No. 13-1496

In the Supreme Court of the United States

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 FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. SUPPORTING PETITIONERS

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

LAURA K. MCNALLY
Counsel of Record
ANDREW R. DEVOOGHT
LOEB & LOEB LLP
321 N. Clark Street
Suite 2300
Chicago, IL 60654
(312) 464-3155
lmcnally@loeb.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. SUPPORTING PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. is a public-policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. 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 affecting its members, and to highlight the potential industry-wide consequences of significant pending cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Retailers are cornerstones of towns and cities across this country. As providers of consumer goods and services and as employers who provide jobs, 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.

---

[1] The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

Yet when it comes to investment and expansion, retailers face continuing uncertainty over the fundamental question of which judicial system governs their conduct on tribal lands. "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).

RLC writes as *amicus* to urge this Court to articulate a simple, workable standard governing when nonmembers may become subject to tribal court jurisdiction: nonmember consent to such jurisdiction must be express, clear, and unequivocal, so as to eliminate uncertainty that can discourage investment.

The Fifth Circuit's permissive reading of the first exception in *Montana v. United States*, 450 U.S. 544 (1981), upends *Montana*'s strong foundational presumption against tribal civil jurisdiction over nonmembers. Indeed, the test applied by the Fifth Circuit creates such an expansive version of this "exception" that it is difficult to imagine many business disputes that would fall outside the rule.

The Fifth Circuit's approach thus ignores more than thirty years' worth of this Court's jurisprudence, which consistently emphasizes that a tribe's inherent sovereignty presumptively does not extend to regulation of nonmembers.

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).

In light of this strong presumption against jurisdiction, any exception "cannot be construed in a manner that would swallow the rule or severely shrink it." *Id.* at 330 (internal quotes and citations omitted). That is exactly what the Fifth Circuit did below by interpreting *Montana's* first exception so broadly that it amounts to a grant of general adjudicatory jurisdiction over any nonmember who conducts business with a tribe or its members.

RLC urges this Court to reject the Fifth Circuit's approach and adopt a simple and straightforward test for adjudicatory jurisdiction over nonmembers that is well-established elsewhere in this Court's jurisprudence: clear and unequivocal express consent. This test will limit needless litigation in both tribal and federal courts regarding which system has jurisdiction. Equally as important, this test will ease uncertainty among parties who have thus far decided to stay on the sidelines rather than

risk investment where they cannot determine which legal system governs their conduct.

ARGUMENT

The Fifth Circuit misconstrues the general presumption underlying tribal jurisdiction over nonmembers. First, the court below read into the first *Montana* exception a general adjudicative authority never recognized by this Court. And second, the court below virtually abandoned any requirement that tribal action fall within the scope of the nonmember's consensual relationship with the tribe or its members.

Both of these errors directly conflict with an unbroken line of Supreme Court case law dating from the "pathmaking" *Montana* case (and with roots back to the founding days of the Union). *See Hicks*, 533 U.S. at 358.

RLC instead recommends an easily-administered test by which consent to adjudicatory jurisdiction may be judged: the party urging jurisdiction must demonstrate that the nonmember gave clear and unequivocal express consent. This rule will permit all parties to understand which legal system will govern any disputes, and it will avoid needless expense and delay while parties engage in years of litigation in jurisdictional disputes.

I. THE COURT BELOW CREATED A TRIBAL COURT JURISDICTIONAL TEST THAT IS AN "EXCEPTION" IN NAME ONLY

A. Analysis Of Tribal Jurisdiction Over Nonmembers Must Start From The Strong Presumption Against Such Authority

All disputes involving tribal power over nonmembers must start with the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. While the two exceptions to the general rule this Court identified in *Montana* have been the primary focus of subsequent court decisions, *Montana's* broad pronouncement regarding the narrow limits on tribal authorities' jurisdiction over the activities of nonmembers remains the starting point for any such dispute.

Too often, as in the decision below, legal analysis of tribal jurisdiction treats *Montana* as little more than a summary of two methods for finding jurisdiction. That's true only in the sense that *Casablanca* is little more than a movie in which Humphrey Bogart hands Paul Henreid two plane tickets. Without an understanding of the context – the general rule from which the *Montana* exceptions are only a small subset – the significance of the exceptions cannot be properly understood.

In *Montana*, this Court firmly rooted the limited scope of tribal authority in one principle: as sovereigns, tribes are permitted general jurisdiction over their members and their territory. *Montana*,

450 U.S. at 563. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (recognizing tribes as a "separate people, with the power of regulating internal and social relations" as well as the authority to "make their own substantive law in internal matters and to enforce that law in their own forums") (citations omitted).

Through incorporation into the Union, however, tribes "have lost many of the attributes of sovereignty," including "those involving *the relations between an Indian tribe and nonmembers of the tribe*." *Montana*, 450 U.S. at 563 (internal quotations omitted) (emphasis in original). The sovereignty retained is "of a unique and *limited* character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added).

This Court has since repeatedly emphasized *Montana*'s "general presumption" limiting the scope of tribal authority. *See*, *e.g.*, *Plains Commerce*, 554 U.S. at 328 ("[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . ."); *Strate*, 520 U.S. at 446 ("*Montana* thus 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 . . . ."); *Hicks*, 433 U.S. at 359 ("Where nonmembers are concerned, the exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal* relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." (internal quotes omitted) (emphasis in

original)); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) ("We concluded that the inherent sovereignty of Indian tribes was limited to their members and their territory" (internal quotes omitted)).

Montana's general rule against jurisdiction is thus no mere preamble. This strong presumption against jurisdiction is the foundation for all analysis that is to follow.

B. The Fifth Circuit Below Reversed The Presumption Against Jurisdiction Over Nonmembers, Making Tribal Court Jurisdiction The Rule And Not The Exception

If this Court's well-established presumption against tribal jurisdiction over nonmembers is to have effect, exceptions to that presumption must be applied with restraint.

The Fifth Circuit exercised no such restraint. Instead, it transformed the first exception into a near-wholesale grant of adjudicative jurisdiction.

In *Montana*, this Court identified two narrow exceptions to the presumption against tribal jurisdiction over nonmembers. The first exception provides that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

Montana, 450 U.S. at 565.[2] In applying this exception, this Court has required a clear nexus between the tribal regulation and the nonmember defendant's consensual relation with the tribe or its members. *Plains Commerce*, 554 U.S. at 338; *Atkinson*, 532 U.S. at 656.

In the ruling below, the Fifth Circuit improperly expanded this exception in two key respects. First, the court of appeals erred when it concluded that there is little difference between regulation through private tort actions (based on a tort law system that is largely unwritten) and regulation through "precisely tailored regulations." Pet. App. at 11 (internal quotes omitted). Second, the Fifth Circuit erred when it held that so long as the plaintiff's cause of action could have been anticipated under tribal law, this Court's nexus requirement is satisfied. *Id.* at 14, n.4 (basing its nexus conclusion on its belief "that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law").

As explained below, neither extrapolation was justified, and the resulting broad pronouncement of

---

[2] The second exception, governing on-reservation conduct that "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 566, applies only to conduct that "imperil[s] the subsistence of the tribal community." *Plains Commerce*, 554 U.S. at 341. Respondent does not argue that the second exception applies to Petitioners' alleged conduct in this case.

tribal authority conflicts with *Montana* and this Court's subsequent decisions.

1. *Montana*'s First Exception Does Not Contemplate Regulation Through General Adjudicative Jurisdiction

By equating private tort claims with tribal regulation through "taxation [and] licensing," the Fifth Circuit turned a narrow exception to this Court's presumption against tribal jurisdiction into a plenary grant of general adjudicative jurisdiction. By its plain terms, the narrow regulatory language of this exception does not provide for any such general adjudicative jurisdiction, and "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Plains Commerce,* 554 U.S. a 330; *Hicks*, 533 U.S. at 358 (noting that whether or not adjudicative jurisdiction *equals* legislative jurisdiction remains an open question); *Strate*, 520 U.S. at 453. Accordingly, as confirmed in *Hicks*, the Court "has never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358 n.2.

The exception this Court outlined in *Montana* is completely silent regarding adjudicative jurisdiction and instead speaks only of regulation "through taxation, licensing, or other means." *Montana*, 450 U.S. at 565. Plenary tribal court jurisdiction cannot reasonably be viewed as the types of "other means" intended by this exception.

Taxes and licenses are, generally speaking, reasonably narrow impositions on a nonmember's

rights, and the power over liberty or property that a tribe may exercise through these vehicles is necessarily limited. The type of general adjudicative jurisdiction prescribed by the Fifth Circuit's decision is another animal entirely. Judicial remedies are vast, including injunctive relief, declaratory relief, other equitable relief, and compensatory and punitive damages. With this wide palette, a single judicial officer possesses the tools to intrude upon a defendant's core liberty and property interests, subject only to such rights of review granted by the applicable tribal court system.

The differences between limited regulation and adjudicative jurisdiction should give pause: As this Court emphasized in *Plains Commerce*, tribal systems exist "outside the basic structure of the Constitution." 554 U.S. at 337 (internal quotes omitted). "[I]t has been understood for more than a century that the Bill of Rights and Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383 (Souter, J., concurring). The Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1302, imposes some procedural safeguards, but "the guarantees are not identical, and there is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clause and need not follow U.S. Supreme Court precedents jot-for-jot." *Id.* (internal citations and internal quotes omitted).

Put simply, the hallmarks and protections of the American judicial system that are guaranteed to all citizens of the United States under the Constitution

are not guaranteed in tribal court. Compounding the impact of these differences is the fact that, following final judgment in the tribal court system, a nonmember defendant has no right to a merits review of the case in federal court – not even in this Court.[3]

Thus, if, for example, a tribal court issues a ruinous punitive damages award based on impermissible considerations, such as that ruled unconstitutional in *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2006), the nonmember would have no recourse outside the tribe's own appellate system – if such a system exists for the specific tribe. Similarly, if a tribal court authorizes a tribe to confiscate a nonmember's property without just compensation, as this Court held unconstitutional in *Horne v. Dep't of*

---

[3] That fact has not been lost on those advocating for expanded independence of tribal court systems. One such commentator is Matthew L.M. Fletcher, whose scholarship on tribal courts was cited with approval in n.10 on p. 20 of the Brief for the United States as *Amicus Curiae* On Petition For A Writ Of Certiorari. *See, e.g.,* Matthew L.M. Fletcher, *Resisting Federal Courts On Tribal Jurisdiction*, 81 U. Colo. L. Rev. 973, 976, 1004, 1025 (2010) (urging "resistance to federal government control embodied in the Supreme Court's assertion of federal court supervision over tribal court civil jurisdiction," recommending that tribal courts "resist the federal judiciary's assertion of jurisdiction to determine tribal court jurisdiction, a step which might include tribal court efforts to assert civil jurisdiction over nonmembers, perhaps even in the face of a federal order to halt," and recommending that "Tribal judges, in carefully chosen instances, can and should resist such federal court decrees by simply refusing to comply.").

Agric., 135 S. Ct. 2419, 2428 (2015), the nonmember would similarly have no recourse outside the tribe's own appellate system. This inability to obtain federal court review of such drastic outcomes further demonstrates that the Fifth Circuit's expansive reading of this Court's narrow exception was erroneous. This inability also chills investment and expansion by businesses, including the *amicus* members of the retail industry, who are understandably reluctant to expose themselves to such unquantifiable risks.

Moreover, neither the taxation nor licensing referenced in *Montana* resembles anything close to the level of power tribal courts would exercise over nonmembers pursuant to the regulation contemplated by the Fifth Circuit's decision. The principle of *ejusdem generis* thus excludes civil adjudicative jurisdiction as one of the "other means" of regulation intended by the first exception. *Yates v. United States*, 135 S. Ct. 1074, 1087-88 (2015). Had this Court intended the first exception to include perhaps the most sweeping form of regulation – general civil adjudicatory authority – it would have had no reason to first list only the highly-specific and technical terms "taxation" and "licensing."

Preventing an overly-expansive view of the *Montana* exception will not leave tribes and their members without legal recourse. First, tribes always retain the authority to "exclude outsiders from entering tribal land," including those who have violated tribal law. *See Plains Commerce*, 554 U.S. at 328.

Furthermore, federal and state courts also remain available to tribes and their members seeking redress. *See Hicks*, 533 U.S. at 373 (noting the availability of "the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- or state-law rights"); *Strate*, 520 U.S. at 459 (1997) (recognizing that state courts are available for tribal member's "optional use"). And finally, as discussed below, the tribal court may seek to obtain the nonmember's clear and unequivocal express consent to jurisdiction.

2. *Montana*'s First Exception Requires A Close Nexus Between The Consensual Relationship And The Exercise Of Jurisdiction

Montana's first exception also requires a nexus between the challenged regulation and the defendant's consensual relationship with the tribal party. The Fifth Circuit dramatically magnified its expansion of this *Montana* exception by holding that the nexus element is satisfied so long as the court "suspect[s] that [the nonmember] could have easily anticipated that such a thing would be actionable under [tribal] law." Pet. App. 14, n.4. That is, the Fifth Circuit's test is reasonable foreseeability *under tribal law*, which has never been the standard for the exercise of jurisdiction under *Montana*.

This Court rejected a virtually-identical argument in *Plains Commerce*. In that case, the plaintiff argued that the respondents "could hardly have been surprised" by the exercise of tribal jurisdiction in

light of their "lengthy on-reservation commercial relationships" with the tribal member. 554 U.S. at 338. This Court rejected that argument, stating, "[A]s we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Id.* (quoting *Atkinson*, 532 U.S. at 656). "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another . . . ." *Atkinson*, 532 U.S. at 656.

Plains Commerce and *Atkinson* thus teach that the scope of the nonmember consent cannot be defined by a court's hindsight suspicions about whether a nonmember "could have" anticipated that his actions might violate a tribal law – especially where such law is often unknown to the nonmember and not published by the tribe. Instead, the examination must begin and end with the nonmember's express declaration of consent. Any other test inevitably will erode *Montana*'s general rule against jurisdiction over nonmembers.

II. A PARTY INVOKING TRIBAL COURT JURISDICTION MUST PRESENT EVIDENCE OF CLEAR AND UNEQUIVOCAL EXPRESS CONSENT

With neither the first (regulatory-based) nor second (emergency-based) *Montana* exceptions providing a basis for general adjudicatory jurisdiction over nonmembers, the vast majority of tribal court actions over nonmembers must be based on consent. *Amicus* RLC urges this Court to adopt a

bright-line standard for measuring such consent, so that its members will be able to evaluate in advance the merits and risks of expanding into tribal areas.

A. Longstanding Confusion Regarding Adjudicatory Jurisdiction Highlights The Need For A Clear Articulation Of A Consent-Based Standard

Although the presumption against 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 is the fourth instance in which this Court has considered tribes' civil adjudicative jurisdiction over nonmembers since *Montana* was decided in 1981. *See Plains Commerce*, 554 U.S. at 324; *Hicks*, 533 U.S. at 406; *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 v. Crowe Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

In light of this history and the lingering confusion demonstrated by the court of appeals below, *amicus*

urges this Court to articulate a simple, bright-line test for evaluating jurisdiction outside the narrow confines of the *Montana* exceptions. The party invoking tribal court jurisdiction must be required to establish that the nonmember gave *clear and unequivocal express consent* to the exercise of jurisdiction.

Anything less, such as a system that infers consent from *post-hoc* examinations of parties' conduct, is incompatible with the general presumption that has been the foundation of this Court's cases from *Montana* to *Plains Commerce.* Moreover, *amicus* emphasizes that a hindsight-based approach discourages investment and expansion because businesses are wary of exposing themselves to risks where such fundamental factors as the applicable legal system cannot be identified until after a dispute has arisen.

B. The "Clear and Unequivocal" Test For Consent Has A Long History In Indian Law

In articulating a test for evaluating nonmember consent, this Court need not create a new test from scratch. Doing so only risks further disputes in the courts below regarding the contours and application of that test.

Rather, the better course is to adopt an existing standard with established interpretive jurisprudence in this Court. In so doing, this Court will short-circuit years of future debate over the meaning of the words of the new standard.

The requirement of a clear and unequivocal expression of consent already exists in Indian law, in the context of sovereign immunity waivers.[4] As this Court held in 1978 in *Santa Clara Pueblo*, a tribe subjects itself to suit in federal court only upon a waiver that "cannot be implied but must be unequivocally expressed." 463 U.S. at 57 (internal quotes omitted). More recently, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* emphasized that the consent to suit must be "clear," 498 U.S. 505, 509 (1991), and this standard was echoed again in *C&L Enterprises v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

This simple and workable rule should be adopted here. Native American tribes are familiar with this standard, and existing case law will provide an interpretive guide for future disputes.

C. A Standard Requiring Clear And Unequivocal Express Consent Will Limit Needless Jurisdictional Litigation In Tribal Court

Adopting the requirement of clear and unequivocal consent will help parties avoid disputes over the application of tribal exhaustion.

---

[4] In making this observation, RLC does not mean to suggest in any way that nonmembers in a tribal system are entitled to the same deference or comity as are sovereign tribes in the federal and state systems. They are not. *Amicus* only calls attention to the existence and successful application of this consent-based standard within Indian law.

Although tribal exhaustion was not at issue in the court below, it is of concern to *amicus*. 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 jurisdiction issues through appeal in tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 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. For example, in this case, when Dollar General was first sued in tribal court in January 2005, it immediately raised a jurisdictional challenge. Pet. App. 3. Dollar General did not fully exhaust the jurisdictional challenge until three years later – February 5, 2008. Pet. App. 75-91. Only then was it in a position to begin a *National Farmers Union* action in the Southern District of Mississippi to review the tribal court's assertion of jurisdiction.

Tribal exhaustion is excused, however, where the tribal court's lack of jurisdiction is clear. *Hicks*, 533 U.S. at 369. 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.

Amicus has no quarrel with the concept of tribal exhaustion when the issue being litigated is a close one, and the proposed standard does not harm the doctrine of tribal exhaustion in such cases. Instead, the proposed standard will simply reduce, dramatically, the number of close questions requiring exhaustion.

A rule that nonmember consent to tribal court jurisdiction must be clear and unequivocal 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.

CONCLUSION

Amicus supports Petitioner's request that this Court clarify the standards for permitting tribal court jurisdiction over nonmembers. Under *Montana* and its progeny, such jurisdiction should be the rare exception and not the default. With a standard that requires clear and unequivocal express consent, businesses will have a framework on which to base their investment decisions. In the absence of such a clear standard, RLC fears the uncertainty will only persist, to the detriment of business and to the detriment of all tribal parties.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

LAURA K. MCNALLY
Counsel of Record
ANDREW R. DEVOOGHT
LOEB & LOEB LLP
321 N. Clark Street
Suite 2300
Chicago, IL 60654
(312) 464-3155
lmcnally@loeb.com

Counsel for Amicus Curiae

September 8, 2015