No. 19-1143

IN THE

Supreme Court of the United States

FMC CORPORATION,
Petitioner,

v.

SHOSHONE-BANNOCK TRIBES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Retailers are cornerstones of towns and cities across this country. As employers and as providers of essential consumer goods and services, retailers play a critical role in the day-to-day lives of all Americans. That role is no less critical for the Native Americans who live on tribal lands.

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[1] Counsel of record for both parties received timely notice of the intent of *amicus* to file this brief pursuant to Supreme Court Rule 37, and both parties have consented to the filing of this brief. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party, or any other person other than *amicus,* its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

Yet retailers face continuing uncertainty over the fundamental question of which judicial system governs their conduct on tribal lands, an uncertainty which affects their decisions on investment and expansion. "The ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given the special nature of [Indian] tribunals, . . . which differ from traditional American courts in a number of significant respects." *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring) (internal citations omitted).

The RLC writes as *amicus* to urge this Court to grant the petition for certiorari and clarify the test for tribal court jurisdiction first articulated in *Montana v. United States*, 450 U.S. 544 (1981). The Ninth Circuit has consistently expanded the scope of the *Montana* exceptions, and its current up-ending of the *Montana* framework has increased the urgency for that clarification regarding which federal appellate court's interpretation of *Montana* is correct. Retailers now face sharply diverging rules on the scope of tribal court jurisdiction when they simply step across state lines, for example, from North or South Dakota of the Eighth Circuit to Montana of the Ninth Circuit. And as it happens, the Turtle Mountain Indian Reservation and its related trust lands span these same three states.

As summarized in *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997), *Montana* "described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions . . . " This Court has underscored *Montana*'s general rule in every

subsequent case examining tribal court jurisdiction, most recently reiterating, "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . " *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). The Ninth Circuit below, however, in conflict with *Plains Commerce* and the decisions of sister circuits, appears to have written this presumption out of the jurisdictional analysis.

This Court has granted certiorari twice in recent years to address whether Indian tribal courts have jurisdiction to adjudicate civil claims against nonmembers, and yet questions persist. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, this Court ruled narrowly and addressed only whether tribal courts have authority to adjudicate claims arising from the sale of fee land from one nonmember to another nonmember. *See id.* at 332-34. And in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, the decision of the Fifth Circuit was affirmed by an equally divided court without further explanation. 136 S. Ct. 2159 (2016).

The RLC urges this Court to end the confusion that has permeated the lower courts (and the Ninth Circuit in particular) regarding the scope of tribal jurisdiction under *Montana* and its progeny. Resolving the dispute around the jurisdictional framework will help reduce needless litigation in both tribal and federal courts regarding which system has jurisdiction. Equally as important, this resolution will encourage investment from businesses that may stay on the sidelines rather than risk investment within reservation boundaries

and the corresponding uncertainty over which legal system governs their conduct.

ARGUMENT

I. Confusion Over The Standard For Tribal Court Jurisdiction Persists, Creating Conflicts In the Circuits And Wasting Judicial Resources.

Although the presumption against tribal court jurisdiction has been a mainstay of this Court's jurisprudence since at least *Montana*, confusion over the applicable standard by which any exercise of jurisdiction should be measured has persisted for almost as long. Justice Souter noted in *Hicks* that the Court's pronouncements on adjudicatory jurisdiction "have pointed in seemingly opposite directions." 533 U.S. at 376 (Souter, J., concurring).

The best evidence of the confusion surrounding this issue is the fact that this would be the fifth instance in which this Court has considered tribes' civil adjudicative jurisdiction over nonmembers since *Montana* was decided in 1979. *See Dollar General*, 136 S. Ct. at 2160 (affirmed by equally divided court with per curiam opinion); *Plains Commerce*, 554 U.S. at 324; *Hicks*, 533 U.S. at 355; *Strate*, 520 U.S. at 442. And that does not include this Court's two related rulings regarding which court system should be permitted to first evaluate questions of tribal court jurisdiction – the issue of "tribal exhaustion." *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); *National Farmers Union Ins. Cos. v. Crowe Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

And yet, as perhaps highlighted best by the Ninth Circuit's ruling below, the lower courts are continuing to wrestle with the scope of tribal court jurisdiction over nonmembers, with inconsistent results that have created unnecessary uncertainty within the business community.

A. The Ninth Circuit's Ruling Conflicts With Those of Sister Circuits.

Despite the long-settled rule that actions by a tribe to regulate nonmembers are "presumptively invalid," *Plains Commerce*, 554 U.S. at 330, the Ninth Circuit has developed a new approach to *Montana* that skips this presumption and jumps immediately to the two *Montana* exceptions, effectively opening the door to general jurisdiction over commercial enterprises on fee land.

To reach its result, the Ninth Circuit disregarded the critical threshold step of first evaluating, before invoking either of the *Montana* exceptions, whether the "exercise of tribal [jurisdiction] . . . is necessary to protect tribal self-government or to control internal relations." *Hicks*, 533 U.S. at 359 (Souter, J., concurring); *see also Plains Commerce*, 554 U.S. at 337 (requiring that the regulation "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."); *Strate*, 520 U.S. at 459 (observing that the *Montana* Court's preface about self-government and control of internal relations is "[k]ey to [the second exception's] proper application); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 178-79 (5th Cir. 2014) (Smith, J., dissenting)

("The [Supreme] Court recently reiterated the limited nature of tribal-court jurisdiction over nonmember defendants by making explicit that *Montana*'s first exception, like its second, grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations.") (quotation omitted).

This revised *Montana* analytical framework has created a conflict among the circuits. The Eighth Circuit, for example, properly applies *Montana* by requiring that, "[e]ven where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019), *quoting Plains Commerce Bank*, 554 U.S. at 336 (alteration in *Burr*).

Similarly, the Seventh Circuit has rejected an analysis based exclusively on nonmember consent. In *Jackson v. Payday Financial, LLC*, the Seventh Circuit held that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court" because first, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government or control internal relations." 764 F.3d 765, 783 (7th Cir. 2014).

The divergent interpretations among circuits and the inconsistent application of the presumption against jurisdiction over nonmembers continue to persist in the absence of clear guidance from this Court. The RLC

believes the Seventh and Eighth Circuits have correctly interpreted *Montana* and its progeny to require regulations over nonmembers to stem from inherent tribal sovereign authority. This Court's resolution of the inter-circuit conflict is necessary to enable businesses, such as the RLC's members, to engage effectively in planning and risk management analysis.

B. A Clear Standard Will Limit Needless Litigation in Tribal Court.

Clarifying the *Montana* framework will resolve the differing interpretations of the courts below and help parties avoid disputes over the application of tribal exhaustion, an issue of importance to the RLC and its members.

Under *National Farmers Union*, the question of whether a tribe can compel a nonmember to submit to civil jurisdiction of a tribal court presents questions of federal law under 28 U.S.C. § 1331. 471 U.S. at 952. Nevertheless, under principles of comity, the federal court faced with a motion to enjoin a pending tribal court action will ordinarily stay its hand until the parties have litigated the jurisdictional issues through appeal in tribal court. *Iowa Mut. Ins. Co.*, 480 U.S. at 16-17; *National Farmers Union*, 471 U.S. at 856-57.

Tribal exhaustion is frequently a time-consuming and expensive process. In this case, exhaustion of tribal remedies took eight years. Pet'r Br. at 9. In the *Dollar General* case that came to this Court in OT-2015, the petitioner was first sued in tribal court in January 2005 and immediately raised a jurisdictional challenge. *See Dolgencorp*, 746 F.3d at

169. Dollar General did not fully exhaust the jurisdictional challenge until three years later, at which time it began a *National Farmers Union* action in the Southern District of Mississippi to review the tribal court's assertion of jurisdiction. *See id.* at 169-70.

Tribal exhaustion is excused, however, where the tribal court's lack of jurisdiction is clear. *Hicks*, 533 U.S. at 369 (Souter, J., concurring). Where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule" and exhaustion "would serve no purpose other than delay," the exhaustion requirement "must give way." *Strate*, 520 U.S. at 459-60 and n.14.

Clarifying the application and scope of *Montana* will dramatically reduce the number of cases requiring lengthy and expensive exhaustion proceedings. A clear rule will thus help both tribes and parties avoid the quagmire of years of litigation over the nature and scope of tribal court jurisdiction. With a clear understanding of "where tribal jurisdiction begins and ends," *Hicks*, 533 U.S. at 383 (Souter, J., concurring), both tribes and nonmembers, such as the retail industry members whose businesses sustain small towns throughout this country, will be free to proceed with confidence about which judicial system will provide relief in the event of a dispute.

II. The Ninth Circuit's Expansion of Tribal Court Jurisdiction Has Sweeping Consequences for All Businesses, Including Retail Outlets, That Interact With Tribes.

Under the Ninth Circuit's decision, tribes may exert tribal court jurisdiction over nonmembers merely by asserting the power to regulate those businesses—even if those businesses are operating on privately-held fee land. Essentially, under the expansive reading of the Ninth Circuit, tribes gain near-plenary adjudicatory jurisdiction over nonmembers simply by possessing some consensual regulatory power over that non-member. In for a penny, in for a pound.

Under this approach, the nonmember—by reaching an agreement under threat of regulatory penalty—must submit to tribal court jurisdiction despite never expressly agreeing to do so. In the view of *amicus* RLC, this approach reaches far beyond the jurisdictional framework set forth in this Court's precedents, and it conflicts with the approaches of sister circuits.

Although the case before this Court arose in the context of EPA-regulated waste, the rule and reasoning underlying the Ninth Circuit's decision are in no way limited to environmental issues. Under the Ninth Circuit's approach, if a business reaches a regulatory compromise in one circumstance, it is thereby agreeing to adjudicatory jurisdiction, unlimited by time and nearly unlimited by subject matter. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 933 (9th Cir. 2019) ("FMC entered a consensual relationship with the Tribes . . . when it negotiated and entered into [a]

permit agreement with the Tribes . . . ."). That initial agreement is all that is needed to satisfy the consent prong of the first *Montana* test for any later tribal court challenge. And thereafter, the second *Montana* test is satisfied as long as a reviewing court can conceive of a circumstance where the safety of tribal members may be at risk. *See id.* at 935 (basing finding of second exception on factual findings of Tribal Court of Appeals and EPA, expert testimony before Tribal Court of Appeals, and "the record as a whole"). In short, the Ninth Circuit's rule follows *Montana* in name only.

This expansive view of *Montana* will affect all Ninth Circuit retail establishments inside a reservation's borders, even if those establishments are on privately-held fee land. These businesses include groceries, general-goods stores, pharmacies, gas stations, and restaurants: the businesses on which tribal members rely, day in and day out.

The businesses in each of these categories are routinely subject to myriad regulations, and the RLC's members are used to working with local, including tribal, authorities to comply with all applicable rules. At times, those efforts will include reaching compromises with governing authorities to avoid protracted regulatory battles. Such compromises allow the RLC's members to focus their attention on the areas of highest priority: providing quality goods and services in their local communities. Yet until the decision below, these businesses had not understood their efforts at collaborative problem-solving to be a potential jurisdictional cudgel.

If the decision below is left undisturbed, businesses within reservations in the Ninth Circuit will be forced to face hard choices when working with tribal authorities. They may well decide against mutually-advantageous compromise on narrow issues, out of a concern that doing so will only be used later as a basis for the exercise of vast adjudicatory jurisdiction. Or worse, they may decide to avoid doing business in Indian Country at all, thereby depriving tribal members of much-needed goods, services, and jobs. The RLC asks this Court to clarify the *Montana* framework and thereby resolve the circuits' diverging interpretations so that retailers and other businesses will be able to properly evaluate the consequences of providing services on fee lands.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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