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, ET AL.
Respondents.

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

Brief For The Puyallup Tribe Of Indians; Southern Ute Indian Tribe; Navajo Nation; Mashantucket Pequot Tribal Nation; Sac And Fox Nation Tribal Court; Big Valley Band Of Pomo Indians; Blue Lake Rancheria; Chemehuevi Indian Tribe; Chicken Ranch Rancheria Of Me-Wuk Indians; Rincon Band Of Luiseno Mission Indians; Santa Ynez Band Of Chumash Mission Indians; Shakopee Mdewakanton Sioux Community Tribal Court; Northwest Intertribal Court System; Southwest Intertribal Court of Appeals; American Indian Law Center, Inc.; The Michigan Tribal State Federal Judicial Forum; And National American Indian Court Judges Association As Amici Curiae In Support Of Respondents

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INTERESTS OF THE AMICI CURIAE[1]

The Puyallup Tribe of Indians, Southern Ute Indian Tribe, Navajo Nation, Mashantucket Pequot Tribal Nation, Blue Lake Rancheria, Chemehuevi Indian Tribe, and Rincon Band of Luiseno Indians are federally recognized Indian tribes with active court systems regularly handling cases involving both Indians and non-Indians. These tribes have a strong and direct interest in seeing that companies that choose to do business within their reservations obey tribal laws and are susceptible to suit in tribal courts if they harm tribal members.

The Shakopee Mdewakanton Sioux Community Tribal Court and the Sac and Fox Nation Tribal Court have an interest in ensuring they can continue to hear cases involving nonmembers for claims arising within the courts' jurisdiction.

The Northwest Intertribal Court System (NICS), the Southwest Intertribal Court of Appeals (SWITCA), and the American Indian Law Center, Inc. (AILC) are non-profit organizations, the latter associated with the University of New Mexico School of Law, which provide judicial services, such as well-trained trial and appellate judges and publication of tribal laws and court procedures, to more than 28 tribes on the west coast and in the western states.

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[1] The parties have given their blanket consent to amicus briefs in support of either party and this consent has been noted on the docket. No counsel for either party authored this brief in part or in whole and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae described above, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Michigan Tribal State Federal Judicial Forum is an ongoing forum to foster working relationships among all of Michigan's court systems. Members include 12 tribal judges and 12 state judges.[2] The National American Indian Court Judges Association is a non-profit membership organization of present and former tribal court judges. These organizations have helped tribal courts become exemplary courts in their areas and strongly support the continuation of tribal jurisdiction in cases such as this one.

The Chicken Ranch Rancheria of the Me-Wuk Indians, Big Valley Band of Pomo Indians, and the Santa Ynez Band of Chumash Indians are federally recognized tribes in California who are currently in the process of establishing tribal court systems and have a similar interest in preserving the jurisdiction of tribal courts.

SUMMARY OF ARGUMENT

Petitioners ask this Court to establish a rule barring any tribal court from exercising civil adjudicatory jurisdiction over any nonmember defendant who does not expressly consent to the exercise of that jurisdiction, or alternatively to hold that tribal courts lack such jurisdiction over tort claims. Petitioners' request relies on unfounded fears about tribal courts, and if granted would have harmful effects on the administration of law throughout Indian country. This brief seeks to provide the Court with a more accurate understanding of tribal courts today, including their

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[2] There are also three federal members of the forum (a federal magistrate judge and two Assistant U.S. Attorneys who work on tribal matters) who did not vote on the decision to join this brief because it involves a pending federal case.

strong working relationships with state and federal courts.

Petitioners' position has no basis in this Court's approach to tribal civil jurisdiction. In limiting tribal regulatory jurisdiction over non-Indians *on non-Indian fee land*, the Court recognized two situations in which a tribe could have jurisdiction over a nonmember. One situation is when the tribe regulates "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 other is conduct that "threatens or has some direct effect on … the health and welfare of the tribe." *Id.* at 566. Here the action occurred on tribal trust land, over which the Court in *Montana* "readily agree(d)" that the tribe retained regulatory authority. *Id.* at 557; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Assuming that the *Montana* framework applies even to tribal land, this case fits easily within the consensual relationship exception, as the Court of Appeals held. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173-74 (5th Cir. 2014). Furthermore, defendants' alleged actions—employing a store manager who sexually molested a tribal member child— seriously threaten the tribe's ability to protect the health and welfare of its members. *See Montana*, 450 U.S. at 566.

In the face of this straightforward exercise of tribal jurisdiction under *Montana*, Petitioners and their supporting amici urge the Court to adopt a categorical rule divesting tribes of jurisdiction over virtually all tort claims against all nonmembers, even those that occur on tribal trust land. Petitioners

argue that because some tribal courts may be deficient, no tribal courts, including those of the Mississippi Band of Choctaw Indians, should have the power to hear tort cases against nonmembers who do not specifically agree to tribal court jurisdiction. Petitioners cannot argue that the Mississippi Choctaw tribal court's handling of this case is inadequate; the Choctaw court system is highly developed and the decision of the Mississippi Choctaw Supreme Court is thorough and impressive. Indeed, the amicus brief of the South Dakota Bankers Association describes the Mississippi Band of Choctaw Indians as having a "well-developed court system." *See* Br. Amicus Curiae of the South Dakota Bankers Ass'n in Supp. of the Pet'rs at 5 (citing Harvard Project on American Indian Economic Development). Many other tribes, including the amici here, also have similarly sophisticated and accessible judicial systems.

Petitioners support their cramped view of tribal jurisdiction by relying on what they claim to be historical views of tribal authority, dating predominately from the 19th century. Br. for the Pet'rs at 24-36. Yet at least since the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (IRA), Congress and the Executive Branch, as well as this Court, have repeatedly supported the revitalization and expansion of tribal governments in general, and tribal courts in particular.

The categorical prohibition Petitioners propose was considered and rejected in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855 (1985), where this Court unanimously concluded that a tribal court's exercise of civil subject-matter jurisdiction over non-Indians "is not automatically foreclosed, as an extension of *Oliphant* would require." Indeed, the

Court in *National Farmers Union*, noting the difference between tribal civil and criminal jurisdiction, quoted an opinion of the Attorney General upholding the civil adjudicatory jurisdiction of the Choctaw Tribe of Oklahoma:

> But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this . . . 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.

Id. at 854-55 (quoting 7 Op.Atty.Gen. 175, 179-181 (1855)).

Petitioners next argue that tribal tort law is unknowable because it might include tribal customary law. But they do not argue that tribal customary law will be used in this case, nor do they provide any reason to believe that such law, if applicable, would be either hidden or harmful. To the contrary, published decisions from a diverse array of tribal courts show tribal judges apply familiar legal principles that result in fair outcomes for all litigants, including nonmembers.

The picture of tribal courts and tribal law painted by Petitioners and amici in support of their position is inaccurate. Tribal courts, supported by nearly a century of federal laws and policies, have evolved to have fair and accessible procedures as well as substantive law, including tort law, that is familiar and understandable. Tribal law is often readily available on the internet through a variety of sources and databases. Litigants in tribal courts, whether tribal members or not, are afforded due process, as required by tribal laws and the Indian Civil Rights

Act, 25 U.S.C. §§ 1301-1304 (ICRA), and tribal courts apply familiar due process principles in a range of circumstances.

Finally, Petitioners also overlook the very good relations that exist between tribal courts and state and federal courts. Statutes and court rules in states where there are Indian tribes generally require state courts to recognize tribal court judgments as a matter of comity, thus enforcing them if the tribal court had jurisdiction and there was no violation of due process. This is also the practice of federal courts in the Ninth and Tenth Circuits, where the majority of Indian reservations are located. A few states treat judgments of tribal courts as they would judgments of other state courts, granting them full faith and credit, but still making sure constitutional rights are not infringed. *See* Part III-A. In both cases, comity and full faith and credit, the state and federal courts provide a second layer of due process review, further ensuring fairness to all defendants, Indian or non-Indian. In addition, most states with large Indian populations have a forum for state and tribal judges to meet and work out any issues there may be between the court systems. These forums allow state and tribal judges to ensure that jurisdictional issues will not inhibit the administration of justice. *See* Part III-B.

This Court has long recognized, "The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system . . . ." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987). Since 1934, when the IRA encouraged tribes to draft their own laws and establish modern governments, Congress, the Executive Branch, and this Court have all given support for the growth and development of tribal courts. The circumstances of

this case provide no cause for the Court to reverse that direction.

ARGUMENT

I. SUPPORTING TRIBAL COURTS IS AN INTEGRAL PART OF THE MODERN FEDERAL POLICY OF TRIBAL SELF-DETERMINATION.

A. Congressional and Executive Policy towards Tribes and Tribal Courts Supports Tribal Jurisdiction.

Contemporary federal laws and policies support Indian tribal courts, including tribal jurisdiction over nonmembers. This is the culmination of nearly a century of federal policy evolution. In 1934, Congress passed the Indian Reorganization Act (IRA), which encouraged tribes to adopt their own constitutions and enact their own laws. 25 U.S.C. § 476(a). As this Court has recognized, this reform effort was part of the broader national goal of reviving tribal self-determination and encouraging tribal governance. *Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically").

Tribal law reform efforts have continued robustly throughout the last five decades because federal self-determination policies, in place since the 1960s, have encouraged tribes to retake control of and build their governmental structures. In 1970, President Nixon announced the federal government's support for tribal self-governance decisively in his Message to Congress, in which he urged Congress to perpetuate the federal trust relationship with tribes, facilitate a

transition to tribal control of federal programs, and support the development of tribal political institutions.[3] Every President since Nixon has likewise embraced self-determination policies.[4]

Consistent with these policies, Congress has provided funding and technical assistance for tribal court systems. *See* Indian Tribal Justice and Legal Assistance Act of 2000, 25 U.S.C. §§ 3651-3682; Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1993). In recent years, Congress has gone even further: it has restored categories of inherent tribal criminal jurisdiction that the Court had rejected. In 1991 Congress amended the Indian Civil Rights Act to affirm that tribes have inherent criminal jurisdiction over nonmember Indians, altering the result in *Duro v. Reina*, 495 U.S. 676 (1990). 25 U.S.C. § 1301(2). Most recently, when it reauthorized the Violence Against Women Act in 2013, Congress recognized tribal inherent authority to prosecute non-Indians who commit dating, sexual, and domestic violence crimes on tribal land. 25 U.S.C. § 1304 (partially overturning *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

The Executive Branch has likewise embraced policies of supporting and strengthening tribal judicial systems. In 1993, the Bureau of Indian Affairs (BIA) established the Tribal Justice Support Program, which provides training and technical assistance to tribal courts. *See* 25 U.S.C. § 3611. Most

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[3] Richard Nixon, Special Message to Congress (July 8, 1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2573.

[4] *See e.g.*, President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983); President William J. Clinton, Remarks to American Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); *available at* www.presidency.ucsb.edu.

recently, in 2014, the Attorney General issued a set of principles for working with federally recognized tribes and emphasized that "stable funding at sufficient levels for essential tribal justice functions is critical to the long-term growth of tribal institutions."[5] In 2010, DOJ began awarding more than $350 million to tribes to address criminal and public safety issues.[6] Through its Bureau of Justice Assistance, DOJ has provided grant funding to nearly three hundred tribes to enhance their judicial systems.[7] As a result of this federal support, tribes are several decades into the process of making their law enforcement and judicial systems responsive to the broad range of issues arising in Indian country today, including those involving nonmembers.

B. Decisions of this Court Have Also Supported the Development of Tribal Courts.

This Court has also played a crucial role in supporting the development of tribal courts. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that state courts lacked jurisdiction over a case brought by a non-Indian against tribal members for a claim that arose within the Navajo reservation. First, the Court discussed the IRA's policies of encouraging

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[5] *See* Attorney General Guidelines Stating Principles for Working with Federally Recognized Tribes, 79 Fed. Reg. 239 (Dec. 12, 2014) (AG Order No. 3481-2014).

[6] U.S. Dep't of Justice, Coordinated Tribal Assistance Solicitation: Fiscal Year 2015 Factsheet, *available at* www.cops.usdoj.gov/pdf/CTAS/2015_ctas_fact_sheet.pdf.

[7] U.S. Dep't of Justice, Bureau of Justice Assistance, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America 6 (2005), *available at* law.und.edu/_files/docs/tji/docs/pathways-report.pdf.

"tribal governments and courts to become stronger and more highly organized." *Id.* at 220. Next, the Court made specific mention of positive developments in the Navajo judicial system, noting, "[t]he Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel." *Id.* at 222. The Court concluded that allowing Arizona state courts to exercise jurisdiction over the case would infringe on the Tribe's right to make its own laws and be ruled by them. As a result, the only forum available to the non-Indian plaintiff was the Navajo judicial system. The Court found it "immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223. The Court concluded by stating that its own cases had "consistently guarded the authority of Indian governments over their reservations. . . . *If this power is to be taken away from them, it is for Congress to do it*." *Id.* (emphasis added).

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court held that tribal courts are appropriate forums to hear claims under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (ICRA). The Court held that federal courts have no jurisdiction to hear ICRA claims (other than petitions for habeas corpus) in part based on the long-established recognition of tribes as "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Id.* at 55 (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). The Court construed the ICRA and other modern federal statutes as "promot[ing] the well-established federal 'policy of furthering Indian self-government.'" *Id.* at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Court in *Santa Clara* reasoned:

"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*." *Id.* at 65 (emphasis added).

Since *Santa Clara*, tribal courts, supported by the Congressional and Executive Branch policies described above, have expanded and evolved rapidly. In *Santa Clara*, the Court noted that there were "287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976." *Id.* at 65 n.21 (citing 1 American Indian Policy Review Commission, Final Report 5, 163 (1977)). In 2005, a DOJ report found that number had increased to 175 tribal courts, 103 of which had their own appellate courts.[8] Today, there are 567 federally recognized tribes and more than 300 tribal courts.[9] *Santa Clara*'s holding, which made tribal courts the forum of first resort for ICRA violations, contributed to this expansion.

This Court's tribal court exhaustion doctrine, articulated in *National Farmers Ins. Co.*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), has also helped foster tribal court development. *National Farmers* involved a tort case brought by a tribal member against nonmember

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[8] U.S. Dep't of Justice, Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country at 20, *available at* www.bjs.gov/content/pub/pdf/ctjaic02.pdf.

[9] The National American Indian Court Judges Association has compiled a list of over 300 tribal courts. *See also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 71 (2013) (estimating the number of tribal courts to be approximately 300).

defendants, and the Court required the nonmembers to exhaust their remedies in tribal court: "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. *Iowa Mutual* applied the doctrine in another tort case against a nonmember defendant, and clarified that exhaustion should include tribal appellate review: "The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." 480 U.S. at 16-17. *Iowa Mutual* also expressed strong support for the presumption that tribes retain civil jurisdiction over nonmember activities on reservation lands "unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.

In sum, this Court has played a complementary role to that of Congress and the Executive Branch in the context of civil jurisdiction. The Court has recognized tribal judicial authority to hear disputes between nonmembers and tribal members, *Williams*, 358 U.S. at 223, and encouraged tribal courts to consider the extent of their jurisdiction in cases involving tort claims against nonmembers. *National Farmers*, 472 U.S. at 855-57; *Iowa Mutual*, 480 U.S. at 16-18. In *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438, 454-59 (1997), the Court adopted a context-sensitive framework for assessing whether tribes have civil jurisdiction over nonmember activity, even when claims arise on non-Indian lands, which is not the situation presented here. *See also Plains*

Commerce Bank v. Long Family and Cattle Co., 554 U.S. 316, 327-30 (2008) ("[T]ribes retain sovereign interest in activities that occur on land owned and controlled by the tribe") (quoting *Nevada v. Hicks*, 533 U.S. 353, 392 (2001) (O'Connor, J., concurring)); *see also id.* at 336 ("the tribe may quite legitimately seek to protect its member from noxious uses" caused by nonmember conduct even on fee lands).

The Petitioners, however, urge the Court to end its support for the growth and development of tribal judicial systems by categorically prohibiting all cases in tribal courts against nonmembers or alternatively those sounding in tort law. As discussed below, the fears Petitioners seek to sew about the unknowability of tribal tort law and the unfairness of tribal courts are unfounded, both in this case and in general. Therefore, there is no justification for the Court to contravene congressional and executive policies as well as the Court's own approach to tribal civil jurisdiction by declaring one category of civil cases to be prohibited in all tribal courts.

II. PETITIONERS' CONCERNS ABOUT THE INADEQUACY OF TRIBAL COURTS AND UNFAMILIARITY OF TRIBAL LAW ARE UNFOUNDED.

A. Tribal Courts Are Well Run and Their Laws are Readily Accessible.

The Mississippi Choctaw Band's Civil Court decided this case initially, and then the Choctaw Supreme Court heard the appeal. The Choctaw Supreme Court decision is thorough and closely reasoned, written by a judge who is also a law professor. *See Doe v. Dolgencorp*, No. CV-02-05, Miss. Band of Choctaw Indians S.Ct. (Feb. 8, 2008) (opinion by Judge Frank Pommersheim, a University of South

Dakota law professor). The Choctaw Band's law and courts are discussed in detail in the Respondent's brief. Information about the Tribe's judicial system is also readily available on-line.[10] The Petitioner and amici do not and cannot argue that the Choctaw court system is inadequate or unfair.

The well-developed Mississippi Choctaw court system is not unusual. Amici tribes, and many other tribes, have established similar tribal court systems. For example, Amicus Puyallup Tribe has a trial court currently served by three judges. Puyallup Judicial Code § 4-16-040.[11] The Puyallup Judicial Code requires that all Tribal Court judges must be members of a state bar, hold a Juris Doctor degree, be members of a federally recognized Indian Tribe, and be free from convictions involving "dishonesty or moral turpitude." *Id*. § 4-16-160.

A litigant dissatisfied with a decision of the Puyallup trial court may file an appeal. The Puyallup Court of Appeals is provided through a contract with the Amicus Northwest Intertribal Court System (NICS), an inter-tribal court system founded in 1979. For many of its participating and member tribes, NICS provides both trial and appellate judges, many of whom are members of the Washington bar and not infrequently law professors, like the judge who wrote the Tribal Supreme Court opinion in this case. NICS plays a major role in assuring the quality of tribal courts in the West. It serves some 18 tribes in the Washington, Oregon, California area. Apart from the

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[10] The Mississippi Band of Choctaw Indians – Tribal Code, *available at* http://www.choctaw.org/government/court/code.html.

[11] Laws of the Puyallup Tribe of Indians, *available at* www.codepublishing.com/WA/puyalluptribe/.

Puyallup, some of the best known are the Tulalip, Chehalis, Klamath, and Muckleshoot tribes. Appellate opinions issued by NICS-administered courts are published in a reporter titled NICS Tribal Appellate Court Opinions, all thirteen volumes of which are available online, searchable, and contain an index by subject matter and tribe.[12]

Amicus Southern Ute Indian Tribe has a similar system and belongs to a similar intertribal judicial organization, the Southwest Intertribal Court of Appeals (SWITCA), which provides appellate courts for twelve tribes and pueblos in Arizona, Colorado, New Mexico and Texas including the Jicarilla Apache, the Ak Chin, Fort Mojave, Zuni Tribe, Santa Clara Pueblo and three other pueblos. The SWITCA judges are all licensed attorneys who have been practicing law for at least five years, and they include two law professors. They operate under a set of Appellate Rules published on the internet by SWITCA, and their decisions are indexed and reported in print and sent to member tribes, attorneys practicing in tribal courts and law school libraries for public use.

By using intertribal associations like SWITCA and NICS, tribes like the Puyallup Tribe and Southern Ute are able to provide an impartial appellate review of tribal court decisions by distinguished and experienced attorneys.

Amicus Navajo Nation's Judicial Branch has eleven judicial districts and a full-time Supreme Court. The Navajo Nation also has two administrative hearing bodies, the Office of Hearings and Appeals and the

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[12] NICS Tribal Court Appellate Opinions, *available at* www.codepublishing.com/wa/nics.

Labor Commission. To practice in Navajo Nation courts, one has to be a member in good standing of the Navajo Nation Bar Association (NNBA), which includes a requirement to pass the Navajo Nation Bar Examination. Members of federally recognized tribes may sit for the bar examination if they are graduates of a four-year college or American Bar Association accredited law school, or have completed a certified paralegal training program or equivalent. Non-tribal members have to be state-licensed attorneys and graduates of accredited law schools.[13]

In addition, the law applied by tribal courts is written and publicly available. There is a West Tribal Law Reporter published in hard copy, and an increasing number of online legal information providers have tribal law databases (comprising decisional and statutory law), including WestlawNext, Lexus Advance, and VersusLaw.[14] The Mississippi Band of Choctaw Indians,[15] the Puyallup Tribe,[16] the Navajo Nation,[17] and many other tribes have tribal codes that are in these databases or

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[13] *See* Navajo Nation Bar Ass'n Bylaws IV.B-C, *available at* http://www.navajolaw.org/New2008/bylaws.htm.

[14] WestlawNext includes West's Tribal Law Reporter (reporting cases for twenty-one tribal courts), Oklahoma Tribal Court Reports (reporting cases for twenty-three tribal courts), and West's Mashantucket Pequot Reports.

[15] Choctaw Tribal Code, *available at* http://www.choctaw.org/government/court/code.html.

[16] Puyallup Tribal Code, *available at* www.codepublishing.com/WA/puyalluptribe/.

[17] The Navajo Nation Code is available on Westlaw in West's Tribal Law Reporter and also available on CD ROM. *See* Judicial Branch of the Navajo Nation, *Navajo Nation Code*, http://www.navajocourts.org/code.htm.

otherwise posted on the internet. For tribes that choose not to publish their tribal codes on the internet, like the Southern Ute Tribe, laws and judicial opinions are available from the tribal courts, designated tribal offices and at local public libraries.[18]

The content of these tribal court decisions and codes are also very familiar to any practitioner trained in general legal principles. While it is not possible to survey the substance of all tribal laws here, many tribal codes are modeled after or incorporate statutes of other jurisdictions. *See, e.g.*, *Tracy v. Superior Ct.*, 810 P.2d 1030, 1033 n.3 (Ariz. 1991) (en banc) ("The Navajo Uniform Act is substantially identical to Arizona's Uniform Act."); Cohen's Handbook of Federal Indian Law § 4.05[8] n.63, at 277 (Nell Jessup Newton ed., 2012) [hereinafter Cohen] (Code of Eastern Band of Cherokees adopting North Carolina civil rules "as a matter of comity to promote respect for the Cherokee Courts and to facilitate the practice of law in the Cherokee Courts"); *id*. at n.64, 278 (some tribes adopt federal rules of procedure for civil litigation). When there is a gap in the tribal code, tribal court judges are often instructed to apply state or federal law. *See* Choctaw Tribal Code § 1-1-4 ("Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi."); Southern Ute Tribal Code § 1-2-101(4) ("Where there is no law contrary, the common law of the United States . . . shall be the rule

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[18] Contact information for the Southern Ute Indian Tribal Court is available online. *See* S. Ute Indian Tribe, *Tribal Court*, www.southernute-nsn.gov/tribal-court/.

of decision . . . ."); *Winstone v. Old Kent Bank-Grand Traverse*, No. 98-04-127-CV, 2000 WL 35750179, at *1 (Grand Traverse Tribal Ct. Feb. 11, 2000) (tribal resolution "mandates that Michigan substantive law be adopted as tribal law to fill voids"). "By adopting federal or state laws, a tribe may be seeking to fill gaps in developing tribal law and to learn from the experience of other sovereigns." Cohen at § 4.05[8], 278; *see also Synowski v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 122, 124-25 (Grand Ronde Cmty. Ct. App. 2003). Especially in the area of commercial law, tribes are sensitive to the fact that providing uniform legislation can facilitate business on the reservation. Cohen at § 4.05[8] n.65, 278 (Confederated Tribes of the Grand Ronde Community adopting Oregon Commercial Code and contract laws unless in conflict with tribal law).

Because tribal courts, including the ones described above, are fair, accessible and familiar, they are also the forums of choice for tribal members, as well as many other reservation residents. Nonmembers are frequently plaintiffs in tribal courts, as well as defendants. And just as state residents often opt to file lawsuits in the courts of their home state, so too will tribal members prefer the court system of their governments. Furthermore, some tribal nations, such as the Navajo Nation, are so vast and remote that the nearest state court may be at least three hours away, whereas the closest Navajo district court is well within an hour's drive. Whether for reasons of familiarity, convenience, or comfort, reservation residents have the same forum selection interests as other litigants and should not be denied the use of their tribal courts.

B. Tribal Court Decisions Comport with Due Process of Law.

The Indian Civil Rights Act provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law . . . ." 25 U.S.C. § 1302(a)(8). The Act protects non-Indians as well as Indians, referring throughout to "any persons" within the tribe's jurisdiction. *See id.* § 1302. In cases applying the ICRA's due process guarantees, "judges and litigants rely almost exclusively on American jurisprudence . . . ." Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 75 (2013). A 2008 study of tribal court decisions applying the ICRA found: "Of the 120 cases involving an ICRA issue, tribal court judges cited federal and state case law as persuasive (and often controlling law) in 114 cases (95 percent)." *Id.* The handful of cases (six) in which tribal courts refused to apply federal or state law fell into two categories: those involving tribal members in domestic dispute cases or those in which the tribal court determined that tribal law afforded *greater* protections for individual rights than were available under federal or state law. *Id.* After a review of hundreds of cases, Professor Fletcher concluded, "tribal courts announced, often as a matter of first impression, the tribal interpretation of 'due process' by reference to American cases." *Id.* at 77.

Any sample of these many tribal due process decisions shows tribal courts to be as protective of individual rights as federal or state courts. First, tribes apply familiar principles of due process in the context of personal jurisdiction and notice. Like states, many tribes codify the bases upon which they

will assert jurisdiction over non-resident defendants,[19] and then subject individual exercises of jurisdiction to due process review. Consistent with Professor Fletcher's general observations about due process in tribal courts, these decisions incorporate familiar principles and reasoning.

The Mashantucket Pequot Tribal Court, for example, hears many cases involving nonmembers as a result of its tort liability statute, which provides tribal court jurisdiction over tort claims against the Tribe's casino as well as other defendants including nonmembers. 4 M.P.T.L. ch.1 § 3(a). In *Barbosa v. Mashantucket Pequot Gaming Enter.*, 4 Mash. Rep. 269, 2005 WL 5740565 (Mash. Pequot Tribal Ct. 2005), the court considered whether it had personal jurisdiction in a case involving proper service on nonmember defendants. It upheld its jurisdiction, but only after finding the defendants had been personally served at their homes, in compliance with both Pequot and New Hampshire law. *Id.* at 274. In another case involving a nonmember defendant (in this case, someone whom the tribe was suing), the Pequot court held the service was inadequate, and dismissed the claim against the nonmember defendant. *Mashantucket Pequot Gaming Enter. v. Goldman*, 5 Mash. Rep. 135, 2009 WL 173098 (Mash. Pequot Tribal Ct. 2009). The approach to personal

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[19] *See, e.g.*, Law & Order Code of the Shoshone and Arapaho Tribes of the Wind River Reservation § 1-2-3 (Personal Jurisdiction); Code of the Sac & Fox Tribe of the Miss. in Iowa § 5–4102 (Personal Jurisdiction of Tribal Court); Navajo Nation Code Ann. tit. 7, § 253a (Long-Arm Civil Jurisdiction and Service of Process Act); Tribal Code of the Poarch Band of Creek Indians § 4-1-1 (Personal Jurisdiction). This partial but representative list was culled from a search on Westlaw's Tribal Codes database. There are many more similar provisions.

jurisdiction and notice in these cases is indistinguishable from that which governs jurisdiction in state or federal courts. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice comports with due process if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action").

Tribal courts also commonly apply familiar due process principles in the context of procedural rights. In *Synowski v. Confederated Tribes of Grand Ronde*, the Grande Ronde Court of Appeals considered whether a non-Indian fired by the tribe had been denied due process due to inadequate notice and the inability to secure the assistance of counsel at his own expense. The court noted that Synowski's right to due process derived from the ICRA and not the United States Constitution, but that the ICRA's purpose was to provide broad constitutional rights against "arbitrary and unjust actions of tribal governments.'" 4 Am. Tribal Law at 124-25 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978)) (quotation marks omitted). The court also clarified that while tribes are free under the ICRA to develop their own due process principles consistent with tribal traditions, no tribal tradition or custom was put at risk "if the general principles of due process under the United States Constitution are applied in this case." *Id*. The court then applied the test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), and held that the due process standard articulated there applied to Synowski's case, entitling him to counsel at his employment hearing. 4 Am. Tribal Law at 126-30.

In addition, as discussed in Part III below, in order for tribal court decisions to be recognized by state and

federal courts (which is necessary for enforcement of judgments in virtually all cases involving nonmember defendants), due process requirements must be met. This is so whether state courts recognize tribal decisions pursuant to full faith and credit or comity principles. There are therefore often multiple layers of due process review in cases involving tribal jurisdiction over nonmembers—the tribe's own laws of personal jurisdiction and notice; the tribe's and the ICRA's due process guarantees; and, if state or federal court recognition is sought, further due process review in those courts.

C. Tribal Tort Law Applies Familiar Principles.

In addition to their general worries about the fairness of tribal courts and tribal law, Petitioners and their amici focus on the supposedly unique qualities of tort law—that it is "fundamentally different" from other law and is generally not codified. Pet. Op. Br. at 52. Tort law is typically developed through common law, not statutory law, and while it may vary between different states – compare Louisiana and Mississippi or either with New York – any jurisdiction would recognize the alleged facts here as a tort. Moreover, many tribes, like the Puyallup Tribe, have a tribal tort claims act broadly waiving tribal sovereign immunity for suits in tribal courts to allow an individual (tribal member or nonmember) to file an action for money damages against the Tribe. *See* Puyallup Tribal Tort Claims Act, Puyallup Tribal Code §§ 4.12.030-.040. The Puyallup Tribe protects itself with an insurance policy, as many municipalities do. The Puyallup Tribal Tort Claims Act is modeled substantially on the Federal Tort Claims Act. The Navajo Nation and many other tribes also have statutes waiving

sovereign immunity for certain tort claims against the tribe and its officials. *See, e.g.*, Navajo Nation Code Ann. tit. 1, § 554 ("Exceptions to the general principles of sovereign immunity").

Nothing in the underlying case in the Choctaw tribal courts indicates that the tort law applied by the tribe in this case would be foreign or strange. The plaintiff's suit is based on allegations that a Dolgencorp employee who managed a Dolgencorp store located on trust land within the reservation sexually molested a 13-year-old tribal member boy. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014). The plaintiff's tort claims arising from these actions are typical and familiar, and borrow from Mississippi state law: vicarious liability for the employee's actions; negligent hiring, training and/or supervision of the employee; and damages resulting from the sexual assaults. *See id*.

A survey of other tort cases emerging from tribal courts likewise does not support the Petitioners' aspersions. These decisions make clear that tribal court decisions follow discernible principles and apply the same analogical and inductive reasoning other common law courts use, not always to the benefit of the Indian party. Tribal courts can be quite conservative. In *Winstone*, tribal member plaintiffs sued a non-Indian bank and other defendants, alleging various tort claims arising from the defendants' repossession of plaintiffs' property. The tribal court granted summary judgment for the non-Indian defendants, concluding that they had a right to repossess the property. 2000 WL 35750179, at *1. The Tribal Council had adopted a resolution that "*mandates* that Michigan substantive law be adopted as tribal law to fill voids that might otherwise exist in

tribal law. Among those . . . is the *Uniform Commercial Code* . . . ." *Id.* (emphasis in original). The court applied the relevant provisions of the UCC, which permit "peaceful self-help repossession" and decided in favor of the non-Indian defendants. *Id.* The substantive law, jurisdictional rules, and outcome of this and many similar cases belie concerns about the inscrutability or unfairness of tribal law.

Similarly, in a tort case brought by a nonmember plaintiff, the Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation applied the same standard of review that would govern in Montana state courts to a case involving evidence and jury instructions. *Smith v. Salish Kootenai College*, 5 Am. Tribal Law 34, 39 (Ct. App. of Confederated Salish & Kootenai Tribes 2004). "When a standard of review has not been established by tribal law or prior court decision, we may look to the standard of review adopted by other courts." *Id.* A third case, this one from the Navajo Nation Supreme Court, involves interpretation of an insurance contract involved in a tort case. In *Benalli v. First Nat'l Ins. Co. of Am.*, 1 Am. Tribal Law 498, 7 Navajo Rptr. 329 (Navajo 1998), the court addressed whether the tribal member plaintiff could recover under multiple insurance policies for uninsured motorist coverage from the non-Indian insurance company. After stating that only Navajo Nation law applied to the question, the court nonetheless noted that "[t]he parties anticipated that the policy would be determined in accordance with the New Mexico insurance law climate. Accordingly . . . we will look closely at New Mexico decisions for guidance to assure the legitimate expectations of the parties." *Id.* at 505. Because the parties would have understood that their contract was to be interpreted consistent

with New Mexico legal principles, the court applied its own common law in a similar manner, and the plaintiff prevailed.

At a higher level of generality, Petitioners' effort to depict tribal common law as something frightening or alien to American legal practice is fundamentally mistaken. As former Chief Justice Tom Tso of the Navajo Supreme Court explained:

> When we speak of Navajo *customary* law . . . many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called "common law." Our common law is comprised of customs and long-used ways of doing things. It also includes court decisions recognizing and enforcing the customs or filling in the gaps in the written law.

Cohen § 4.05[4], at 273 (quoting Tom Tso, *The Process of Decision Making in the Tribal Courts*, 31 Ariz. L. Rev. 225 (1989)). Justin Richland, whose work is cited by Petitioner for the proposition that tribal law is unknowable, *see* Pet. Op. Brief at 6-7, in fact has concluded that tribal courts are incorporating customary law in ways that comport with the due process expectations of the parties. *See* Justin Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* 50-51 (2008) (describing Hopi decision balancing fairness and notice to litigants with priority of incorporating Hopi law). Similarly, Professor Matthew Fletcher reviewed tribal court decisions applying tribal common law, and concluded that in cases involving non-Indians, "there is *no* instance where a tribal court has chosen to depart in an unusual manner from the established common law of other jurisdictions . . . ." Matthew L.M. Fletcher, *Toward a Theory of Intertribal and*

Intratribal Common Law, 43 Hous. L. Rev. 701, 726 (2006) (emphasis added). Petitioners' fears about tribal common law have no basis in what is actually happening in contemporary tribal courts, and should not be relied on to divest tribes of civil jurisdiction.

III. STATE AND FEDERAL ENFORCEMENT OF TRIBAL COURT JUDGMENTS RESPECT TRIBAL COURTS' AUTHORITY AND PROTECT NONMEMBER DEFENDANTS.

Through legislation and court decisions, states generally recognize tribal court judgments based either on comity or, in some states, full faith and credit. Consequently, they enforce those judgments (and only those) where they find that the tribal court afforded due process to the litigant. The Ninth and Tenth Circuits have similarly held that tribal court judgments should be recognized and enforced based on comity. These practices not only recognize the competence and authority of tribal courts, but also provide important additional protections because judgments against non-Indian defendants ordinarily require enforcement by state or federal courts.

A. States and the Courts of Appeal for the Ninth and Tenth Circuits Recognize Tribal Court Judgments as a Matter of Comity or Full Faith and Credit.

Many states grant at least comity to tribal court judgments. Cohen at § 7.07[2][b], 664. Among these, Arizona is home to over twenty federally recognized tribes. Despite the position taken by its Attorney General in the Oklahoma amicus brief, Arizona requires its courts to recognize and enforce tribal court judgments if no party objects. Ariz. R. P. for Recognition of Tribal Ct. Civ. Judgments 5(a). If there is an objection, the court is directed to evaluate

whether the tribal court had jurisdiction and whether it afforded the complaining party due process. *Id.* 5(c). If the complaining party fails to show there was no jurisdiction or that he was not afforded due process, the courts are directed to enforce the judgment. *See also Tracy*, 810 P.2d at 1041 ("tribal laws are entitled to recognition on the basis of comity if they are otherwise in accord with Arizona's public policy" and "Arizona courts have consistently afforded full recognition to tribal court proceedings").

The State of Oklahoma has thirty-eight federally recognized tribes. Despite its brief to this Court, for over two decades Oklahoma court rules have provided that its district courts must "grant full faith and credit and cause to be enforced any tribal court judgment where the tribal court that issued the judgment grants reciprocity to judgments of [the state courts]." Okla. Stat. tit. 12, ch. 2, app., § 30. The Oklahoma Supreme Court has enforced this rule. *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994) The Oklahoma legislature has affirmed the court's power to issue standards for extending full faith and credit to the records and judicial proceedings of tribes. Okla. Stat. tit. 12, § 728.

The State of Washington, like Oklahoma, requires a reciprocal recognition by the tribes of judgments of the state courts. Washington has twenty-nine federally recognized tribes, including the Puyallup Tribe. The superior courts of Washington "shall recognize, implement and enforce" tribal court judgments unless the superior court finds that the tribal court issuing the judgment "(1) lacked jurisdiction over a party or subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of [state court

judgments and orders]." Wash. Super. Ct. Civ. R. 82.5.

California has over 100 federally recognized tribes. In 2014, the State enacted the Tribal Court Civil Money Judgment Act, which set forth procedures for applying for recognition and entry of a tribal court money judgment. Cal. Civ. Proc. Code §§ 1730-1742. Similar to other jurisdictions, the California law provides for enforcement of tribal court money judgments unless the California court finds that the tribal court lacked jurisdiction or did not provide due process. *Id.* § 1737(b). The California court may also decline to recognize the tribal court judgment on other equitable grounds (*e.g.*, fraud or cause of action violates public policy of the state or the United States). *Id.* § 1737(c).

Similarly, the courts of Alaska, South Dakota, Montana and Oregon all recognize tribal court judgments based on comity. *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999); *Red Fox v. Hettich*, 494 N.W.2d 638, 641-42 (S.D. 1993) (quoting S.D. Codified Laws § 1-1-25); *Wippert v. Blackfeet Tribe of Blackfeet Indian Reservation*, 654 P.2d 512, 515 (Mont. 1982); *In re Marriage of Red Fox*, 542 P.2d 918, 921 (Or. Ct. App. 1975).

The States of New Mexico, Idaho, Iowa and Michigan go farther still in recognizing tribal court judgments. New Mexico is home to over twenty federally recognized tribes. Its Supreme Court has simply held that tribal laws are entitled to full faith and credit in New Mexico courts because tribes are "territor[ies]" under 28 U.S.C. § 1738. *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975). The State of Idaho has reached the same conclusion, granting full faith and credit to tribal judgments. *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho

1982). Iowa has done likewise, Iowa Code ch. 626D, as has Michigan, Mich. Ct. R. 2.615. Michigan's exemplary working relationship with its tribal courts is further detailed in a law review article by one of its supreme court justices. *See* Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. Det. Mercy L. Rev. 709 (1999).

The Court of Appeals for the Ninth Circuit has held that it will recognize tribal court judgments under rules of comity, if it finds the tribal court had jurisdiction and the defendant was afforded due process of law. *Wilson v. Marchington*, 127 F.3d 805, 809-12 (9th Cir. 1997); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140-52 (9th Cir. 2001) (refusing to recognize a tribal court judgment which the court of appeals concluded was unfair to a nonmember defendant). The Tenth Circuit will either apply comity or full faith and credit, in the same manner. *See Burrell v. Armijo*, 456 F.3d 1159, 1171-72 (10th Cir. 2006); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1065 (10th Cir. 2007) (noting that Tenth Circuit has not resolved whether comity or full faith and credit should be applied to enforcement of tribal court orders).

The laws, rules and practices surveyed above reveal several vitally important themes. First, states that have the most experience with tribal courts and legal systems recognize and provide a means for tribal court judgments to be enforced in state court. As the North Dakota legislature has explained, "Indian tribes in this state are considered the equivalent of foreign nations for the purposes of recognizing the orders and judgments of the tribal courts in this state" and "[t]his policy and rule are to promote justice, to encourage better relations between the

tribes . . . and the state of North Dakota . . . ." N.D. R. Ct. 7.2.

Second, whether through comity or full faith and credit, the state and federal regimes provide a safeguard against contested tribal court judgments. Tribal court judgments will not be enforced if, after independent analysis, the tribal court lacked jurisdiction or did not provide due process. This exception to full faith and credit (or comity recognition) tracks the one applicable to other state and foreign court judgments and has been in place since at least 1877. *See Pennoyer v. Neff*, 95 U.S. 714, 729-33 (1877) (due process provides an exception to the requirement of full faith and credit). Because most, if not all, nonmember defendants will have the bulk of their assets located off-reservation, tribal court judgments against these defendants will usually be subject to this second layer of due process protection. Petitioners' fears of unlimited judgments by prejudiced tribal courts denying them due process are figments of their imaginations. They have the safeguard of the well-organized tribal appellate courts, and, upon enforcement action, of state and federal courts as well.

B. State - Tribal Judicial Forums Create Good Working Relationships Between State and Tribal Courts.

State sponsored meetings for tribal and state judges have increased knowledge and cooperation between their respective court systems. California has established a Tribal Court-State Court Forum, which is an advisory committee composed of both tribal court judges and state court judges. Its goal is to allow these judges to "come together *as equal partners* to address issues common to both relating to the recognition and enforcement of court orders that

cross jurisdictional lines, the determination of jurisdiction for cases that might appear in either court system, and the sharing of services between jurisdictions." [20] The New Mexico Tribal-State Judicial Consortium serves a similar purpose; its current projects involve "the Indian Child Welfare Act (ICWA), full faith and credit/comity . . . ."[21]

State and tribal courts have long worked together in Michigan, which first established a Tribal State Court Forum in 1992. The Forum's recommendations led to Michigan Court Rule 2.615, which authorizes state and tribal courts to accord full faith and credit to each other's orders, judgments and other judicial acts. Mich. Ct. R. 2.615. Another result of the Forum's work was to recommend that the legislature pass the Michigan Indian Family Preservation Act of 2012, Mich. Comp. Laws §§ 71213.1-.41, which further enhances the working relationship between state and tribal courts. In 2014, the Michigan Supreme Court established the Tribal State Federal Judicial Forum, resulting in twelve state and twelve tribal court judges convening regularly with federal officials. In addition, tax agreements entered into between the state and tribes in 2002[22] provide for significant tribal court involvement, and were negotiated by the Michigan governor and attorney general.

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[20] Cal. Tribal Ct.-State Ct. Forum, *Forum Overview* 2 (2014) (emphasis added), *available at* http://www.courts.ca.gov/documents/TribalForumoverview.pdf.

[21] N.M. Tribal-State Judicial Consortium, *Home*, https://tribalstate.nmcourts.gov/.

[22] *See* Mich. Dep't of Treasury, *Taxes – Native American*, Michigan Taxes, http://www.michigan.gov/taxes/0,4676,7-238-43513_43517---,00.html.

Arizona and Idaho, as discussed above, and New York, North Dakota, Utah and Wisconsin, all have similar programs.[23] This level of cooperation between state court and tribal court judges improves the operation of both sets of courts, and provides for mutual education about the laws, procedures, and customs of each jurisdiction.

CONCLUSION

Federal laws, policies and judicial decisions have supported the growth and development of tribal courts since 1934. Over the last several decades in particular, tribal courts have expanded in number and grown in capacity. Many tribal courts, including those of the Mississippi Band of Choctaw Indians and amici tribes, regularly hear a wide range of cases involving tribal members and nonmembers alike. These well-developed tribal courts have accessible and familiar laws and fairly adjudicate cases before them, regularly affording due process to all parties. State and federal courts that recognize tribal court judgments, whether as a matter of comity or full faith and credit, afford an additional layer of due process review. This case presents no reason for the Court to issue a decision that would strip the Mississippi Choctaw Band, much less all tribes, regardless of the quality and sophistication of their court systems, of the power to hear cases involving tort claims against nonmember defendants absent express consent. Such a decision would limit tribes' ability to ensure the welfare of their people, be out of step with federal

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[23] *See* Tribal Law & Policy Inst., *Tribal-State Court Forums: An Annotated Directory,* (2015), *available at* http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/jcip/2015TribalStateCourtConvening/Tribal-State%20court%20forum%20document%20DRAFT%20FINAL%207-2015.pdf.

laws and policies, and be based on little more than unfounded and unjustified fears of tribal courts.

The decision below should be affirmed.

Respectfully submitted,

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