Supreme Court, U.S.
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In the

Supreme Court of the United States

BANK ONE, N.A.,

PETITIONER,

v.

MYRA MAE SHUMAKE, ET AL.,

RESPONDENTS.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prudential, judge-made "tribal exhaustion" doctrine should be expanded to displace the statutory command of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, which creates a judicial remedy in federal district court for the enforcement of agreements to arbitrate.

2. Whether Indian tribal court jurisdiction extends to civil suits arising out of alleged commercial relationships between members and non-members of the tribe, where such assertions of jurisdiction are not necessary to protect tribal self-government or to control internal tribal relations – a question left open by this Court in *Nevada v. Hicks*, 533 U.S. 353 (2001).

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the parties to the proceeding in the court of appeals were:

Bank One, N.A.
Myra Mae Shumake
Darlene Vaughn
Andria Williamson
Karren Sam
Virginia Willis
Willie Willis
Lavern Willis
Brainard Lewis
Robin Willis
Danita Willis
Dina Thomas
Rose Willis

RULE 29.6 STATEMENT

Bank One, N.A. is a national banking association organized under the laws of the United States with its principal place of business in Ohio. It is a wholly owned subsidiary of Bank One Corporation, which is a public held corporation that has issued securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Bank One, N.A. ("Bank One") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 281 F.3d 507. The opinion of the district court (Pet. App. 15a-35a) is reported at 144 F. Supp.2d 640.

JURISDICTION

The court of appeals issued its decision on Feb. 15, 2002. Bank One's timely petitions for rehearing and rehearing *en banc* were denied on Mar. 28, 2002. Pet. App. 36a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Arbitration Act are reprinted in the Appendix. Pet. App. 38a-42a.

STATEMENT

In this case, the Fifth Circuit held that a prudential, judge-made rule – the so-called "tribal exhaustion" doctrine – should be expanded to displace the statutory command of the Federal Arbitration Act (FAA), 9 U.S.C. § 4. Section 4 of the FAA directs federal district courts to entertain motions to compel arbitration notwithstanding the pendency of actions in another forum in which the issue of arbitration might be raised. The Fifth Circuit nevertheless held that, when there is an action pending in Indian tribal court, a federal district court *may not* adjudicate a motion to compel arbitration under the FAA, even though a party has breached a legally enforceable arbitration agreement.

This case presents this Court with the opportunity to resolve two important legal questions on which the lower courts have diverged.

First, this case presents the question whether the statutory directives of the FAA may be supplanted by a judge-made, prudential practice in the form of the "tribal exhaustion" doctrine. The Fifth Circuit's decision ignores the text and purpose of the FAA and defeats "the 'liberal federal policy favoring arbitration agreements.'" *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) (citation omitted). The Fifth Circuit's ruling also conflicts with the many decisions of this Court and other appellate courts giving effect to the important federal pro-arbitration policy.

This case is an ideal vehicle to decide the question presented because the enforceability of the arbitration provision at issue has been resolved. In a related series of cases, the Fifth Circuit itself has recently confirmed that the very same arbitration clause at issue in this case is valid and binding as a matter of law. *See Bank One, N.A. v. Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished); *Bank One, N.A. v. Coates*, 125 F. Supp.2d 819 (S.D. Miss. 2001), *aff'd without op.*, 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002). In another series of cases, the Fifth Circuit has reaffirmed, following *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), that the FAA does not permit a federal district court to defer to pending litigation in state court in which the issue of arbitration might be raised. *Bank One, N.A. v. Boyd*, 2002 U.S. App. Lexis 6226 (5th Cir. Apr. 5, 2002).

In stark contrast, the Fifth Circuit in *this* case has held that a federal court must defer to a tribal court under precisely the same circumstances – even though states are fully "sovereign entities" protected by the Constitution and basic axioms of federalism, *Alden v. Maine*, 527 U.S. 706, 713 (1999), while Indian tribes are, to quote this Court again, merely "federal 'wards.'" *Rice v. Rehner*, 463 U.S. 713, 731 n.15 (1983) (citation omitted). This case therefore presents the question whether the "tribal exhaustion" doctrine should be expanded simultaneously to thwart the important federal statutory policy of arbitration and to

turn the relative status of state and tribal courts upside down.

This case also presents a second important question relating to tribal court jurisdiction. The Fifth Circuit held that Indian tribal courts may exercise civil jurisdiction over defendants who are non-members of the tribe so long as the dispute arises out of "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" (Pet. App. 7a n.13) (internal quotation omitted) – without regard to whether such assertions of jurisdiction are necessary to protect tribal self-government or to control internal tribal relations. The Fifth Circuit's judgment extends tribal court jurisdiction far beyond anything ever approved by this Court and conflicts with decisions rendered by other appellate courts.

The Fifth Circuit failed even to cite, much less analyze, this Court's most recent decision interpreting the "tribal exhaustion" doctrine and the limits of tribal civil jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). Instead, the Fifth Circuit erroneously described *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as "the most recent Supreme Court case" relevant to the dispute. Pet. App. 7a.

This Court should grant plenary review to resolve the important questions raised by the Fifth Circuit's decision. Alternatively, because the Fifth Circuit's decision cannot be squared with *Nevada v. Hicks*, this Court should summarily reverse the Fifth Circuit's judgment or GVR the decision below in light of *Nevada v. Hicks*, 533 U.S. 353 (2001).

1. Background. These consolidated cases arise out of Bank One revolving charge accounts used to finance the purchase of television satellite systems. Individuals seeking to establish a revolving charge account with Bank One ("Cardmembers") were required to complete and execute a Credit Application and

Security Agreement (the "Credit Application"). R. 63, 67.[1] The Credit Application was accompanied by a Revolving Credit Card Plan and Disclosure Statement (the "Cardmember Agreement"), which addressed, among other things, how the agreement could be amended. The amendment provision stated that Bank One "may change or amend the terms of this Agreement upon fifteen (15) days prior written notice if required by law." R. 19. The Cardmember Agreement also provided that a Cardmember's account would be governed by Ohio and applicable federal law. R. 20.

On March 8, 1998, Bank One notified its Cardmembers of a proposed modification to the Cardmember Agreement (the "Notice"). R. 64. The Notice clearly stated that the Cardmember Agreement would be modified by adding a clause ("the Arbitration Provision") providing that any disputes between Bank One and Cardmembers "shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the Claim is filed" and "shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16." R. 21. The Notice continued, in block capital letters:

> IN THE ABSENCE OF THIS ARBITRATION AGREEMENT YOU AND WE MAY OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH A COURT, AND/OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS, BUT EXCEPT AS OTHERWISE PROVIDED ABOVE, ALL CLAIMS MUST NOW BE RESOLVED THROUGH ARBITRATION.

R. 21.

[1] Citations to the Record in the Court of Appeals, No. 01-60234 (5th Cir.), are styled "R. ___."

Cardmembers were given the option of rejecting the Arbitration Provision contained in the Notice. R. 66. Cardmembers who rejected the changes contained in the Notice could maintain their accounts under the prior terms of the Cardmember Agreement. R. 21, 66. If Cardmembers did not reject the changes in writing, all claims asserted after April 15, 1998 by either a Cardmember or Bank One were subject to binding arbitration. Although some Bank One customers rejected the Arbitration Provision, none of the Respondents notified Bank One of their refusal to accept the terms of the Arbitration Provision. R. 66.

2. Procedural History. Between February and August 2000, Respondents – each of whom had accepted the amendment to the Cardmember Agreement – filed complaints against Bank One in the Choctaw Tribal Court of the Mississippi Band of Choctaw Indians ("Tribal Court Actions"). R. 11. In the Tribal Court Actions, Respondents alleged that each financed the purchase of a television satellite system through an account with Bank One. They filed these actions despite their agreement to arbitrate any disputes with Bank One. In response, Bank One exercised its rights under the FAA by filing in the Southern District of Mississippi a separate complaint against each Respondent to compel arbitration.

On February 20, 2001, the District Court issued Memorandum Opinions and Orders and Judgments in these consolidated cases dismissing Bank One's complaints on the basis of the tribal exhaustion doctrine. Pet. App. 15a. The District Court explained that "[t]he tribal exhaustion rule is not jurisdictional, but rather is a 'prudential' rule pursuant to which a federal court, in view of comity considerations, 'should stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction.'" *Id.* at 17a (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997)). The court acknowledged that "[t]he tribal exhaustion doctrine is not * * * applicable to every case to which a tribe or a member is a party,

and thus it must be determined whether the circumstances of this case are such as to invoke the requirements of tribal exhaustion." *Id.* at 20a.

The District Court opined that the defendants had "advanced the requisite colorable claim of tribal jurisdiction, since the activities of which [they] complain[] not only occurred on the [Choctaw] reservation, but also involve the formation of an ostensible consensual relationship between Bank One and a member of the tribe." *Id.* at 21a. The court rejected Bank One's argument that FAA § 4 unmistakably authorized Bank One to invoke federal-court jurisdiction to enforce the arbitration agreement between the parties. Although the court conceded that § 4 of the FAA grants any party aggrieved by the breach of an arbitration agreement the right to petition a United States district court for an order compelling arbitration, the district court observed that the FAA does not include an independent grant of federal question jurisdiction, something the court considered essential to negate the judge-made tribal exhaustion doctrine. *Id.* at 26a-28a. Accordingly, the District Court dismissed Bank One's complaints in their entirety.

3. **The Court of Appeals' Decision.** The Fifth Circuit affirmed. Pet. App. 1a. The court of appeals began by holding that the Choctaw tribal court had jurisdiction over Respondents' suits, even though Bank One is a non-member of the Choctaw tribe: "As a threshold inquiry under the tribal exhaustion doctrine, we must determine whether the tribal court's jurisdiction is explicitly limited." Pet. App. 6a n.13. "Although tribes usually do not have jurisdiction over non-Indians for activities off the reservation or Indian-fee land, *Montana* [*v. United States*, 450 U.S. 544 (1981),] noted several exceptions." *Id.* "One of its exceptions . . . applies here: 'A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* (quoting *Montana*,

450 U.S. at 565).

After addressing the jurisdictional issue, the Fifth Circuit held that the judge-made tribal exhaustion doctrine displaces the statutory right to federal court protection under the FAA. The Fifth Circuit did not analyze the text, structure, or purpose of the FAA. Nor did the court address *Nevada v. Hicks*, 533 U.S. 353 (2001), the most recent Supreme Court decision interpreting the tribal exhaustion doctrine, even though the parties had addressed *Nevada v. Hicks* at oral argument and in letters to the court of appeals under FRAP 28(j). Rather, the Fifth Circuit mistakenly described *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as "the most recent Supreme Court case" on the issue. Pet. App. 7a.

The court of appeals observed that, "[a]lthough the FAA reflects a strong policy favoring the enforcement of arbitration clauses," it "does not provide an independent ground of federal jurisdiction. To sue in federal court to enforce an arbitration claim, a petitioner must demonstrate the existence of federal subject matter jurisdiction on the *underlying* contract claim." Pet. App. 9a (emphasis in original). The court of appeals held that, under *Neztsosie*, the absence of an independent ground of federal subject matter jurisdiction in the FAA meant that the judge-made tribal exhaustion doctrine supplanted Bank One's statutory rights under the FAA. The court of appeals reached that result even though the creation of federal subject matter jurisdiction was not the test set forth in *Neztsosie*.

Bank One filed timely petitions for rehearing and rehearing *en banc*, which were denied on March 28, 2002. Pet. App. 36a.

4. **The Enforceability of the Arbitration Provision is Confirmed by State-Court and Federal Litigation.** Although the court of appeals has now remitted Bank One to the vagaries of the Choctaw tribal court system, the Fifth Circuit reached the opposite result with respect to pending *state-court* litigation against Bank One involving the very same satellite dish claims.

In *Bank One, N.A. v. Boyd*, 2002 U.S. App. Lexis 6226 (5th Cir. Apr. 5, 2002), the court of appeals held that a district court abused its discretion in deferring to a pending state-court proceeding in which the issue of arbitration could have been raised. The Fifth Circuit ruled that the federal district court was required to rule on Bank One's motion to compel arbitration under the FAA.

In another related series of proceedings, the Fifth Circuit has affirmed nineteen decisions of three different district courts compelling arbitration under the same Bank One Arbitration Provision. *Bank One, N.A. v. Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished). Every federal district and bankruptcy court to have considered the validity of the Bank One Arbitration Provision has concluded that it is enforceable as a matter of law and has compelled arbitration. The district and bankruptcy courts have also unanimously denied motions for discovery, jury trial, or evidentiary hearing. For example, Chief Judge Tom S. Lee found that the Arbitration Provision "began with the heading 'IMPORTANT NOTICE.' *The language of the notice was clear* as to the defendant's choice to accept or reject the arbitration clause; *and the arbitration clause itself was not filled with 'legalese' as defendant claims, but was instead clear.*" *Bank One, N.A. v. Coates* 125 F. Supp.2d 819, 833 (S.D. Miss. 2001) (emphasis added), *aff'd without op.*, 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002).

In addition, a federal bankruptcy judge has upheld the Bank One Arbitration Provision and compelled arbitration in a proceeding involving Bank One and another member of the Choctaw Tribe. *Bank One, N.A. v. Chickaway (In re Chickaway)*, No. 97-10630 EEG (Bankr. S.D. Miss. Feb. 26, 2002). Chickaway's circumstances are identical in every relevant respect to those of the Respondents in this case. She made the same allegations in a complaint originally filed in tribal court. The disparity in treatment between Ms. Chickaway and the remaining members of the Tribe is occasioned solely by the

accident of federal bankruptcy jurisdiction. But the simultaneous pendency of *In re Chickaway* confirms the enforceability of the Bank One Arbitration Provision and the mischief caused by the tribal exhaustion doctrine in this case.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law regarding the Federal Arbitration Act, the tribal exhaustion doctrine, and the circumstances in which Indian tribal courts may exercise jurisdiction over nonmembers. The Fifth Circuit's judgment conflicts with this Court's decisions in *Nevada v. Hicks*, 533 U.S. 353 (2001), *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), as well as with decisions of other appellate courts. This Court's review is plainly warranted.

A. This Court Should Grant Review To Establish That the Prudential Tribal Exhaustion Doctrine Does Not Displace the Statutory Commands of the FAA.

1. *The Tribal Exhaustion Doctrine is Merely Prudential.*

The tribal exhaustion doctrine was announced in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), a case involving a tort suit initiated by a tribal member against a school district and its insurer. The tribal member brought suit in tribal court, and the defendants promptly sued for a declaration that the tribal court had no jurisdiction to entertain a civil suit against a non-Indian. This Court held that, in such circumstances, the examination of the tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856. The Court explained that the jurisdictional inquiry may often be a fact-intensive exercise and that "the orderly administration of justice" would be served "by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is

addressed." *Id.* "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. The Court recognized that exhaustion is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; "where the action in tribal court is patently violative of express jurisdictional prohibitions"; or "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." *Id.* at 857 n.21 (internal quotation and citation omitted).

The doctrine was extended to the diversity context in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which explained that "tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16. The Court affirmed the limits of the doctrine, opining that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite," *id.* at 16 n.8, and that "Congress undoubtedly has the power to limit tribal court jurisdiction." *Id.* at 17. *See also Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 450 (1997) ("[W]e do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accept [or rejecting] jurisdiction.'") (citation omitted; brackets in original).

The tribal exhaustion doctrine has been the source of much confusion in the lower courts. The district court in this case opined that the doctrine is "not clear" and noted the differences among lower court decisions. Pet. App. 25a n.7. "[T]he courts have been unable to reach a consensus with respect to the scope of this 'utterly novel rule' in large part because 'the Supreme Court did not clearly delineate the class of cases to which the

tribal exhaustion doctrine applies.'"[2] Even after *Nevada v. Hicks*, commentators continue to complain that "the entire area is awash in confusion." Cynthia Ford, *Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later*, 37 TULSA L.J. 485, 502 (2001).

This case presents an ideal vehicle to clarify the scope of the tribal exhaustion doctrine and to establish that it does not displace the statutory commands of Congress embodied in the FAA. The FAA reflects an important federal pro-arbitration policy and a distinct congressional preference for a federal judicial forum. *See, e.g., Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000). "[W]here important federal interests are at stake . . . comity yields." *United States v. Gillock*, 445 U.S. 360, 373 (1980). Indeed, this Court has held that the principles of the FAA are not displaced by many other federal statutes. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (FAA not displaced by ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-84 (1989) (Securities Act); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (Securities Exchange Act and RICO statute); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-40 (1985) (Sherman Act).

None of these important federal statutory policies displaces the FAA. Accordingly, the Fifth Circuit erred in holding that the FAA could be supplanted by a merely prudential, judge-made doctrine of tribal exhaustion. Indeed, this Court has already held that an Indian tribe may waive its sovereign immunity from suit by agreeing to a standard form arbitration contract. *See C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of*

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[2] Blake A. Watson, *The Curious Case Of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 535 (1997) (citations omitted).

Oklahoma, 532 U.S. 411 (2001). If the federal policy of arbitration is so strong as to effect a waiver of an entire tribe's immunity, it would be astonishing to hold that an individual tribal member may defeat the pro-arbitration policy by commencing suit in tribal court despite the existence of a legally binding arbitration agreement.

2. *The Text, Structure, and Purpose of the FAA Demonstrate That It Is Not Displaced By the Tribal Exhaustion Doctrine.*

Under *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court's most recent discussion of the tribal exhaustion doctrine, that rule does not apply to suits to compel arbitration under § 4 of the FAA. Remarkably, the Fifth Circuit did not cite – let alone apply – *Hicks* even though it was the subject of FRAP 28(j) letters by both parties and was addressed at oral argument. Accordingly, this Court should summarily reverse the Fifth Circuit's judgment, or GVR the case in light of *Hicks*, if this Court does not grant plenary review.

In *Hicks*, this Court held that the tribal exhaustion doctrine does not apply to actions brought under 42 U.S.C. § 1983. 533 U.S. at 369. This Court opined that tribal courts, unlike state courts, are not "courts of 'general jurisdiction'" and that the tribal exhaustion doctrine does not apply to § 1983 claims because "no provision in federal law" explicitly establishes tribal jurisdiction over such claims. *Id.* at 367, 368.

Similarly, no provision of federal law explicitly grants tribal courts jurisdiction over § 4 arbitration claims. In fact, the text, structure, and purpose of the FAA all indicate that the tribal exhaustion doctrine is inapplicable. The plain language of § 4 of the FAA grants parties the right to file an arbitration petition in "any United States district court." The statute thereby singles out the *federal courts* by name and imposes on them a special duty to entertain petitions for arbitration. The Fifth Circuit improperly negated this statutory right to a federal forum by

misapplying the prudential, judge-made tribal exhaustion doctrine – even though the FAA was specifically intended to override judge-made rules that hinder arbitration. *See Green Tree Financial Corp.*, 531 U.S. at 89.

Section 4 of the FAA is a special statutory procedure designed to provide a federal forum for the "specific enforcement" of arbitration agreements. *American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765, 766-67 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944). This Court has opined that "the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone*, 460 U.S. at 29. *See also Green Tree Financial Corp.*, 531 U.S. at 85 (FAA's "goal [is to] 'mov[e] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible'") (citation omitted).

This special right to a federal forum for expeditious enforcement of arbitration clauses would be nullified if the tribal exhaustion doctrine were applied.

Moreover, the FAA also contains a special right to immediate appeal, which would also be defeated if tribal exhaustion were required. Section 16 of the FAA, 9 U.S.C. § 16, provides for immediate appeal of federal court orders hostile to arbitration, "whether the orders are final or interlocutory." *Green Tree*, 531 U.S. at 86. This special interest in affording immediate federal appellate review of orders denying arbitration could not be accommodated if the tribal exhaustion doctrine were applicable.

Applying the tribal exhaustion doctrine in the arbitration context would create what this Court in *Hicks* termed "serious anomalies" in the federal statutory scheme. 533 U.S. at 368. *See also id.* at 383-84 (Souter, J., joined by Kennedy and Thomas, JJ., concurring). Just as those anomalies showed in *Hicks* that

the tribal exhaustion doctrine did not apply to § 1983 cases, here they demonstrate that the doctrine does not apply to suits under § 4 of the FAA.

Another tell-tale sign that the tribal exhaustion doctrine is inapplicable is what the FAA does *not* say. Like § 1983 at issue in *Hicks*, § 4 of the FAA does not mention tribal courts. This Court has held that the uncertainty over whether a *state* court is bound by § 4 is enough to eliminate any discretion of federal courts to abstain in favor of state courts. *See Moses H. Cone*, 460 U.S. at 26-27. *A fortiori*, the uncertainty about whether tribal courts are bound by § 4 of the FAA is enough to render the tribal exhaustion doctrine inapplicable in the context of petitions to compel arbitration. If a federal court faced with a motion to compel arbitration under § 4 of the FAA may not defer to pending litigation in *state* court – even if the arbitration issue could be raised in the state forum – then the federal court certainly should not defer to a *tribal* court. As this Court observed in *Hicks*, tribal courts lack the co-equal status of state courts: "This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts." 533 U.S. at 367.

The Fifth Circuit's decision would have the anomalous effect of wrongly elevating tribal courts over state courts – even though Indian tribes (unlike States) are wards of Congress and "have lost many of the attributes of sovereignty." *Montana v. United States*, 450 U.S. 544, 563 (1981). Tribal immunity "developed almost by accident." *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 756 (1998). By contrast, of course, the States are independent sovereigns which have been held to enjoy immunity from suit and protection against federal interference under the Tenth and Eleventh Amendments and the

structural architecture of the Constitution.[3] Tribal courts should not be elevated over state courts.[4]

3. *This Court's Decision In* Neztsosie *Provides a Further Reason to Grant Review.*

The Fifth Circuit purported to apply *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), where this Court held that the tribal exhaustion doctrine does not apply to claims under the federal Price-Anderson Act. *Id.* at 484-85. Far from supporting the Fifth Circuit's decision, *Neztsosie* demonstrates the need for this Court's review. For, properly applied, *Neztsosie* shows that the FAA reflects an unmistakable congressional preference for a federal judicial forum and therefore is not displaced by the tribal exhaustion doctrine.

The Fifth Circuit opined that, unlike the Price-Anderson Act

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[3] *See generally Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (ADA did not validly abrogate state sovereign immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (ADEA did not validly abrogate state sovereign immunity); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Art. I does not authorize Congress to abrogate state sovereign immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (Congress may not subject state to suit in state court without its consent); *Printz v. United States*, 521 U.S. 898, 917 (1997) (striking down Brady law); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 703, n. 10 (1982) (States are "'coequal sovereigns in a federal system'") (citation omitted); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U.S. 691, 704 (1982) (recognizing "the structure of our Nation as a union of States, each possessing equal sovereign powers").

[4] In *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001), this Court held that the Indian Gaming Regulatory Act does not exempt Indian tribes from paying gambling-related taxes that States need not pay. The Court expressly rejected the tribe's request to apply "a special Indian-related interpretive canon, namely, 'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" *Id.* at 532 (citation omitted).

at issue in *Neztsosie*, "the FAA does not provide an independent ground of federal jurisdiction." Pet. App. 9a. But the court of appeals misstated the test set forth in *Neztsosie*. In two separate passages, *Neztsosie* explained that the standard for displacing the tribal exhaustion doctrine is not whether there is exclusive federal subject-matter jurisdiction but whether there is an unmistakable congressional "preference for a federal forum." 526 U.S. at 484-85, 487 n.7. In yet a third portion of the opinion, the Court reiterated that the tribal exhaustion doctrine was displaced because "leaving such claims in [tribal] courts" would "thwart the Act's policy of getting such cases into a federal forum." *Id.* at 487. This Court's choice of language must have been deliberate, for the Price-Anderson Act authorizes the removal only of state-court suits and is *silent* with respect to actions arising in tribal courts. *See* 42 U.S.C. § 2210. Because the Price-Anderson Act does *not* expressly provide for the removal of claims from tribal courts, *Neztsosie* plainly does *not* require creation of exclusive federal-court jurisdiction, or an express congressional bar on tribal court jurisdiction, in order to find displacement of the tribal exhaustion doctrine. Rather, the question is whether displacement of the tribal exhaustion doctrine can be inferred from Congress' handiwork.

Neztsosie relied on an explicit parallel between state and tribal courts. This Court opined that "[w]e are at a loss to think of any reason that Congress would have favored tribal exhaustion. * * * The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal as to state-court litigation." *Id.* at 485-86. "It is not credible that Congress would have uniquely countenanced, let alone chosen, such a delay when public liability claims are brought in tribal court." *Id.* at 487. "[L]eaving such claims in [tribal] courts would just as effectively thwart the Act's policy of getting such cases into a federal forum for consolidation, as leaving them in state forums would do." *Id.*

Precisely the same analysis governs here and demonstrates

that the FAA displaces the tribal exhaustion doctrine. The reason that Congress created an immediate federal-court forum to enforce arbitration agreements – in order to overcome judicial hostility to arbitration agreements, *see Green Tree Financial Corp.*, 531 U.S. at 89 – is equally applicable to tribal courts. It is unthinkable that Congress would have wanted state-court actions to proceed promptly to arbitration while allowing Indian tribal court disputes to languish in litigation – particularly in light of "[t]he special nature of [Indian] tribunals." *Duro v. Reina*, 495 U.S. 676, 693 (1990).

Tribal courts "differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges." *Hicks*, 533 U.S. at 384 (Souter, J., joined by Kennedy and Thomas, JJ., concurring). "Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'" *Id.* (citation omitted). "The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out." *Id.* at 384-85 (citation omitted). "The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that '[t]ribal courts are often subordinate to the political branches of tribal governments.'" *Id.* at 385(citation omitted).

It is inconceivable that Congress would have intended to leave federal rights under the FAA to such an uncertain fate in tribal court while affording state-court litigants ready access to a federal forum under § 4 of the FAA. To be sure, the FAA does not create federal subject-matter jurisdiction for cases arising in either state or tribal court. But that absence has not stopped this

Court from recognizing the ability of state-court defendants to file federal-court motions to compel arbitration under § 4. This Court has expressly warned that the lack of a grant of subject-matter jurisdiction in the FAA is not to be misconstrued as weakening Congress' preference for a federal forum in arbitration cases. *See Moses H. Cone*, 460 U.S. at 25 n.32. Moreover, the FAA is in some respects more potent than the Price-Anderson Act, despite the FAA's lack of a grant of subject-matter jurisdiction. Under § 4 of the FAA, Congress has granted a party the right to halt a state-court action by filing a new federal suit to compel arbitration and securing an injunction against the state-court litigation. *Merrill Lynch v. Haydu*, 637 F.2d 391, 395 (5th Cir. 1981). The ability to enjoin state-court actions, despite the limits of 28 U.S.C. § 2283, means that the FAA exhibits a preference for a federal forum that is at least as strong as (if not *stronger* than) the creation of removal authority through a grant of federal question jurisdiction. Accordingly, the Fifth Circuit's judgment conflicts with this Court's decision in *Neztsosie*.

4. *The Fifth Circuit's Decision Conflicts With The Decisions of Other Circuits.*

The Fifth Circuit's decision also conflicts with those of other circuits. First, the decision conflicts with cases recognizing that the tribal exhaustion doctrine does not displace other federal statutes. *See, e.g., Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (holding that tribal exhaustion doctrine is inapplicable to claims under Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*); *Lower Brule Construction v. Sheesley's Plumbing*, 84 B.R. 638 (D.S.D. 1988) (tribal exhaustion doctrine does not apply to adversary proceeding under Bankruptcy Code). The only difference between the FAA and these statutes is the absence of a grant of subject-matter jurisdiction. As noted in Part I-A-3, however, that distinction does not make a material difference. *See Neztsosie*, 526 U.S. at 484-85, 487 n.7.

In addition, the Fifth Circuit's decision conflicts with the decisions of circuits recognizing that the tribal exhaustion doctrine, as a prudential, judge-made rule, is always subject to the caveat that it does not apply where there are no practical reasons to invoke it. *See Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 83 (2d Cir. 2001) (tribal exhaustion not required where "[t]he party seeking relief in federal court – Garcia – is not a member of the tribe that she is suing," and where "Garcia's theories of liability are grounded (if anywhere) on federal and state law, not 'tribal law.' This factor seems particularly important in light of the Supreme Court's recent opinion in *El Paso Natural Gas Co. v. Netzsosie*, 526 U.S. 473, 484 (1999)"); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993) (tribal exhaustion not required because "there has been no attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law"); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991) ("exhaustion would not have assisted the district court in deciding federal law issues"), *cert. denied*, 505 U.S. 1212 (1992); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 754-55 (D.N.D. 1989) (tribal exhaustion of Title VII claims not required where there was no challenge to tribal court jurisdiction and case presented issues of predominantly federal law).

In this case, there were no practical reasons for requiring tribal exhaustion. Bank One's motions to compel arbitration implicated no interest in tribal self-government. They involved federal law – the FAA – not tribal law. Nor was a tribal court proceeding needed to develop an evidentiary record. The relevant jurisdictional facts were undisputed. The court of appeals failed to give any weight to these practical considerations, erroneously refusing to apply prudential principles of abstention. The Fifth Circuit opined:

> Bank One also argues that courts must apply the abstention principles included in *Colorado River* when considering tribal exhaustion. We disagree. The tribal exhaustion doctrine is in no way based on *Colorado River*.

Pet. App. 11a.

In so holding, the Fifth Circuit placed itself in direct conflict with this Court's decision in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which described the tribal exhaustion doctrine as "analogous to principles of abstention" governing the state courts. *Id.* at 16 n.8. The Fifth Circuit also placed itself in conflict with decisions of other circuits faithfully following *Iowa Mutual*. *See, e.g.*, *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 80 (2d Cir. 2001) (tribal exhaustion doctrine is "analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)" and "must be interpreted narrowly in light of the 'virtually unflagging obligation of federal courts to exercise the jurisdiction given them,' *Colorado River*, 424 U.S. at 817").

5. *This Case Is an Ideal Vehicle To Resolve The Question Presented.*

This case is ideally suited for deciding the question presented. First, the Fifth Circuit, in a series of nineteen companion cases, has addressed the very same Bank One Arbitration Provision at issue here and has compelled arbitration of satellite dish claims asserted by state-court plaintiffs. *Bank One, N.A. v. Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished); *Bank One, N.A. v. Coates* 125 F. Supp.2d 819, 833 (S.D. Miss. 2001), *aff'd without op.*, 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002). A bankruptcy court proceeding involving another member of the Choctaw tribe who filed the identical complaint as Respondents has reached the same conclusion. *Bank One, N.A. v. Chickaway (In re Chickaway)*, No. 97-10630 EEG (Bankr. S.D. Miss. Feb. 26, 2002).

Remitting the parties to tribal court would serve no purpose other than delay in this case because the dispute between these parties has been held to be arbitrable as a matter of federal law. There is thus no reason to force the parties to return to tribal court. *See Hicks*, 533 U.S. at 369 (tribal exhaustion doctrine does not apply where remitting parties to tribal court "would serve no purpose other than delay"); *Strate*, 520 U.S. at 459 n.14 (same).

The Fifth Circuit has also applied the holding of *Moses H. Cone* in this very context. The Fifth Circuit has held that a federal district court, faced with a motion to compel arbitration under the Bank One Arbitration Provision, may not defer to pending state-court satellite dish litigation in which the issue of arbitration could be raised. *Bank One, N.A. v. Boyd*, 2002 U.S. App. Lexis 6226 (5th Cir. Apr. 5, 2002). This Court is therefore faced with a concrete instance in which state courts hearing the same underlying satellite claims are treated less favorably than Indian tribal courts.

Because of the simultaneous pendency of state-court and bankruptcy court actions involving the very same arbitration clause, it is difficult to imagine a more fortuitous procedural posture in which to decide the question presented.

B. This Case Presents A Perfect Opportunity To Resolve Issues of Tribal Jurisdiction Left Open in *Nevada v. Hicks*.

This case also presents this Court with the opportunity to resolve important questions of tribal jurisdiction over non-members which were left open in *Nevada v. Hicks* but in which the Justices of this Court expressed substantial interest, as evidenced by the four separate concurring opinions filed in that case.

Here, the Fifth Circuit has held that a tribal court may exercise civil jurisdiction over nonmembers whenever the suit

arises from "'the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" Pet. App. 6a n.13 (quoting *Montana*, 450 U.S. at 565).

In *Hicks*, however, this Court called that very test into question. The Court pointedly noted that "we have never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358 n.2; *see also id.* at 374 (noting that the views of three Justices "would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court"). *Hicks* held that a tribal court could not exercise jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a member of the tribe suspected of having violated state law outside the reservation. This Court therefore reversed the Ninth Circuit's decision in *Hicks*, on which the district court in this case had relied in footnote 3 of its opinion to find a "colorable claim of tribal jurisdiction." *See* Pet. App. 21a & n.3.

This Court's *Hicks* opinion was "limited to the question of tribal-court jurisdiction over state officers enforcing state law" and left "open the question of tribal-court jurisdiction over nonmember defendants in general." 533 U.S. at 358 n.2. Nonetheless, this Court opined that "the general proposition" is "that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe' except to the extent 'necessary to protect tribal self-government or to control internal relations.'" 533 U.S. at 358-59 (internal citation omitted). "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361. As examples of such laws, this Court cited such matters as "punishing tribal offenders, determining tribal membership, regulating domestic relations among members, [and] prescribing rules of inheritance." *Id.*

This Court should grant review in this case to resolve the question of tribal jurisdiction over nonmembers left open in *Hicks*. The Court should make clear that such jurisdiction may not be exercised except when necessary to protect tribal self-government or to control internal relations. *See Hicks*, 533 U.S. at 364 (tribal court jurisdiction over § 1983 suit "is not essential to tribal self-government or internal relations"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-51 (2001) ("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 the tribes.") (citation omitted); *Strate*, 520 U.S. at 459 (tribal court lacked jurisdiction over suit arising from auto accident on Indian reservation, even though plaintiff was widow and mother of tribal members, because requiring defendants to defend "in a nonfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare'" of tribe). Indeed, some courts and commentators have gone even further and predicted that, in the wake of *Hicks*, nothing less than a clear congressional delegation of tribal jurisdiction will suffice to provide tribal courts with authority over nonmembers.[5]

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[5] *See United States v. Archambault*, 174 F. Supp. 2d 1009, 1011 (D.S.D. 2001) ("It can be argued that the opinion of the Supreme Court [in *Hicks*] is that any tribe's adjudicative jurisdiction over nonmembers is at most only as broad as the jurisdiction granted legislatively by Congress."); Alex Tallchief Skibine, *Making Sense out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 358 (2001) (arguing that the Court is "moving towards the principle that tribal jurisdiction over non-members would be allowed only if such jurisdiction had somehow been recognized or acquiesced to by Congress"); Alfred R. Light, *Sovereignty Myths and Intergovernmental Realities: the Etiquette of Tribal Federalism*, 14 ST. THOMAS L. REV. 373, 387-88 (2001) ("Though technically limited to the assertion of tribal authority over state officials, [the] prediction that 'the Court will soon refuse to recognize inherent tribal sovereign powers over non-members while on non-member lands without any indication that Congress would somehow support such tribal authority' seems almost certain after *Hicks*").

The Fifth Circuit's decision is in conflict with cases in the lower courts recognizing the more rigorous jurisdictional requirements in the wake of *Hicks*. In *Boxx v. Warrior*, 265 F.3d 771, 777-78 (9th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 3056 (U.S. Apr. 29, 2002), for example, the Ninth Circuit held that a tribal court plaintiff's status as a member of the tribe "alone cannot satisfy" the jurisdictional requirements of tribal court. *Id.* at 778 n.4. The court of appeals, citing *Hicks*, held that tribal self-government was not implicated by a tort suit by a member of the tribe against a non-member for an alcohol-related auto accident. "'[T]he impact [on the tribe] must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" *Id.* (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989)). "Even assuming that the Tribe possesses some regulatory and adjudicatory power over the sale and consumption of alcohol, the Tribe is not prevented in any way from exercising such authority by being denied the right to adjudicate this garden variety automobile accident." *Id.* at 778. *See also United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 979 n.8 (8th Cir. 2001) (citing *Hicks* for the proposition that "regulatory authority over nonmembers must 'be connected to that right of the Indians to make their own laws and be governed by them'"); *Hornell Brewing Company v. Seth Big Crow*, 133 F.3d 1087 (8th Cir. 1998) (tribal court lacked jurisdiction over defamation and intentional infliction of emotional distress claims against brewery for use of "Crazy Horse" name in alcoholic beverage); *Wilson v. Marchington*, 127 F. 3d 805, 814-15 (9th Cir. 1997) (tribal court lacked jurisdiction over tort suit by tribal member arising from a traffic accident with a non-Indian on U.S. highway within Indian reservation because requirement of bringing individual tort claims in state or federal court does not have a demonstrably serious effect or imperil political integrity, economic security or health and welfare of tribe); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM.

U.L. REV. 1177, 1191 (2001) ("*Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks* cement the notion that Indian tribes only have jurisdiction over non-tribal members in extremely narrow circumstances.").

Tribal civil jurisdiction over nonmembers should not be lightly inferred. "[I]f jurisdiction exists non-Indians will have no representation in the government or councils of the tribes, but will be subjected to the demands of a separate sovereign within the boundaries of the United States itself." *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1223-24 (9th Cir. 2001) (Fernandez, J., dissenting). The mere fact that a nonmember of the tribe has allegedly entered into a commercial relationship with a tribal member should not provide a basis for tribal court jurisdiction, absent a demonstrable impact on tribal self-government or internal relations. In many cases, nonmembers will have no notice that they are dealing with a tribal member and hence are (under the Fifth Circuit's view) subject to tribal court jurisdiction. Certainly, Bank One had no notice that it would be haled into tribal court as a result of the transactions at issue. Bank One did not enter into a contract with the Choctaw Tribe. Nor could it reasonably have been aware of Respondents' tribal membership at the time any credit card agreements were executed. Respondents live on certain trust land parcels spread over several Mississippi counties. Appellees' Br. 11 (5th Cir.). Nothing in their addresses put Bank One on notice that they were members of the Choctaw Tribe. In fact, any such inquiry about an individual's race is prohibited by federal law. 15 U.S.C. § 1691, *et seq.* The credit card agreement provides that all disputes are to be governed by Ohio law and by applicable federal law – not by tribal law. Any exercise of tribal court jurisdiction based on the existence of the agreement would resemble the exercise of tribal jurisdiction based on the mere fact of tribal ownership of the land on which the cause of action allegedly arose, which *Nevada v. Hicks* held is not by itself sufficient to support tribal jurisdiction over nonmembers. 533

U.S. at 360.

In a concurring opinion in *Hicks*, Justice Souter, joined by Justices Kennedy and Thomas, explained at length why "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequences." 533 U.S. at 383. These concerns apply with special force to the Fifth Circuit's holding that an unsuspecting defendant may be haled into tribal court based purely on the unknown tribal membership of the plaintiff. For example, Justice Souter observed that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Id.* "[T]here is a definite trend by tribal courts toward the view that they ha[ve] leeway in interpreting the . . . due process and equal protection clauses and need not follow the U.S. Supreme Court precedents 'jot-for-jot.'" *Id.* (internal quotations omitted). In light of the significant rights lost by a defendant when he is haled into tribal court, fair notice of the limits of tribal jurisdiction is necessary in order to satisfy the "overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty.'" *Id.* (citation omitted).

Accordingly, Justice Souter, joined by Justices Kennedy and Thomas, would have held in *Hicks* that there is a presumption that tribal court jurisdiction does not extend to nonmembers and that "land status within a reservation is not a primary jurisdictional fact." *Id.* at 375-76 (concurring opinion). "[A] jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyance." *Id.* at 383. "[T]ying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt," which would make it difficult for "nonmembers to know where tribal jurisdiction begins and ends." *Id.*

The same lack of fair notice is a fatal defect in any

jurisdictional rule that turns on whether the counterpart in an arm's length commercial transaction is a member of a tribe. Just as "it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n. 1 (2001) (citation omitted), so it defies common sense to suppose that a party in Bank One's position could reasonably be aware that it was subject to tribal jurisdiction.

The Court should grant review to establish that tribal court jurisdiction does not extend to claims against nonmembers, even in the context of commercial dealings, except where it is necessary to protect tribal self-government or to control internal relations. This Court should make clear that the portion of the *Montana* opinion on which the Fifth Circuit relied – which noted 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," 450 U.S. at 565 – pertains to jurisdiction for *administrative* or *legislative* regulation rather than to jurisdiction for *judicial* authority and thus provides no support for the Fifth Circuit's decision in this case. Indeed, in *Hicks*, this Court reserved the question of whether, even if a nonmember would be subject to tribal regulation, he nonetheless might remain outside the adjudicatory authority of tribal courts. 533 U.S. at 374. This Court should grant review to make clear that the "doing business" or "contract" basis of tribal jurisdiction has been assimilated into the self-government test.[6]

[6] Although Bank One takes the position that the imposition of tort damages for the financing of privately sold satellite dishes is not necessary to protect tribal internal relations, and thus that there is no tribal jurisdiction in this case as a matter of law, this Court could leave the question of the proper application of the jurisdictional test to the Fifth Circuit on remand.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should summarily reverse the Fifth Circuit's judgment, or GVR the case in light of *Hicks*.

Respectfully submitted.

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May 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Consolidated Cases Nos. 01-60228, 01-60229, 01-60230, 01-60231, 01-60232, 01-60233, 01-60234, 01-60235, 01-60236, 01-60237, 01-60238

February 15, 2002

BANK ONE, N.A.,

PLAINTIFF-APPELLANT,

VERSUS

MYRA MAE SHUMAKE, DARLENE VAUGHN, ANDIA WILLIAMSON, KARREN SAM, VIRGINIA WILLIS, WILLIE WILLIS, LAVERN WILLIS, BRAINARD LEWIS, A/K/A BRIANARD LEWIS, ROBIN WILLIS, DANITA WILLIS, KIRBY WILLIS, DINA THOMAS AND ROSE WILLIS,

DEFENDANTS-APPELLEES.

Appeals from the United States District Court
for the Southern District of Mississippi

Before KING, Chief Judge, and DAVIS and MAGILL,* Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Bank One challenges the district court's dismissal of its suit to compel arbitration. Bank One contends that the reasoning of the U.S. Supreme Court's decision in *El Paso Natural Gas Co.*

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* Circuit Judge, U.S. Court of Appeals for the Eighth Circuit, sitting by designation.