No. 14-991

IN THE
Supreme Court of the United States

WESTERN SKY FINANCIAL, *et al.*,
Petitioners,

v.

DEBORAH JACKSON, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

KATYA JESTIN
NEIL M. BAROFSKY
BRIAN J. FISCHER
R. TRENT MCCOTTER
ESTEBAN M. MORIN
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022-3908
(212) 891-1600

BARRY LEVENSTAM
Counsel of Record
MICHAEL T. BRODY
DANIEL T. FENSKE
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654-3456
(312) 222-9350
blevenstam@jenner.com

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosures:

Petitioners are Western Sky Financial, LLC, Payday Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, Martin A. ("Butch") Webb, CashCall, Inc., and Does 1-5.

Western Sky Financial, LLC, Payday Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, CashCall, Inc., and Does 1-5 are privately held companies. They have no parent companies that are not parties to this proceeding, and no publicly held entity owns 10% or more of any of these entities' stock.

Respondents are Deborah Jackson, Linda Gonnella, and James Binkowski.

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By stretching to free Respondents from their voluntary agreements to arbitrate this dispute, the Seventh Circuit not only created a circuit split but also lowered the burden required to void an arbitration clause, thereby violating this Court's holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-48 (2011). Respondents' contrary arguments lack merit.

The Seventh Circuit created a circuit split by concluding that the validity of the parties' Arbitration Clause should be determined by the common-law "reasonableness" test of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), rather than the statutory requirements of FAA § 2. Although Respondents deny this circuit split, the fact remains that the Seventh Circuit adopted a test that four other circuits have expressly rejected. *See* Pet. 16-19. The *Bremen* test makes no sense applied to an arbitration clause. That test renders unenforceable any contractual provision that deprives a party of "its day in court," Pet. App. 20a, but parties adopt arbitration provisions precisely *to avoid* the courts. *Bremen* would also void any arbitration clause that "contravene[s]" a state law "public policy," *id.*, which would allow state policy to trump the FAA. By significantly lowering the showing required to set aside an arbitration clause, the Seventh Circuit effectively nullified the FAA's strong policy in favor of arbitration. *See* Pet. 19-23.

The Seventh Circuit's "unconscionability" holding fares no better. It rests solely on an application of state

law that FAA § 5 flatly prohibits. Section 5's plain language contradicts Respondents' assertions that substitution was not warranted here. When the lower courts concluded that the parties' selected arbitrator was unavailable, § 5 required the courts to appoint a substitute. *See* 9 U.S.C. § 5. Instead, the Seventh Circuit labeled the unavailability as unconscionable under Illinois law and voided the entire Arbitration Clause, in direct violation of *Concepcion*, 131 S. Ct. at 1747-48.

Arbitration aside, Respondents also cannot deny the considerable circuit disagreement about the scope of tribal jurisdiction over non-tribal members. *See* Pet. 30-36. The decision below is the first by a circuit court to adopt a *per se* rule that physical entry onto tribal land is required for tribal jurisdiction to exist over a nonmember. That holding conflicts with caselaw from the Second, Fifth, and Eighth Circuits.

Given that the Seventh Circuit created several circuit splits on important issues of arbitration and tribal law, the petition for a writ of certiorari should be granted.

I. The Seventh Circuit's Arbitration Holdings Created A Circuit Split And Violated *Concepcion*.

The circuit courts are divided on a fundamental threshold issue of arbitration law: whether the validity of an arbitration clause is determined exclusively by the statutory requirements of FAA § 2, or instead by

the common-law *Bremen* "reasonableness" standard. *See* Pet. 16-19. Respondents' arguments that there is no split and that *Bremen* applies here are meritless. *See* Opp. 2-10, 15-23.

1. Respondents insist that there is no circuit split because the *Bremen* test is not "materially different from using 'generally applicable contract defenses,' as authorized by 9 U.S.C. § 2." Opp. 4-5, 7. Four circuit courts and several state appellate courts have expressly disagreed and held that the *Bremen* reasonableness test does not cover FAA-protected arbitration clauses, and that in fact *Bremen* is incompatible with FAA § 2. *See* Pet. 16-19.

Respondents fail to distinguish the cases that reject *Bremen*. They argue that several cases are distinguishable because they "required arbitration in foreign countries," Opp. 17, or because the courts "remanded for fact-finding," *id.* at 16. But neither of those factors is relevant to the threshold question of whether *Bremen* applies to an arbitration clause. Respondents never even address *Sam Reisfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679 (5th Cir. 1976), which was the first case that Petitioners cited on this topic in their petition, *see* Pet. 17, and which flatly rejected the "premise that the *Bremen* unreasonableness test is applicable to arbitration clauses," 530 F.2d at 680.

Respondents next contend that no circuit split exists because all of the circuits agree that courts can use generally applicable law to void an arbitration

clause. *See* Opp. 9-10. That entirely misses the point: the *Bremen* standard of mere unreasonableness is *not* a generally applicable contract defense; accordingly, it is not a proper ground upon which to void an arbitration clause. *See* 9 U.S.C. § 2; Pet. 19-23.

If Respondents and the Seventh Circuit were correct, courts would be obligated to void arbitration clauses on grounds that make no logical sense and would severely undercut the FAA. For example, the Seventh Circuit's test requires a court to void any arbitration clause that "deprive[s]" a party of "its day in court." Pet. App. 20a. This cannot be correct, as parties choose arbitration precisely to "avoid[] the courts." *Concepcion*, 131 S. Ct. at 1752. The *Bremen* test also voids any arbitration clause that "would contravene a strong public policy of the forum in which the suit is brought," Pet. App. 20a, which means state law policies could trump the FAA itself. Indeed, the *Bremen* test could strike any arbitration clause that is considered a "hard bargain." *Columbus Ry., Power & Light Co. v. City of Columbus*, 249 U.S. 399, 414 (1919). *None* of these are grounds for revocation of an entire contract, as § 2 requires. The Seventh Circuit's test significantly lowers the burden the FAA imposes to void an arbitration clause and defies this Court's precedent. *See* Pet. 24-25.[1]

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[1] Respondents also never address the significant practical reasons why arbitration clauses should be more difficult to void than forum-selection clauses. *See* Pet. 22-23.

The decision below squarely conflicts with the decisions of the First, Fourth, Fifth, and Eleventh Circuits on the fundamental issue of whether *Bremen*'s common-law reasonableness test applies to arbitration clauses.[2]

2. Respondents next argue that this case does not actually implicate the circuit split on *Bremen* because the Arbitration Clause here is fraudulent and unconscionable—and thus would fail FAA § 2 as well as *Bremen*. Opp. 2, 7-9, 14. This argument is meritless.

First, Respondents are simply wrong to claim that the Arbitration Clause is "fraudulent." Opp. 2, 8, 11-14. No court in this case has ever held that the Arbitration Clause was obtained by fraud, and the district court specifically rejected Respondents' argument that the

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[2] Respondents incorrectly claim that the Loan Agreement's general disclaimer of federal law in favor of CRST law precludes Petitioners from invoking the FAA. *See* Opp. 4. But it is well recognized that "a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules." *Action Indus., Inc. v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 342 (5th Cir. 2004); *see also Kemph v. Reddam*, No. 1:13-cv-6785, slip op. at 4-5 n.3 (N.D. Ill. Mar. 27, 2015) (rejecting Respondents' argument and applying FAA to similar arbitration clause). Parties may waive non-mandatory FAA rules only with "clear and unambiguous contractual language," such as when "a contract expressly references state arbitration law, or if its arbitration clause specifies with certain exactitude how the FAA rules are to be modified." *Action Indus.*, 358 F.3d at 341. The Arbitration Clause never rejects or specifies modifications to the FAA.

Arbitration Clause was the product of duress or undue influence. Pet. App. 55a-56a.

Second, the Seventh Circuit's finding of unconscionability cannot be credited, because it rested solely on an application of state law that FAA § 5 and *Concepcion* forbid. *See* Pet. 25-28. The Seventh Circuit held that the Arbitration Clause was unconscionable under Illinois law because the parties' selected arbitrator and rules were not available. Pet. App. 25a-26a. Section 5, however, mandates that when there is a "lapse" or "vacancy" for "any ... reason" in the "naming of an arbitrator," then the district court "shall" appoint a substitute arbitrator. 9 U.S.C. § 5. Rather than follow § 5, however, the Seventh Circuit voided the entire arbitration clause pursuant to Illinois law.

Respondents argue that § 5 does not apply where an arbitrator was never initially appointed, *see* Opp. 21-22, but dictionaries from the period when Congress passed the FAA in 1925 show that the ordinary meanings of the words "vacancy" or "lapse" for "any" reason certainly cover what happened here. For example, *Black's Law Dictionary* 1794 (3d ed. 1933), states that "vacancy" "applies not only to an interregnum in an existing office, but it aptly and fitly describes the condition of an office when it is first created, and has been filled by no incumbent." Similarly, *Webster's New International Dictionary of the English Language* 101, 1214, 2261 (1st ed. 1925), defines a "vacancy" as "an unoccupied office or position"; a "lapse" as the "termination or failure of a right or privilege ...

through *failure of some contingency*"; and "any" as "[o]ne indifferently out of a number." *Id.* (emphasis added).

Further, contrary to Respondents' assertion, it is irrelevant that the contractually-selected procedural rules for arbitration may be unavailable. Opp. 19-20. "Once it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute ... should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Such "procedural questions" certainly include the determination of which rules will apply to the arbitration. *Bell Atl.-Pa., Inc. v. Commc'ns Workers of Am., AFL-CIO, Local 13000*, 164 F.3d 197, 203 (3d Cir. 1999). In other words, once appointed, the substitute arbitrator would "determine his procedures if the parties cannot agree." *Chattanooga Mailers' Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975), *abrogated on other grounds as recognized by Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402 (6th Cir. 1988).

If the Seventh Circuit were correct that the unavailability of the selected arbitrator would void the entire Arbitration Clause, then § 5 would serve no purpose. To the contrary, Congress designed § 5 *specifically* for situations where the selected arbitrator is not available to hear the parties' dispute for "any ... reason." *See* 9 U.S.C. § 5.

The Seventh Circuit also overlooked that appointing substitutes would moot any claims that the *original* arbitral details were somehow unfair or illusory; the replacements mandated by § 5 will have completely superseded those original details. The arbitrator's unavailability for "any ... reason" is all that matters—the Seventh Circuit cannot circumvent § 5 merely by labeling the unavailability as "unconscionable" or "illusory" under state law. Pet. App. 20a-21a, 23a-26a.

By allowing Illinois law to trump § 5, the Seventh Circuit violated *Concepcion*'s core holding that the FAA preempts any "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1747-48; *see* Pet. 25-28. Respondents claim that *Concepcion* is not relevant here because the FAA preempts only those state laws that are "designed solely to attack arbitration contracts." Opp. 7. That is clearly incorrect, as the preempted state law in *Concepcion* itself did not specifically target arbitration clauses. 131 S. Ct. at 1747.[3]

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The Seventh Circuit offered two reasons for voiding the Arbitration Clause: the court deemed it

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[3] The denial of certiorari in *CashCall, Inc. v. Inetianbor*, No. 14-775, *cert. denied*, --- S. Ct. ---, 83 U.S.L.W. 3584 (U.S. Apr. 6, 2015), does not affect whether the Court should grant certiorari here. *Inetianbor* addressed whether there is an "integrality exception" to FAA § 5, while the case *sub judice* addresses the primacy of the FAA over contrary state law doctrines.

unreasonable under *Bremen* and unconscionable under state law. As discussed above, these reasons are not just wrong but actually created a circuit split, drastically lowered the threshold test for determining the validity of an arbitration clause, and violated the core holding of *Concepcion*. This Court should grant the petition for a writ of certiorari.[4]

II. The Court Should Clarify The Scope Of Tribal Jurisdiction Over Non-Tribal Members.

The Court should also grant the petition for a writ of certiorari to address the disagreement among the circuits as to the scope of the tribal exhaustion doctrine and whether this Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), modified the test for tribal jurisdiction in *Montana v. United States*, 450 U.S. 544 (1981).

1. Respondents' arguments against tribal exhaustion cite decisions addressing entirely different issues and do not respond to the significant federal caselaw that Petitioners cited. Opp. 23-25. The reality is that the bar for invoking tribal exhaustion is low, and Petitioners have met it here. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845,

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[4] Alternatively, the Court should hold this case in abeyance pending the outcome in *DIRECTV, Inc. v. Imburgia*, No. 14-462, *cert. granted*, 83 U.S.L.W. 3267 (U.S. Mar. 23, 2015), which raises similar issues of FAA preemption of state law.

856 (1985). It is undisputed that Respondents have not exhausted tribal remedies, and it is likewise undisputed that Petitioner Western Sky operated on the Reservation, that Petitioner Butch Webb is an enrolled tribal member and the sole owner of Western Sky, and that the CRST views Western Sky as the equivalent of a tribal member.[5] *See* Opp. 25.

Because this case arises out of consensual commercial relationships that nonmembers voluntarily entered with a tribal member doing business on the Reservation, the CRST has at least colorable jurisdiction over this dispute. *See Montana*, 450 U.S. at 565-66 (tribal jurisdiction exists over "nonmembers who enter consensual relationships with the tribe *or its members*" (emphasis added)). Accordingly, the Seventh Circuit should have ordered exhaustion.

2. By refusing to order tribal exhaustion and instead imposing a *per se* rule requiring a physical on-reservation presence by the nonmember, the Seventh Circuit parted ways with the Eighth Circuit's decision in *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877 (8th Cir. 2013), and the Second Circuit's decision in

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[5] The CRST Court of Appeals has held that a company owned by a tribal member is the equivalent of a tribal member under CRST law. *Cheyenne River Tele. Co. v. Pearman*, 89-006-A, at 3 (CRST Ct. of Appeals 1990) (noting that "key to the identity or character of [a] corporation is in its ownership"); *see also Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013); *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 404 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (S.D. 2004).

Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services, 769 F.3d 105 (2d Cir. 2014). *See* Pet. 34-35.

Respondents argue that the Seventh Circuit did not create a split in the circuits, Opp. 26-28, but their arguments rely on immaterial factual differences. Regardless of what type of suit is at issue or where the underlying conduct took place, the decision below is the first circuit opinion to impose a categorical rule prohibiting tribal jurisdiction over individuals who have not physically entered a reservation. This rule stifles on-reservation economic development by Indian tribes and their members, especially in today's modern, Internet-based economy. Tribal members operating businesses on reservations will often be forced to accept whatever laws and fora their nonmember business partners impose. In the event of a dispute, the tribal members will be unable to invoke their tribe's laws or utilize their tribe's courts, even where the opposing party expressly consented to tribal jurisdiction.

No reading of *Laducer* or *Otoe-Missouria* can support such a broad proposition. To the contrary, the Eighth Circuit in *Laducer* focused its inquiry on whether the underlying agreement "relate[d] to activities on tribal land," and ultimately noted that tribal court jurisdiction may be appropriate over a tort that "occurred off tribal lands." 725 F.3d at 884. Similarly, in *Otoe-Missouria*, the Second Circuit in no way tied tribal jurisdiction to physical entry on a reservation. 769 F.3d at 114-15. These cases differ

radically from the Seventh Circuit's absolutist rule, which is unique in American jurisprudence.[6]

Finally, by claiming that Petitioners did not satisfy *Plains Commerce Bank*, Opp. 25, Respondents merely beg the question. A key part of this dispute is whether *Plains Commerce* altered the *Montana* construct—a question on which the Seventh Circuit created another circuit split. *See* Pet. 32 n.9. By holding that *Plains Commerce* modified the test for tribal jurisdiction in *Montana*, the Seventh Circuit acknowledged that it was parting ways with the Fifth Circuit, which expressly *rejected* the argument "that *Plains Commerce* narrowed the *Montana* consensual relationship exception." *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 174 (5th Cir. 2014) (quotation marks omitted), *petition for cert. filed*, 83 U.S.L.W. 3006 (U.S. June 12, 2014) (No. 13-1496); *see* Pet. App. 36a-37a n.43. Under *Dolgencorp*, tribal jurisdiction does not require "a showing that the specific relationships implicate tribal governance and internal relations," 746 F.3d at 174 (quotation marks omitted); therefore, a consensual commercial relationship with a tribal member suffices to establish tribal court jurisdiction. That clearly conflicts with the

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[6] Respondents also ignore the most striking evidence of discord among the lower courts on tribal exhaustion: two federal courts granted tribal exhaustion in nearly identical cases. *See Brown v. W. Sky Fin., LLC*, --- F. Supp. 3d ---, No. 1:13-cv-255, 2015 WL 413774 (M.D.N.C. Jan. 30, 2015); *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170 (D.S.D. 2014).

Seventh Circuit's decision here. *See* Pet. App. 36a-37a n.43.

This Court should grant the petition for a writ of certiorari and resolve the circuit splits about the scope of tribal jurisdiction over nonmembers. These issues are important and pressing as Indians strive for economic independence through entrepreneurship.[7]

[7] If the Court grants the pending petition in *Dolgencorp*, Petitioners request that this case be held in abeyance and then remanded when this Court issues its opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KATYA JESTIN
NEIL M. BAROFSKY
BRIAN J. FISCHER
R. TRENT MCCOTTER
ESTEBAN M. MORIN
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022-3908
(212) 891-1600

BARRY LEVENSTAM
Counsel of Record
MICHAEL T. BRODY
DANIEL T. FENSKE
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654-3456
(312) 222-9350
blevenstam@jenner.com

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