartered, statewide, intertribal, non-profit association of 32 federally recognized Indian Tribes in the state of California.

Amicus Coquille Indian Housing Authority is the Tribally Designated Housing Entity of the Coquille Indian Tribe, a federally recognized Indian Tribe.

The remaining 53 *amici* are all federally recognized Indian Tribes.

Collectively, *amici curiae* represent a diverse array of individual Indian Tribes and tribal organizations from every region of the United States. *Amici* share a strong interest in this case because of the sweeping impact its resolution could have on their ability (or the

¹ The Parties have filed blanket consents to the filing of *amicus* briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief.

ability of their member Tribes) to exercise civil adjudicative jurisdiction over nonmembers on tribal lands. *Amici's* interest in maintaining such jurisdiction stems from their interests in tribal self-government and the protection of their members and territories; in the maintenance and enforcement of civil law and order on tribal lands; and in ensuring that justice and the protection of the law are extended to all persons on reservation lands.

The exceedingly narrow standards for tribal court jurisdiction over nonmembers proposed by the Petitioners and their *amici*, in particular the proposal to condition tribal court jurisdiction on the “express consent” of nonmembers, would depart radically from this Court’s prior decisions and substantially injure the *amici* Tribes’ interests. This brief is intended to aid the Court in understanding the severe adverse impact that the Petitioners’ proposed jurisdictional standard would have in a wide range of civil cases arising on tribal lands that involve circumstances and concerns beyond those raised or addressed by the Parties in this case.²

SUMMARY OF ARGUMENT

An “express consent” standard for tribal civil jurisdiction over nonmembers would depart radically from current standards established by this Court’s jurisprudence and is, quite simply, unworkable. As this Court has noted previously, “Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe’s power, when the power

² Petitioners and some of their *amici* specifically urge that their proposed express consent standard should apply to *all* civil suits in tribal court. Pet. Br. 19; Br. for *Amicus* Ass’n of Am. Railroads 5; Br. for *Amicus* Retail Litig. Ctr. Inc. 15-16.

instead derives from sovereignty itself.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982).³

In many cases, an express consent requirement would be absurd and impossible to implement. As a result, it would amount to an effective bar on tribal court jurisdiction over nonmembers in some of the very situations where jurisdiction is most critical to a Tribe’s ability to self-govern its own people, territories, and resources. In the case of trespass on tribal lands, for example—a common occurrence often resulting in serious harm to tribal lands, natural resources, and cultural or religious sites—obtaining express consent is inconceivable. Likewise, it is unworkable for Tribes to obtain express consent over every nonmember on tribal lands who has domestic or familial relationships with members and who may come before the tribal court on family law or other domestic matters, including cases of domestic disturbance or abuse requiring civil protection orders or other civil remedies (including tort remedies), or as a result of their participation in tribal programs and services such as housing.

Even where express consent to tribal court jurisdiction could theoretically be obtained through the imposition of permit or licensing requirements for nonmember activities on tribal lands, the consent requirement would only provide an incentive for nonmembers entering tribal lands to “withhold consent” by violating tribal law—i.e., by acting without a permit or license. Without

³ Importantly, the last time this Court considered the breadth of tribal jurisdiction, it expressly noted that tribal “laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (emphasis added).

the ability to otherwise enforce valid regulatory requirements in tribal court—the logical result of Petitioners’ and their *amici*’s express consent requirement—Tribes would be hamstrung. Tribal authority to impose taxes and other conditions on nonmember activity on tribal lands, acknowledged as valid under well-settled case law of this Court, would also be thrown into doubt.

The existing standards for tribal court jurisdiction over nonmembers established by this Court in *Merrion*, 455 U.S. 130, and *Montana v. United States*, 450 U.S. 544 (1981), avoid disruption to tribal self-government and civil law and order while adequately protecting the legitimate fairness interests of nonmember defendants. This Court need not and should not overturn those decisions nor significantly alter their scope, as requested by Petitioners.

ARGUMENT

I. The “express consent” standard proposed by Petitioners and their *amici* is illogical and unworkable

Tribal courts across the United States routinely exercise jurisdiction over nonmembers who have engaged in tortious conduct on tribal lands. That jurisdiction is an essential aspect of a Tribe’s self-government and regulation of its territory, and serves the public interest by providing a local forum for dispute resolution and the enforcement of civil law and order. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n.21 (1978). For over three decades, the scope of that jurisdiction has been considered to be settled under this Court’s decisions in *Merrion* and *Montana*.

Petitioners and their *amici* now urge this Court to bar the continued exercise of tribal civil adjudicative jurisdiction over nonmember defendants—even where

the cause of action arises from that nonmember's activity on tribal lands—absent the “express consent” of the nonmember (“e.g., in a forum selection clause of a contract”). Pet. Br. 16.⁴ Such a standard, which would require this Court to abandon decades of settled case law, would be utterly unworkable and disruptive in a wide range of situations involving nonmember activities on tribal lands over which Tribes presently exercise jurisdiction.

A. Trespass and related conduct that threatens or harms tribal natural and cultural resources

Tribes utilize their civil jurisdictional authority over nonmembers to enact and enforce laws against trespass. Often, trespass onto tribal lands is accompanied by vandalism or desecration of sacred and cultural sites; theft of cultural artifacts; destruction of tribal property; habitat destruction; theft of firewood, timber, or other resources; illegal cultivation of marijuana; illegal dumping; unauthorized grazing; illegal hunting and fishing; poaching, and the like.⁵ In one recent

⁴ See also, Pet. Br. 19, 23; Br. for *Amicus* Retail Litig. Ctr. Inc. 16; Br. for *Amici* State of Oklahoma, et al. 16; Br. for *Amicus* Ass'n of Am. Railroads 5, 13.

⁵ See, e.g., *Indian Country Priorities for the 114th Congress: Oversight Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 17 (2015) (testimony of Brian Cladoosby, President, National Congress of American Indians), available at http://www.ncai.org/attachments/Testimonial_gwiAHQgGtXVytDaptlvWsMoWXsUfu zSXjeIZFPsQnNINVJDKXWs_Final%20NCAI%20Testimony%20-%20Priorities%20for%20the%20114th%20Congress%2001%2029%2015%20Revised.pdf; Warm Springs Tribal Code § 306.001, available at http://www.warmsprings.com/Warmsprings/Tribal_Community/Tribal_Government/Current_Governing_Body/Tribal_Code_Book/ (legislative finding that “trespass upon Reservation lands has caused or contributed to the following problems:

case, a nonmember who had been driving through a reservation set a fire in the woods after her car ran out of fuel and she got lost. The fire spread and joined with an existing forest fire, burning more than 400,000 acres of land and causing millions of dollars in damage to tribal natural resources. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844 (9th Cir. 2009).

Tribal courts are instrumental in the enforcement of tribal trespass laws and in the recovery of restitution by the Tribe or reservation residents harmed by the trespass. In *Elliott*, the United States Attorney's Office declined to prosecute the nonmember trespasser who started the fire, but the White Mountain Apache Tribe brought a civil action in tribal court seeking civil penalties and restitution for violations of numerous tribal code provisions, as well as for common law negligence and trespass.⁶ 566 F.3d at 845. Many tribal codes similarly provide for civil fines, forfeiture, restitution, and other tribal court remedies for trespass and related damage. See, e.g., Coquille Indian Tribal Code, ch.

(1) Range and forest fires; (2) Injury to or destruction of fish spawning beds; (3) Intrusion on privacy of Reservation residents; (4) Loss of Reservation and resident resources, including firewood, timber, fish, horses, cattle, and other livestock; (5) Injury to tribal housing and loss of rent for tribal housing occupied by trespassers.”).

⁶ The White Mountain Apache Tribe Natural Resources Code, among other things, prohibits abandoning or leaving a fire unattended and sets civil penalties for violations. White Mountain Apache Tribe Natural Resources Code §§ 1.26, 1.28, available at <http://www.wmat.nsn.us/Legal/contents.html>. The Code further provides that “the [tribal] court may award payment of costs associated with damage to tribal forest land, including, but not limited to, rehabilitation, reforestation, loss of future revenue, loss of productivity and damage to other forest resources.” *Id.* at § 1.29(A)(4)(c).

652 (Trespass Ordinance) (establishing trespass as a civil violation);⁷ Skokomish Tribal Civil Trespass Ordinance § 3.07 (defining trespass and vandalism as civil infractions);⁸ Warm Springs Tribal Code §§ 306.020-055 (creating three classes of civil infractions for trespass and trespass with intent to commit a crime) and § 306.047 (creating a private cause of action for violation of the Tribe's trespass laws).⁹ Tribal codes also address livestock trespass, which is a common issue on many rural reservations, *e.g.*, Pueblo of Laguna Code Section 10-1-13 (violations and enforcement of grazing

⁷ The Coquille Indian Tribal Code is available online at: <http://www.coquilletribe.org/CoquilleTribalOrdinances.htm>.

⁸ Codes and Ordinances of the Skokomish Indian Tribe are available online at: <http://www.skokomish.org/skokomish-codes-and-ordinances/>. In declaring the purpose of the Skokomish Tribal Civil Trespass Ordinance, the Skokomish Tribal Council stated:

It is the duty and obligation of the Skokomish Tribal Council to safeguard, protect, manage, administer and develop the natural resources of Tribal lands for the sole economic, cultural, and social benefit of the members of the Tribal Community. The peace, property, and public safety of all persons, both Indian and non-Indian, may be threatened by disruptive, destructive, negligent, or malicious acts.

Id. at § 3.07.002.

⁹ In enacting Chapter 306 in 1982, the Warm Springs Tribal Council stated:

It is the intent of the Tribal Council that Warm Springs Tribal Code Chapter 306 “fill the gap” created by existing federal, state and tribal laws relating to trespass by non-Indians on Reservation land. The present milieu of laws has created a situation in which the Reservation has become a no-mans land with regard to enforcement of illegal entry onto Reservation lands.

Warm Springs Tribal Code § 306.001.

regulations; defining livestock trespass),¹⁰ as well as lease holdover for agricultural or business leases, *e.g.*, Jamestown S’Klallam Tribal Code § 31.04.06 (holdover of business lease treated as trespass).¹¹

One problem associated with trespass is the high incidence of illegal dumping of hazardous and solid waste on reservation lands. This is especially true for reservations near construction sites or expanding urban and suburban development, where private waste management companies can evade landfill charges by entering reservation lands to dump waste.¹² If a non-Indian dumps waste on reservation lands, states are without authority to enforce civil infractions outside of

¹⁰ The Pueblo of Laguna Tribal Code is available at: https://www.municode.com/library/nm/pueblo_of_laguna/codes/tribal_code.

¹¹ The Jamestown S’Klallam Tribal Code is available at http://www.jamestowntribe.org/govdocs/gov_code.htm. Though it may be possible for Tribes to require consent to tribal court jurisdiction when entering into a new lease, there are hundreds of thousands of existing long-term leases in Indian Country that may not include a forum selection clause. *See* 25 U.S.C. § 415 (permitting certain leases of restricted land up to 99 years). An express consent requirement could make it difficult or impossible for Tribes to manage those existing leases and enforce their terms.

¹² *See, e.g.*, Carole Goldberg, *Illegal Dumping in Indian Country* in U.C.L.A. INSTITUTE FOR THE ENVIRONMENT, SOUTHERN CALIFORNIA ENVIRONMENTAL REPORT CARD 2004 23-29 (Ann E. Carlson ed., 2004) (describing the proliferation of illegal dumping of solid and hazardous waste on Indian Reservations in southern California, the economic incentives for waste companies to do so, and how tribal institutions—rather than federal and state—are the only realistic options for stopping such dumping). *See also* Lauren Straub, *Dumping at Reservation Blocked*, L.A. TIMES, Aug. 5, 1994, http://articles.latimes.com/1994-08-05/local/me-23817_1_reservation-blocked (noting that private waste management companies trucked more than 3,000 tons of solid waste to the Torres Martinez reservation from neighboring counties each week).

their jurisdictions, and the Environmental Protection Agency has disclaimed any ability to act without an impact on water resources.¹³

In response, Tribes have enacted solid waste or illegal dumping codes and ordinances that provide for civil penalties, fines, and asset forfeiture applicable to non-Indian perpetrators (over whom tribal criminal authority does not extend). *See, e.g.*, Fort McDowell Law & Order Code ch. 23 (Environmental Code) §§ 23-12 to 23-15 (civil and criminal penalties for violating prohibitions on illegal dumping of solid or hazardous waste).¹⁴ Such procedures and processes are the only realistic way for Tribes to prevent or sanction illegal dumping by non-Indians on their lands. To require a person dumping waste illegally on reservation land to provide express consent to enforcement jurisdiction would be impossible, and tribal ordinances recognize as much by providing that jurisdiction extends to all persons within the reservation.¹⁵

The rampant looting of archeological sites on tribal land also presents a great challenge for many Tribes, with devastating consequences for scientific inquiry in general as well as tribal cultural and spiritual concerns.

¹³ Goldberg, *Illegal Dumping in Indian Country*, *supra* note 12, at 26-27.

¹⁴ The Fort McDowell Yavapai Community Tribal Environmental Code is available at http://www.narf.org/nill/codes/fort_mcdowell/index.html.

¹⁵ *See, e.g.*, Fort McDowell Law & Order Code ch. 23, §§ 23-2 to 23-4. *See also*, Hopland Band of Pomo Indians Code, tit. 20, ch. 5 (Hopland Tribe Solid Waste Management Code) § 4.3, available at <http://www3.epa.gov/region09/waste/tribal/pdf/hopland-hw-manage-plan.pdf>; Statutes of the Pit River Tribes of California tit. 15, ch. 1 (Solid Waste Disposal Ordinance) § 203, available at <http://www.narf.org/nill/codes/pitriverncode/>.

Although there are a number of federal laws that criminalize this activity,¹⁶ a severe lack of enforcement manpower means that only a fraction of the looters are caught, and even fewer successfully prosecuted.¹⁷ Most of these looters are not tribal members and therefore in the absence of a sufficient federal effort, a Tribe's sole recourse is to assert its civil jurisdiction.¹⁸

Trespass and related conduct by nonmembers such as illegal dumping or looting on tribal lands directly impacts a Tribe's territory, its natural resources, and its cultural heritage. Without the ability to enforce its laws and seek redress within its own jurisdiction for such offenses, the Tribe would be stripped of "the tools necessary to self-government and territorial control." *Merrion*, 455 U.S. at 139.

¹⁶ See, e.g., Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee; Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601 §4(a), 18 U.S.C. § 1170.

¹⁷ Leslie Macmillan, *Regulations for Native American 'artifacts' auctions may still be too lax*, HIGH COUNTRY NEWS (Nov. 18, 2013), <https://www.hcn.org/blogs/goat/regulating-native-american-artifacts-auctions>.

¹⁸ Cf. *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1475 n.11 (9th Cir. 1989); *Chilkat Indian Vill. v. Johnson*, No. 90-01, 20 Indian L. Rep. 6127, 6142 (Chilkat Trib. Ct., Nov. 3, 1993); *After a Court Fight, Old Totems Return to an Alaskan Village*, N.Y. TIMES, Oct. 17, 1994, <http://www.nytimes.com/1994/10/17/us/after-a-court-fight-old-totems-return-to-an-alaskan-village.html> (tribal art returned to Tribe as a result of tort claims in tribal court).

B. Intentional conduct that threatens the safety of tribal members on tribal lands

The most abhorrent offenses committed by nonmembers on Indian reservations are those committed against tribal members themselves. With respect to the protection of tribal members against domestic abuse and sexual assault, for example, the *amicus* brief filed in this case on behalf of the National Indigenous Women's Resource Center, Inc. and other advocacy organizations for survivors of domestic violence and assault powerfully illustrates why an express consent standard would critically undermine a Tribe's ability to protect its members, and even its own survival.¹⁹ In no other jurisdiction would accountability for such heinous acts be conditioned on the express consent of the perpetrator, and for obvious reasons.

The problem of lawlessness and violence on tribal lands is not limited to domestic violence and sexual assault. The Bureau of Justice Statistics reported in 2004 that "[t]he rate of violent crime estimated from self reported victimizations for American Indians is well above that of other U.S. racial or ethnic groups and is more than twice the national average."²⁰ Further, "American Indians are more likely than people of

¹⁹ Even in the absence of criminal jurisdiction over non-Indian offenders, tribal civil authority can provide critical protection and enforcement, including tort remedies, enforcement of civil protection orders, and procedures for requesting exclusion of offenders from tribal lands. *See, e.g.*, Coquille Indian Tribal Code §§ 652.150, 652.385 (defining trespass to include entry in violation of any restraining order, and permitting any resident of the Reservation to make an application to the Tribal Court requesting that a person be excluded, following a hearing to show cause).

²⁰ Steven W. Perry, *American Indians and Crime, A BJS Statistical Profile 1992-2002*, iii. Washington, D.C.: U.S.

other races to experience violence at the hands of someone of a different race[.]”²¹ It is widely recognized that the high rates of crime and violence committed by non-Indians on Indian reservations is driven in large part by the narrow scope of tribal criminal jurisdiction, and the fact that non-Indians who commit crimes in tribal communities go unpunished by any other jurisdiction more often than not.²² Simply put, non-Indian criminals believe they can act with impunity on Indian lands.²³

Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (NCJ 203097, Dec. 2004).

²¹ *Id.*

²² *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEP'T OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 6 (2010) (the Department of Justice declined to prosecute fifty percent of the cases referred to it from law enforcement agencies in Indian Country between 2005 and 2009); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 710-23 (2006) (law enforcement by States on Indian reservations ineffective).

²³ *E.g.*, S. Rep. No. 112-265, at 7 (2012) (“Criminals tend to see Indian reservations and Alaska Native villages as places they have free reign, where they can hide behind the current ineffectiveness of the judicial system.”); Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, THE ATLANTIC, Feb. 22, 2013, <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>; Gary Fields, *On U.S. Indian Reservations, Criminals Slip Through Gaps: Limited Legal Powers Hobble Tribal Nations; Feds Take Few Cases*, WALL ST. J., June 12, 2007, <http://www.wsj.com/articles/SB118161297090532116>.

In light of the extent to which Tribes rely on their civil authority to fill gaps in criminal jurisdiction on Indian reservations, a rule of law permitting nonmembers to evade civil as well as criminal jurisdiction by withholding express consent would seriously undermine the ability of tribal governments to maintain law and order within their territories. In *One Thousand Four Hundred Sixty Three Dollars v. Muscogee (Creek) Nation*, involving a non-Indian who transported methamphetamines onto treaty lands owned by the Tribe and the site of a tribally-owned casino, the Supreme Court of the Muskogee (Creek) Nation observed:

The only means in which the Nation may reduce the amount of drugs brought onto tribal lands by non-Indians is through the limited provisions of the Nation's civil code. It is imperative that the Nation possess certain regulatory authority over all persons entering the Nation's land and business enterprises, as this case reflects.

No. SC 2005-01, 2005 WL 6218811 at *6 (Muscogee (Creek) Apr. 29, 2005) (civil citation for disorderly conduct for possession and intent to distribute controlled dangerous substance, and civil forfeiture proceeding for vehicle used to transport illegal drugs onto tribal lands and cash and drugs found in vehicle).

As the case at bar demonstrates, individual tort remedies are one important way to curb criminal activity on reservation lands in the absence of criminal jurisdiction. Other types of civil regulations and citations also play an important role in maintaining public safety on tribal lands, such as civil citations to regulate driving on tribal roads—one of the most common (and potentially dangerous) nonmember activities on

tribal lands.²⁴ If this kind of regulation were contingent on express consent, it would be effectively nullified.

C. Domestic relations on tribal lands involving nonmembers

Tribal courts also play an important role in the maintenance of civilized society by providing a forum for the peaceful resolution of domestic and other civil matters that arise at the local level. Nonmembers are frequently involved in such disputes as a result of their personal relationships with tribal members and entry or residence on tribal lands. An express consent requirement would frequently preclude jurisdiction over them in tribal court, however, creating a local jurisdictional gap on reservation lands.

The adjudication of family law matters, for example, including custody of tribal member children with a nonmember parent residing on tribal lands, is not only a local matter most appropriate for resolution in the

²⁴ See, e.g., Three Affiliated Tribes of the Fort Berthold Indian Reservation, Civil Motor Vehicle Code, tit. X, ch.3, § 10-3-1, http://www.mhanation.com/main2/elected_officials/elected_officials_resolutions/resolutions_2011/Aug%2011%202011%20Meeting.pdf (legislative finding that “the lack of enforcement of motor vehicle laws on the Highways and roads on the Reservation against non-Indian operators has become a number one public safety concern on the Reservation and that the disregard for motor vehicle laws on the Reservation threatens and has direct effect on the political integrity, the economic security and the health and welfare of the Tribe and its members”). Tribes generally maintain civil jurisdiction over nonmember activity on “tribal roads” not subject to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), which may be open to the public but are maintained by the Tribe or by the Bureau of Indian Affairs with no right-of-way grants to a state or local government. See, e.g., *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

local (tribal) courts, but is also core to a Tribe's right to control internal relations and to make its own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959). In fact, federal, state and tribal courts regularly hold that tribal courts should retain jurisdiction over such cases for that very reason. *See, e.g., Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988); *Miodowski v. Miodowski*, No. 8:06CV443, 2006 WL 3454797 (D. Neb. Nov. 29, 2006); *Byzewski v. Byzewski*, 429 N.W. 2d 394 (N.D. 1988); *Kelly v. Kelly*, No. DV 08-013, 2008 WL 7904116 (Standing Rock Sioux Trib. Ct. June 23, 2008). Yet it is these very cases—cases which arise from everyday occurrences and social and domestic relationships between members and other individuals living on tribal lands—that are least likely to involve written documents specifying a judicial forum for dispute resolution. Petitioners' extreme express consent standard would preclude tribal court jurisdiction in such matters.

D. Nonmember family members benefitting from tribal programs and services

Nonmembers who enter into domestic relationships with tribal members frequently become eligible for or incidentally benefit from tribal programs and services carried out by the Tribe for the benefit of its members and their families. As a consequence, Tribes regularly exercise civil jurisdiction over those nonmembers in order to preserve the integrity of the governmental services and programs they offer on their own lands. In these cases, an express consent requirement would needlessly burden the regulation of tribal governmental programs, in derogation of a Tribe's right to self-govern its people and territories.

For example, tribal housing authorities rely on the availability of remedies in tribal court in the operation of tribal housing programs, and from time to time it is necessary for them to initiate eviction or trespass proceedings against occupants of tribal housing who have engaged in criminal activity, have otherwise become a threat or nuisance to their neighbors, or have taken possession of a unit without permission. Commonly, tribal housing authorities require that the individual who signs the housing lease as head of household be a tribal member, and thus no questions arise with respect to tribal court jurisdiction over those individuals. However, nonmember family members who are not signatories to the lease may also be present in tribal housing, sometimes without the knowledge or permission of the housing authority.

For instance, the Housing Authority for *amicus* Confederated Tribes of the Colville Reservation is currently facing a situation arising from the death of a tribal member who was residing in the home under the terms of a lease-to-own agreement. Several of her relatives (nonmembers of the Tribe) moved into the home before the Housing Authority learned of the tenant's death, and now will not vacate voluntarily. They have not signed any lease, and are in trespass. The Housing Authority may need to rely on the Tribal Court to have them removed.

In another case, *amicus* Coquille Indian Housing Authority was forced to file a complaint in tribal court against a family that, in applying for tribal housing, had falsely represented that the head of household was a tribal member. In fact, no family member was a tribal member. When the Housing Authority learned of the fraud, it first sent a letter demanding that the family vacate, but the family refused. The family did

eventually vacate before any hearing was held, but without the threat of an eviction action in tribal court, the Housing Authority may have been powerless to remove those individual members of the household who had not signed the lease from the tribal housing unit. Presumably, if the nonmember family (who was willing to perpetrate a fraud against the Tribe) could have evaded tribal court jurisdiction by “withholding consent” to tribal court jurisdiction, they would have done so.

The Housing Department for *amicus* Klamath Tribes has similar concerns. The Housing Department is currently aware of a nonmember spouse or other nonmember adult residing in at least 20 out of the 84 households managed by the Housing Department, and there are likely others of whom they are unaware. There have been instances where a tribal member head of household fled because of domestic violence perpetrated by the nonmember living in the home. In such cases, the Tribes rely on the Tribal Court to evict that nonmember (who is not a lease signatory). If the Tribes were unable to initiate those eviction proceedings, short of the Tribes resorting to self-help measures, the abuser could obtain eviction-proof housing as a direct benefit of his or her abusive and violent acts toward the head of household.

E. Licensed and otherwise regulated activities by nonmembers on tribal lands

Tribes permit many nonmembers onto their lands for commercial and recreational purposes. It is well settled that Tribes retain the ability to regulate these activities and, for example, impose licensing or taxation requirements on them. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation,*

447 U.S. 134, 152 (1980) (Tribes retain sovereignty to tax transactions occurring on trust lands); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (approving applicability of hunting and fishing regulations to non-Indians on tribal land); *Montana*, 450 U.S. at 557 (same). If express consent were required in order for a Tribe to enforce its regulatory requirements or to adjudicate torts or other disputes arising from regulated activities, it would undermine the ability of Tribes to exercise their long-recognized regulatory powers on their own lands. In fact, it would provide a perverse incentive for nonmembers to “withhold consent” by violating tribal law—i.e., by engaging in the regulated activity on tribal lands without a license or permit.

This is not a hypothetical fear. For example, *EXC, Inc. v. Kayenta Dist. Court*, No. SC-CV-07-10, 9 Am. Tribal Law 176 (Navajo Sept. 15, 2010), involved a nonmember tour bus operator that was sued for negligence in the courts of the Navajo Nation in connection with a fatal motor vehicle accident that occurred on the Navajo Reservation. The tour operator had failed to obtain a required tour activity permit, even though it regularly passed through Navajo territory, scheduled overnight stays on the Navajo Reservation, and stopped at the Monument Valley Navajo Tribal Park (a tribally administered natural park and tourist attraction) as part of its marketed package tours. The permit, which is required under the Navajo Nation Tour and Guide Services Act, requires the permit holder to specifically consent to jurisdiction of the Navajo Nation’s courts. The tour bus operator argued that “by not acquiring the necessary vehicle tour permit from the Navajo Nation Parks and Recreation Department and signing the requisite agreement, they effectively withheld their consent to Navajo Nation court jurisdic-

tion sufficient to evade jurisdiction” despite their regular presence on the Navajo Reservation as part of their tour business. *Id.* at 184. Not surprisingly, the court did not accept this misplaced, nonsensical argument.²⁵

This Court has also expressly rejected the argument that a Tribe’s regulatory powers are contingent on the express consent of those subject to the regulation. *Merrion*, 455 U.S. at 147. That ruling could effectively be overturned if the Court were to radically alter the standard for enforcement of tribal laws against non-members in tribal court as Petitioners’ and their *amici* propose.²⁶ The resulting uncertainty would throw current tribal taxation and other regulatory schemes into chaos with devastating impacts on many Tribes.

For example, many Tribes rely on production and severance taxes from oil and gas extraction and other commercial activity to support their tribal governments. Between September 2013 and February 2014 alone, for instance, the Three Affiliated Tribes received \$120,233,563 in taxes from oil tax allocations due to

²⁵ The Navajo Supreme Court remarked that it was an “obvious tenet of governance” that “no person or entity may deny the Navajo Nation’s regulatory and adjudicatory jurisdiction on the basis of a violation of our laws.” *EXC, Inc.*, 9 Am. Tribal Law at 185. The United States District Court for the District of Arizona agreed, but found that tribal court jurisdiction was lacking on other grounds. *EXC, Inc. v. Jensen*, No. CV 10-08197, 2012 WL 3264526 (D. Ariz. Aug. 9, 2012), *aff’d*, 588 Fed. Appx. 720 (9th Cir. 2014). A petition for a writ of certiorari was filed with this Court on July 13, 2015, *Jensen v. EXC* (July 13, 2015) (No. 15-64).

²⁶ This Court has indicated that tribal adjudicative jurisdiction and legislative jurisdiction are coextensive. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 652 (2001). It would be anomalous for any government to have valid legislative and regulatory authority but not adjudicative enforcement authority over the same individuals and activities within its territory.

extraction on the Tribe's reservation.²⁷ Those funds would cease if Tribes were suddenly forced to ask producers for consent—no producer would agree to such a tax if given a choice—or if those producers believed they could evade enforcement.²⁸

F. Locally-based torts and other disputes between members and nonmembers arising on tribal lands

Myriad other categories of disputes arise between members and nonmembers on tribal lands. Tribal courts currently exercise their jurisdiction to ensure

²⁷ North Dakota Legislative Council, *Three Affiliated Tribes – Oil and Gas Agreement and Oil Tax Allocations* (July 2014), available at <http://www.legis.nd.gov/files/resource/committee-memorandum/15.9220.02000.pdf?20151013012911>. The Tribe is allocated 50% of the tax; the State of North Dakota receives an equal amount.

²⁸ Similarly, the proposed express consent standard would effectively nullify hundreds of tribal regulatory laws applicable to anyone on Indian and trust land by removing tribal enforcement authority. See, e.g., Stockbridge Munsee Tribal Law Land Ordinance, ch. 40, § 40.13 (land assignment ordinance governing land rights for nonmembers if a member spouse dies), available at <http://www.mohican-nsn.gov/Departments/Legal/Ordinances/>; Reno Sparks Indian Colony Ordinance No. 45 (Graffiti Ordinance) (Reno Sparks Indian Colony ordinance setting forth fines and community service for graffiti for any offender), available at <http://www.rsic.org/rsic-services/court-services/tribal-ordinances/>; Pokagon Band of Potawatomi Indians Child Safety Zone Act, ch. 4 (providing for civil fines for violation of Act that bars registered sex offenders from tribally designated child safety zones), available at <http://www.pokagon.com/government/codes-and-ordinances>; Poarch Band of Creek Indians Code of Ordinances, tit. 40 ch. 5, § 40-5-1 (enforcement of tribal alcohol beverage control ordinance applicable to any seller, Indian and non-Indian), available at https://www.municode.com/library/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances.

that justice is available to the parties in those cases where the nonmember's consensual acts have been sufficient to justify such jurisdiction. *E.g.*, *Clark v. Richter*, No. 300, 2 Am. Tribal Law 179 (Fort Peck Ct. App. Feb. 18, 2000) (medical malpractice claim against nonmember doctor providing services to tribal members on reservation); *Carmona, M.D. v. Acoma Pueblo Tribal Court*, No. 97-CV-06, 25 Indian L. Rep. 6123 (Acoma Pueblo Ct. App. Mar. 21, 1998) (same); *Wolf Point Org. v. Inv. Centers of Am., Inc.*, No. 324, 3 Am. Tribal Law 290 (Fort Peck Ct. App. Feb. 6, 2001) (action alleging fraud and negligence against nonmember investment company that solicited business from tribal community organization); *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) (tribal court properly exercised jurisdiction over action for negligence involving injury to tribal member allegedly caused by nonmember defendant's horse, which trespassed onto a tribal road).

Petitioners and their *amici* suggest that their express consent standard would have little impact on these cases, even though it would preclude tribal court jurisdiction in many of them, because state and federal courts exist as alternative forums to hear these disputes. To the contrary, precluding tribal member plaintiffs from bringing claims in tribal court would frequently result in a denial of justice.

In the experience of the *amici* submitting this brief, many tribal member plaintiffs simply would not pursue their claims in state or federal court, which may be located far from their homes, require a much greater investment of time and money, or appear foreign or intimidating. Many tribal members, for example, lack reliable transportation necessary to reach non-local

courts.²⁹ Comprehensive studies on access to justice in Indian Country from both state and federal sources show that state law enforcement and court institutions do not serve tribal communities well.³⁰ Many scholars have also documented the difficulties that tribal members and reservation citizens have when attempting to access federal and state courts.³¹ Moreover, there is no need to remove local disputes to state or federal court. As the brief of *amici curiae* Puyallup Tribe of Indians, et al. in support of Respondents in

²⁹ See Kathleen O'Halleran, *Contemporary Social Pressures Facing American Indians*, in AMERICAN INDIANS AT RISK 557, 563-564 (Jeffery I. Ross ed., 2014).

³⁰ See Goldberg & Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, *supra* note 22, at 711; Carole Goldberg, Duane Champagne & Heather Valdez Singleton, FINAL REPORT; LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007).

³¹ See, e.g., Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711 (2006) (“... the challenge facing a victim or witness from the Red Lake Band of Ojibwe Reservation near the Canadian border in northern Minnesota who may be required by federal summons to travel 250 miles or more of back roads and highways to reach federal court in St. Paul or Minneapolis, Minnesota.”); *Id.* at 711 n.6 (“... the Fort Peck Reservation is nearly 300 miles from the federal courts in either Great Falls or Billings, and both drives could easily take six hours in good weather.”); Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, 54-APR FED. LAW. 40, March/Apr. 2007, at 42 (“... the nearest U.S. district judge serving the citizens of [the Ute Mountain Ute Reservation] is more than 400 miles away in Denver, an eight-hour drive—even in good weather.”); Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 U.C.L.A. L. REV. 553, 569 n.97 (2009) (referencing a tribal court administrator in Arizona for whom the closest federal detention center is a nine-hour drive to another state).

this case establishes, tribal courts are no less competent, fair, or accessible than their sister courts in the handling of these cases.

Tribal member plaintiffs, like other plaintiffs, are entitled to bring their claims in the forum of their choosing, and in particular, in the forum local to where their claim arises. *See, e.g., Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013) (“plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations)”); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) (“When the home forum has been chosen, it is reasonable to assume that this choice is convenient.”). Aside from the plaintiff’s choice, the convenience of the parties, the location of witnesses and evidence, and the interests of justice are prime considerations in determining the proper venue in the ordinary federal court action. *Atl. Marine Const. Co.*, 134 S. Ct. at 581; *Id.* at n.6. When it comes to claims arising from consensual conduct on tribal lands, the same policy considerations apply, and all weigh in favor of tribal court jurisdiction. State and federal courts, while appropriate as alternative venues in some cases, are not substitutes for local tribal courts.

II. The existing jurisdictional standards established in *Merrion* and *Montana*, rooted in the protection of tribal self-government, are realistic, workable, and fair

In these and other classes of cases, restricting tribal court jurisdiction over nonmembers on tribal lands by imposing an “express consent” or other narrow standard could have devastating consequences for Tribes nationwide. Broader standards, by contrast, are firmly rooted in this Court’s precedent and strike a proper balance

between tribal sovereignty, on the one hand, and the interests of nonmembers and other sovereigns, on the other. These existing standards, established by this Court in *Merrion v. Jicarilla Apache Tribe* and *Montana v. United States* and further refined in subsequent cases, have worked well when properly applied by the lower courts.

A. Tribes retain significantly broader authority to regulate and adjudicate the conduct of nonmembers on tribal lands, where tribal self-government interests are strongest

This Court's decisions governing tribal civil jurisdiction over nonmembers have been consistently rooted in the principle that Tribes retain those powers necessary to protect tribal self-government, control internal relations, and to manage tribal lands. *Montana*, 450 U.S. at 564; *Merrion*, 455 U.S. at 137; *Plains Commerce Bank*, 554 U.S. at 334. From this general principle, the Court has announced specific rules and exceptions to govern different circumstances; however, if these powers are to have any meaning at all, they must encompass the right of Tribes to enact and enforce civil laws to protect themselves and their people from trespass or violence, to manage and protect cultural and natural resources, and to maintain civil society *on their own lands*.

In this case, the events giving rise to this lawsuit took place on Mississippi Choctaw's tribal trust land. This Court's precedent has recognized that Tribes retain significantly broader latitude to regulate and adjudicate the conduct of nonmembers on such tribal lands than on non-Indian fee lands. That is so because a Tribe's interests in self-government and territorial management are strongest on its own lands and because the Tribe

retains its inherent authority to exclude nonmembers from those lands altogether.³² While the Court need not determine in this case precisely how *much* latitude Tribes have in this respect, that latitude certainly encompasses situations—such as this one—in which a defendant willfully enters onto a Tribe’s land and commits torts against the Tribe or its members.

Petitioners’ argument to the contrary dangerously misreads this Court’s precedent. In *Montana*, this Court set out a “general proposition” with respect to non-Indian fee lands, holding that tribal jurisdiction does not extend to nonmembers, subject to two exceptions designed to account for the sovereign right of Tribes to exercise self-government and to control internal relations. 450 U.S. at 564-65.³³ However, *Montana* itself was clear that the exercise of tribal jurisdiction on trust land is not limited to those two exceptions. Rather, the Court in *Montana* “readily agree[d]” that, “on land belonging to the Tribe or held by the United States in trust for the Tribe,” a Tribe may regulate activities of nonmembers. 450 U.S. at 557. As to its specific holding delineating the two exceptions, the

³² *Montana*, 450 U.S. at 557 (distinguishing land owned by or held in trust for the Tribe from fee land owned by nonmembers and agreeing that the Tribe may prohibit or regulate hunting and fishing on such tribal lands); *Merrion*, 455 U.S. at 138, 141-42 (upholding a Tribe’s power to tax nonmember activity on tribal lands and observing that a Tribe’s interests in levying taxes is strongest when the taxed activity takes place on tribal lands).

³³ The two exceptions are as follows: (1) where the nonmember “enter[ed] consensual relationships with the tribe or its members”; or (2) where the nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 565-66.

Court made clear that it was referring to “land owned in fee by nonmembers of the [t]ribe.” *Id.*

Subsequent decisions of this Court have confirmed this understanding of the scope of the *Montana* rule and its exceptions. See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (describing *Montana* and its exceptions as “[r]egarding activity on non-Indian fee land”); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001) (referring to “*Montana*’s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land”).

Less than one year after *Montana*, the Court in *Merrion* upheld the Jicarilla Apache Tribe’s ability to tax nonmember businesses as an exercise of “the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction” and “a necessary instrument of self-government and territorial management.” *Merrion*, 455 U.S. at 137. Alternatively, the Court reasoned, the Tribe had authority to impose the tax by virtue of its power to exclude nonmembers—a power that “necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.” *Id.* at 144. The Court in *Merrion* reached these conclusions without ever suggesting that *Montana* might pose any bar to the Tribe’s exercise of such authority.

To be sure, later decisions of this Court have indicated that tribal jurisdiction over nonmembers on tribal lands is not absolute. See *Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank*, 554 U.S. 316. However, those decisions do not fundamentally alter the general framework created in *Merrion* and *Montana* or their distinction between fee lands and tribal lands.

In *Hicks*, the Court addressed the narrow—and factually extreme—question of tribal court jurisdiction over tort claims arising from state law enforcement’s execution of a search warrant relating to off-reservation violations of state law. Specifically limiting its decision to the “question of tribal-court jurisdiction over state officers enforcing state law,” 533 U.S. at 358 n.2, the Court held that tribal court jurisdiction was precluded because “the principle that Indians have the right to make their own laws and be governed by them requires an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” *Id.* at 362 (internal quotations omitted).³⁴ Though the Court noted that Indian land ownership does not “suspend[] the ‘general proposition’” that the exercise of tribal jurisdiction over nonmembers must be “‘necessary to protect tribal self-government or to control internal relations,’” *id.* at 359 (quoting *Montana*, 450 U.S. at 564-65), the Court nevertheless recognized that in the ordinary case the status of the land in question is “significant” and “may sometimes be a dispositive factor” in determining whether that requirement is met.

In *Plains Commerce Bank*, the issue before the Court concerned the Tribe’s ability to regulate the sale of non-Indian fee land, which the Court held was not justified under *Montana*. 554 U.S. at 332, 340. The Court’s holding did not establish a standard for the exercise of tribal civil authority over nonmembers on *tribal lands* and did nothing to limit or alter the general rule

³⁴ The Court accordingly held that “tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations[.]” *Hicks*, 533 U.S. at 364.

that Tribes retain inherent authority to manage their territories, protect tribal self-government, and control internal relations—interests which are at their strongest on lands owned by or held in trust for the Tribe. *Id.* at 334.

Citing *Merrion*, the Court in *Plains Commerce Bank* acknowledged that tribal land ownership and a Tribe's right to exclude are significant. *Id.* at 333 (noting that the Court's cases since *Montana* have generally upheld regulatory authority on tribal lands, but rarely upheld such authority over fee lands, based upon the impact to the Tribe); *id.* at 335 (recognizing that the power to exclude persons from tribal lands includes the power to set conditions on entry in the form of regulatory authority). The Court also emphasized that Tribes "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security," and can do so "by regulating nonmember activity on the land." 554 U.S. at 336 (emphasis omitted).

In the case now before the Court, the Mississippi Choctaw Tribe has shown that jurisdiction was eminently justified because it derived from the Tribe's rights "to set conditions on entry, preserve tribal self-government, or control internal relations," as articulated by this Court in *Plains Commerce Bank*, *id.* at 337, and because Dollar General was engaged in a consensual relationship with the Tribe under *Montana*'s first exception. However, *amici* urge the Court not to resolve this case in a manner that could be interpreted as requiring that one of the *Montana* exceptions be met in *every* case arising on tribal lands. Such a ruling could preclude Tribes from protecting themselves and their members against the kinds of "noxious uses" of land

discussed in this brief and referred to by the Court in *Plains Commerce Bank*.³⁵

In any event, this case presents no compelling reason for the Court to abandon decades of precedent, which has never conditioned the exercise of tribal jurisdiction over nonmembers on express consent, even where the *Montana* exceptions apply.³⁶ The absence of an express consent requirement does not mean that a nonmember defendant is without the ordinary procedural protections that condition the exercise of jurisdiction by any other court within the United States. As with other jurisdictions, nonmembers can avoid becoming subject to tribal authority by abstaining from entering onto tribal trust lands or engaging in consensual relationships with Tribes or tribal members. But at the very least, where a nonmember has knowingly

³⁵ In the context of non-Indian fee lands, the *Montana* exceptions have been interpreted in a restrictive manner that would not make sense on tribal trust lands. See, e.g., *Plains Commerce Bank*, 554 U.S. at 330, 341 (stating, in the context of non-Indian fee land, that the *Montana* exceptions “are ‘limited’ ones,” and noting that nonmember conduct must “imperil the subsistence” of the Tribe in order for the second *Montana* exception to apply) (citations omitted). As noted above, however, the Court seems to have simultaneously recognized that such narrow standards should not apply on trust lands, lest the Tribe lose its ability to protect itself from harmful uses of, or activities on, those same lands. *Id.* at 336.

³⁶ See *Montana*, 450 U.S. at 565 (explaining 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”); *Strate*, 520 U.S. at 446 (same); *Plains Commerce Bank*, 554 U.S. at 329 (same); *id.* at 337 (nonmember may consent “either expressly or by his actions.”) (emphasis added); cf. *Merrion*, 455 U.S. at 147 (explaining that “Indian sovereignty is not conditioned on the assent of a nonmember”).

entered into relations with a Tribe or its members on the Tribe's trust lands, as in this case, it is fair for him or her to expect to be subject to tribal regulatory and adjudicatory authority.³⁷ *Montana*, 450 U.S. at 557; *Merrion*, 455 U.S. at 138, 141-42; *Plains Commerce Bank*, 554 U.S. at 333.

B. The standards established in *Merrion* and *Montana* are both workable and necessary in light of current self-government policies and developments in Indian Country

The exercise of tribal jurisdiction over nonmembers has become increasingly important as Indian Tribes work to recover from the aftermath of failed policies of federal paternalism and begin to flourish again under their own self-government. Over the last several decades, Congress and the Executive Branch have pursued policies that strongly favor tribal development, self-determination, and local self-control,³⁸ expressly

³⁷ *Amicus* the State of Oklahoma's example of a driver subject to tribal jurisdiction by virtue of chance activities at a rest stop is a strawman, for it may not actually involve the sort of willful conduct that supports tribal jurisdiction. See *Plains Commerce Bank*, 554 U.S. at 337 (tribal law "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.").

³⁸ For example, Congress has sought to improve tribal governance and economies by passing statutes such as the Indian Financing Act of 1974, see 25 U.S.C. § 1451 *et seq.*, the Indian Self Determination and Education Assistance Act of 1975, see 25 U.S.C. § 450 *et seq.*, and the Indian Reorganization Act of 1934, see 25 U.S.C. § 461 *et seq.* In recent years, Congress has bolstered these federal efforts through the Indian Gaming Regulatory Act, see 25 U.S.C. § 2701 *et seq.*, intended to provide Tribes with a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments," *id.* § 2702(1). Likewise, the Native American Housing Assistance and Self-Determination Act

rejecting past policies that inhibited, even dismantled, the full functionality of tribal governments.

Self-determination policies that seek to rebuild and strengthen tribal governments and economies have resulted in enormous improvements in the lives of tribal members, as well as nonmembers living on reservations and in surrounding communities. They have also brought significant changes to Indian Country, including improved social and economic opportunities that bring more nonmembers to tribal lands and result in greater interaction between tribal members, nonmembers, and the tribal government. Not surprisingly, then, the implementation of self-determination policy has not only supported the strengthening of tribal judiciaries, but *necessitated* them.

Tribal housing is a prime example. Programs made possible under the Native American Housing Assistance and Self-Determination Act and other self-determination policies and programs have permitted Tribes to offer government housing programs that make a real difference in the lives of tribal members and their families. Most Tribes were not able to offer such programs until relatively recently. The operation of these programs creates new circumstances under which the exercise of

of 1996, *see* 25 U.S.C. § 4101 *et seq.*, provided assistance “in a manner that recognizes the right of Indian self determination and tribal self-governance” and with the “goals of economic self-sufficiency and self determination for tribes and their members,” *id.* §§ 4101(6)-(7). *See also*, President Barack Obama, Remarks at the White House Tribal Nations Conference (Dec. 5, 2012), <http://www.presidency.ucsb.edu/ws/index.php?pid=102735>; President George W. Bush, Proclamation 8313: National American Indian Heritage Month (Oct. 30, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=84752>.

tribal self-government requires tribal court jurisdiction over nonmembers, like eviction from tribal housing. Viewed in this light, the growth in tribal court jurisdiction over nonmembers is a positive development resulting from the overall revitalization of reservation communities.

This Court has been cognizant of the United States' "firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 & n.10 (1980) (citations omitted). Critically, this Court has made clear that the "federal policy of promoting tribal self-government *encompasses the development of the entire tribal court system.*" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987) (emphasis added). Accordingly, "[t]ribal 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 (emphasis added); cf. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (explaining that the tribal exhaustion doctrine provides tribal courts with "the first opportunity to evaluate the factual and legal bases for [a] challenge" to their jurisdiction).

As Tribes continue to make strides in the self-determination era to improve conditions throughout Indian Country for all of its residents, now is not the time to upend decades of this Court's precedent, Congressional and Executive policy, and settled expectations of tribal authority that have made those strides possible. Rather than adopt a radical "express consent" standard that would all but preclude the exercise of tribal jurisdiction over nonmembers and substantially impair the maintenance of law and order on tribal

lands, this Court should reaffirm the existing jurisdictional standards adopted in *Merrion* and *Montana*, recognizing the primacy of tribal court civil jurisdiction on tribal lands.

CONCLUSION

For the reasons stated, this Court should affirm that tribal courts retain civil jurisdiction over the activities of nonmembers on tribal lands.

Respectfully submitted,

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