No. 12-2717

In the United States Court of Appeals
for the Seventh Circuit

DEBORAH JACKSON, *et al.,*

Plaintiffs- Appellants,

v.

PAYDAY FINANCIAL, LLC, *et al.,*

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 1:11-cv-09288.
The Honorable **Charles P. Kocoras**, Judge Presiding.

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE,* DR. GAVIN CLARKSON, IN SUPPORT OF APPELLEES

Amicus Dr. Gavin Clarkson, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, respectfully moves for permission to file the attached brief *amicus curiae.* Dr. Clarkson, an Associate Professor of Finance in the College of Business at New Mexico State University, is a leading expert on tribal finance and economic development issues. Dr. Clarkson holds both a bachelor's degree and an MBA from Rice University, a doctorate from the Harvard Business School and a law degree from the Harvard Law School. Dr. Clarkson previously held faculty appointments at the University of Houston Law Center, the University of Michigan and Rice University. He was a contributing author for the 2005 edition of *Felix Cohen's Handbook of Federal Indian Law* on the topics of tribal finance, economic development,

and intellectual property. Dr. Clarkson is actively engaged in economic development in Indian Country as Managing Director of Native American Capital and as CEO of the Lower Brule Community Development Enterprise. He holds the Series 7, Series 24, and Series 66 Securities licenses from the Financial Industry Regulatory Authority. Dr. Clarkson has helped tribes raise more than $700 million for tribal governmental and entrepreneurial enterprises using a variety of financial mechanisms including taxable and tax-exempt bonds, bank credit facilities, and New Markets Tax Credits. Dr. Clarkson is an enrolled member of the Choctaw Nation of Oklahoma.

Tribal communities are often historically disadvantaged, geographically isolated, and struggling with long-standing cycles of poverty.[1] Just as with other emerging markets, the need for economic development on tribal lands remains acute and affects nearly every aspect of reservation life. Large portions of Indian Country lack basic infrastructure, posing a daunting barrier to tribal leaders' attempts to develop their economies. Such realities highlight the importance of stimulating economic development to create economic opportunity for tribal members.

The *Amicus* recognizes that access to capital for tribes and individual Indian entrepreneurs is a significant and pressing problem. Businesses and consumers entering into commercial contracts rely heavily on consistency and

[1] Entrepreneurial Sector Is the Key to Indian Country Development, INDIAN COUNTRY TODAY, Sept. 6, 2002, at A2, available at http://www.indiancountrytoday.com/archive/28216794.html.

predictability in contracting, including when the parties mutually agree to apply tribal law and/or utilize tribal based dispute resolution procedures. The uniform interpretation and enforcement of such agreements is critical to ensuring continued investment in tribal businesses. With over one quarter of American Indians living in poverty, nearly thirteen percent higher than the national average,[2] it has never been more important to promote confidence in the Native American economy—a confidence that is threatened when courts do not give full force and effect to contracting parties' desire to arbitrate their private disputes using tribal arbitration and court systems.

The *Amicus* respectfully moves this Court to accept the *Brief of the Amicus Curiae* filed concurrently. Counsel for Appellees has given oral consent to *Amicus* to file this Motion for Leave and brief. Although the brief is submitted outside of the time period prescribed by Rule 29, it is not so untimely as to present an inconvenience or delay on this proceeding because the Court has invited additional parties to submit *amicus* briefs on or by this date. The Court will permit an amicus brief filed outside of the prescribed period where it will "assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003).

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[2] *See* Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011, U.S. Census Bureau, http://www.census.gov/prod/2013pubs/acsbr11-17.pdf (last visited June 24, 2013).

The *Amicus* submits this brief to offer its insights into this important area of law and urge the Court to reject Appellants' arguments, thereby affirming the dismissal by the district court below.[3]

Dated: June 24, 2013

Respectfully Submitted,

/s/ T. Michael Guiffre
T. Michael Guiffre
Edward D. Gehres, III*
Andrew Zimmitti*
Lesley B. Sachs
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
202-457-6000
Counsel for Amicus Curiae

*Pending admission to the Seventh Circuit Court of Appeals.

[3] Pursuant to Rule 29(C)(5), no counsel for a party wrote this brief in whole or in part, and no counsel for a party or a party made monetary contribution intended to fund the preparation or submission of this brief. Think Finance, a corporation that partners with several Native American tribal governments, has an interest in preserving and promoting economic development in Indian Country and made a monetary contribution to fund this brief. Neither Think Finance, nor any of its tribal government partners, is affiliated with either party.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Michele Arington
FEDERAL TRADE COMMISSION
Office of the General Counsel
Room H-582
600 Pennsylvania Avenue N.W.
Washington, DC 20580-0000

Claudia Callaway
KATTEN MUCHIN ROSENMAN LLP
Suite 200
2900 K Street NW
Washington, DC 20007-5118

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
Thomas E. Soule
EDELMAN COMBS LATTURNER & GOODWIN
Suite 1800
120 S. LaSalle Street
Chicago, IL 60603-0000

Jane E. Notz
OFFICE OF THE ATTORNEY GENERAL
12th Floor
100 W. Randolph Street
State of Illinois Center
Chicago, IL 60601-3218

/s/T. Michael Guiffre
T. Michael Guiffre

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AMICUS CURIAE BRIEF OF GAVIN CLARKSON, Ph.D. IN SUPPORT OF DEFENDANT-APPELLEE

T. MICHAEL GUIFFRE
EDWARD D. GEHRES, III
ANDREW ZIMMITTI
LESLEY BOWLING SACHS
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

Attorney for Amicus Curiae
Gavin Clarkson, Ph.D.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2617

Short Caption: Deborah Jackson et. al. v. Payday Financial LLC et. al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Professor Gavin Clarkson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Patton Boggs LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: S/ T. Michael Guiffre Date: 6/24/13

Attorney's Printed Name: T. Michael Guiffre

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 2550 M Street, NW, Washington, DC 20037

Phone Number: 202-457-6441 Fax Number: 202-457-6315

E-Mail Address: mguiffre@pattonboggs.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

INTEREST OF AMICUS CURIAE

The *Amicus Curiae* files a Motion For Leave to File concurrently with this brief and has the oral consent of counsel for Appellees to file the Motion and brief.[1] The *Amicus* recognizes that access to capital for tribes and individual Indian entrepreneurs is a significant and pressing problem. Businesses and consumers entering into commercial contracts with Native Americans rely heavily on consistency and predictability in contracting, including when the parties mutually agree to apply tribal law and/or utilize tribal based dispute resolution procedures. The *Amicus's* urges the Court to give full force and effect to contracting parties' desire to arbitrate their private disputes using tribal arbitration and court systems and affirm the district court's dismissal.

ARGUMENT

The district court properly dismissed this case, validating and upholding the parties' choice of forum, in a mutually agreed-to contract to arbitrate and further resolve disputes before an arbitrator from the Cheyenne River Sioux Tribe ("Tribe").

Native American economic development – whether driven by tribally-owned businesses or those owned by individual tribal members located in

[1] Pursuant to Rule 29(C)(5), no counsel for a party wrote this brief in whole or in part, and no counsel for a party or a party made monetary contribution intended to fund the preparation or submission of this brief. Think Finance, a corporation that partners with several Native American tribal governments, has an interest in preserving and promoting economic development in Indian Country and made a monetary contribution to fund this brief. Neither Think Finance, nor any of its tribal government partners, is affiliated with either party.

tribal communities – depends upon fair treatment and interpretation of contracts between Native American entities and their partners and customers. Parties contracting with Native American businesses regularly agree to applicable law, specific venues, and arbitration to resolve contract disputes. There is no reason in law or policy to treat these contractual provisions with any less respect than courts throughout the country have accorded other contracts selecting unique bodies of law or specially designed dispute resolution procedures.

There is a strong federal policy favoring arbitration, rooted in the Federal Arbitration Act ("FAA"), which recognizes that arbitration agreements are to be construed by the parties' intentions upon entering into the contract. As with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability. *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth Inc.,* 473 U.S. 614, 626 (1985). Appellants urge this Court to disregard the parties' agreement to arbitrate their disputes arising under the applicable contracts, citing potential bias, discrimination, and the alleged incompetency of tribal dispute resolution venues. Appellants' argument, if given credence, would undermine years of federal arbitration policy and jurisprudence deferring to tribal venues under the tribal exhaustion doctrine.

The *Amicus* respectfully submits this brief urging the Court to uphold the district court decision dismissing the case.

I. Appellants' Urge this Court to Overturn Long-Establish Federal Precedent Favoring Arbitration

Instead of promoting uniformity and consistency, Appellants urge this Court to disregard decades of federal jurisprudence mandating the enforcement of arbitration agreements under the FAA. If Appellants succeed in subverting the parties' agreement to arbitrate their disputes, it will undermine every contract with a Native American individual, tribe, or business in which the parties have elected to resolve their disputes under tribal law, on tribal land, and/or by tribal arbitrators. Not only is Appellants' position at odds with the strong federal policy favoring arbitration under the FAA, it is also dangerous to Native American economies and businesses which, like any other domestic business, depends upon predictability and certainty of contractual dispute resolution.

a. The Federal Arbitration Act Mandates the Enforcement of the Parties' Arbitration Agreement

Under the FAA, "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable . . . ." *9 U.S.C. § 2*; *see, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-19, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001); *Jain v. DeMere,* 51 F.3d 686, 687 (7th Cir. 1985) (holding that federal courts had power to compel arbitration between two foreign nationals where their

arbitration agreement failed to specify a location for the arbitration or a method of choosing arbitrators).

As the Supreme Court has held, the FAA reflects both a "liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC, v. Concepcion,* 131 S.Ct. 1740, 1745, 179 L.Ed. 22d 742, 751 (2011) (internal citations omitted). The principal purpose of the FAA ensures private arbitration agreements are enforced according to their terms and expectations of the parties. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). Here, the loan agreement states that "[a]ny Dispute…will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and terms of this Agreement." *Appellant Brief* at 5. Appellants, by challenging the legality of the loan agreements, raise a dispute that is within the scope of the loan agreement's arbitration agreement.

When the parties submit to arbitration, and then dispute arbitrability or the enforceability of their arbitration agreement in federal court, the FAA governs the court's analysis. *See 9 U.S.C. § 4; Stolt-Neilsen v. AnimalFeeds Int'l. Corp.,* 559 U.S. 662, 130 S. Ct. 1758, 1773-74, (2010) (affirming that, while the interpretation of an arbitration agreement is generally a matter of state law, the FAA gives effect to the contractual rights and expectations of

the parties in constructing their arbitration agreement). The FAA applies to determine such threshold questions of arbitrability even where, as here, the parties have chosen a different set of laws to govern the interpretation and construction of the contract as a whole. *See Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994), *cert. dismissed*, 515 U.S. 1187, 116 S. Ct. 37, 132 L. Ed. 2d 917 (1995) (acknowledging that "[a]lthough the contract provides that Arizona law will govern the contract's construction, the scope of the arbitration clause is governed by federal law"); *see also Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130-31 (9th Cir.2000) (holding that the district court correctly found that the federal law of arbitrability under the FAA governs the allocation of authority between courts and arbitrators despite arbitration agreement's choice-of-law provision). Thus, the FAA mandates enforcement of the loan agreements; requiring the Court to hold the Appellants to the terms of their agreement to arbitrate.

b. Principles of Severability Require that Arbitrators, Not the Court, Decide the Legality of the Loan Agreements

Appellants argue they should not be required to arbitrate because the loan agreement, on the whole, is illegal, unconscionable or usurious under Illinois law. *Appellants' brief* at 14, 20-21. However, the Supreme Court explains that the arbitration provision is severable from the rest of the loan agreement, mandating arbitration, even if the underlying contract is later held invalid. In *Buckeye Check Cashing, Inc. v. Cardegna*, borrowers claimed

that a usurious interest provision in their loan agreement invalidated the entire contract, including the arbitration clause, and thereby precluded the Court from relying on the clause as evidence of the parties' consent to arbitrate matters within its scope. 546 U.S. 440, 449 (2006). The Supreme Court held that Section 2 of the FAA treats an arbitration clause as severable from the contract in which it appears and enforces it according to its terms. *Id.* at 444, 126 S.Ct. 1204; s*ee also Rent-A-Center, West, Inc. v. Jackson,* 130 S.Ct. 2772, 2778 (2010) (explaining that the arbitration provision is severable from the remainder of the contract). Thus, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye,* 546 U.S. at 444, 126 S.Ct. 1204; *see also Janiga v. Questar Capital Corp.*, 615 F.3d 735, 736 (7th Cir. 2010) (explaining that challenges to the legality of the contract are properly before the arbitrator, while disputes involving contract formation may be decided by the court). The Appellants' position that the district court should not have dismissed their complaint is contrary to the FAA as it impermissibly seeks a judicial determination on issues of contract legality which are properly decided by the arbitrators.

While District courts are empowered to decide discrete questions of arbitrability, *see Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), none of those issues are raised here. The parties do not dispute that the arbitration clause exists; nor do they

argue the dispute is outside of the scope of the arbitration clause. Indeed, the district court in the Southern District of Florida reviewed an arbitration agreement nearly identical to the one in the loan agreements here, holding that all issues of arbitrability were sufficiently resolved by the arbitration agreement. *Inetianbor v. Cashcall,* 2013 U.S. Dist. LEXIS 70450, *6, (S.D. Fla., May 17, 2013) ("The terms of the agreement are clear: all disputes between the borrower and the holder of the Note or holder's servicer must be resolved through arbitration. Plaintiff seeks damages from Cashcall, the servicer of the note, for actions related to Cashcall's servicing and collecting on the note. Therefore, Plaintiff's claims fall within the scope of the arbitration agreement.") Because there is neither a challenge to the arbitration clause itself, nor a dispute that the Appellants' claims fall outside the scope of their arbitration clause, the FAA requires that the parties' dispute be decided by the arbitrators. The District Court therefore correctly dismissed the Appellants' complaint due to improper venue.

c. Under the FAA, Courts Routinely Enforce Arbitration Agreements that Specify the Personal Characteristics of Arbitrators or Apply Specific Laws or Rules to the Dispute.

Appellants allege that arbitration is improper because aspects of the arbitration provisions are discriminatory and biased. Native Americans, they explain, are inherently biased in favor of fellow tribal members and tribal law degrades the rights of non-Indians. *Appellants' brief* at 21-23. Appellants claim that "[r]ejection of a clause mandating an arbitrator of a specific race is

particularly necessary here, where the ethnicity of the arbitrator will be shared by one party to the contract, and not shared by the opponent." *Id.* at 21. Appellants' arguments are not only contrary to the large substantive body of case law respecting the parties' decisions about *who* they wish to arbitrate their disputes, but are also offensive in portraying Native American tribal governments as incapable of the sound and fair administration of justice.

Courts systematically reject such "bias" arguments, holding that the FAA recognizes that contracting parties have broad latitude to choose the terms of their arbitration, including the composition of the arbitration panel. *S*ee *Omron Healthcare v. Maclaren Exports*, 28 F.3d 600, 604 (7th Cir.1994) (ruling a forum selection clause choosing the High Court of Justice in England is enforceable despite allegations of bias against the plaintiff). The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. *AT&T Mobility LLC, v. Concepcion,* 131 S. Ct. 1740, 1748 (2011) ("It can be specified for example, that the decision maker be a specialist in a relevant field, or that proceedings be kept confidential to protect trade secrets").

In selecting the arbitrator, the parties are free to identify the ethnicity of the arbitrators. *See Inetianbor* 2013 U.S. Dist. LEXIS 70450 at *11-12 (explaining that plaintiff failed to show any evidence of ethnic bias, the district court upheld arbitration agreement selecting arbitrators from the

Cheyenne River Sioux Tribe absent any proof of a relationship between the tribal arbitrator and the defendant). Contracting parties may also choose the nationality of their arbitrators. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 636-37 (1985) (finding no reason an arbitration clause requiring arbitration in Japan would not adequately resolve disputes that arose between a Japanese company and a Swiss company). Parties may even specify preferences for arbitrators by their religious affiliation. *See Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (looking to neutral principles of law and Federal Arbitration Act to enforce the agreement to arbitrate a division of assets before a Jewish arbitration panel and uphold panel's award.)

Likewise, courts routinely enforce arbitration agreements that specify arbitrators with a community or industry affiliation shared by one or more parties to the dispute. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (upholding an arbitration clause requiring arbitration under the rules of the New York Stock Exchange despite the Plaintiff's argument that the securities arbitration panel would be biased because the claim arose in the employment discrimination context); *Koeveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365-66 (7th Cir. 1998) (rejecting the Plaintiff's claim that an arbitration clause requiring securities industry arbitration would result in bias).

Broad policies favoring arbitration under the FAA similarly respect parties' choice of law governing contract disputes. Parties may decide that foreign law applies to the dispute. *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1269 (11th Cir. 2011) (concluding that a court should not nullify an arbitration agreement even when the agreement specifies that foreign law will apply and the foreign law might provide unfavorable remedies for one party given the "strong presumption" favoring enforcement of arbitration and choice of law clauses). Courts even uphold arbitration provisions applying religious law to contract disputes. *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp.2d 1101, 1106 (D. Colo. 1999) (upholding agreement to arbitrate in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, because the plaintiff was "bound by its contract"); *Prescott v. Northlake Christian Sch.*, 141 Fed. App. 263, 274 (5th Cir. 2005) ("The parties freely and knowingly contracted to have their relationship governed by specified provisions of the Bible and the arbitrator's determination that NCS had not acted according to the dictates of Matthew 18 relates to that contract.").

Here, the challenged arbitration agreements are no different from other agreements enforced by courts in which the parties agreed to select arbitrators of a particular nationality, ethnicity, or religion. Why, then, should the Appellants' arbitration agreements be treated any differently because they agreed to select their arbitrators from a particular Native

American tribe? They should not. As the courts have held time and again, parties have wide latitude in choosing where they arbitrate, under what laws and rules they wish to arbitrate, and who their arbitrators are, even if arbitrators are from a single ethnic, national, or religious group. *See Stolt-Nielsen*, 130 S. Ct. at 1774 (expressing that parties are "generally free to structure their arbitration agreements as they see fit").

II. The Appellants Attack The Integrity Of The Tribal Legal System With Discriminatory Arguments And Unsupported Accusations That Are At Odds With Federal Jurisprudence

Appellants claim that tribal law, and by extension tribal courts, will somehow degrade the rights of non-Indian plaintiffs. *Appellants' brief* at 25. This argument, if not explicitly contradicted by this Court, is toxic to Native American legal systems and shakes the confidence of investors, lenders, and consumers doing business in Indian Country. Not only is Appellants' position harmful to businesses and individuals who enter into contracts governed by tribal law, it is flatly contradicted by federal policy supporting tribal justice systems. Congress acknowledges that protecting and promoting strong criminal and civil justice systems are part of the federal responsibility to tribes. 25 U.S.C. 3601(2) & (5) ("[T]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government" and "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal

governments"). Tribal courts play a "vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

A. The Tribal Exhaustion Doctrine Requires Appellants to Exhaust Remedies at the Tribal Court Before Appealing to Federal Court

Although the district court held that the proper forum for the dispute is in the Cheyenne River Sioux Tribal Court, Appellants attempt to evade the jurisdiction of tribal court, seeking to litigate in federal court. Unconditional access to federal courts impairs tribal court authority to resolve affairs related to tribes and their citizens and "infringe[s] upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual Ins.*, 480 U.S. at 16; *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61, 66 (2d Cir. 1997) ("as long as a tribal forum is arguably in existence, as a general matter, we are bound by *National Farmers* to defer to it").

Under this body of Federal Indian law, known as the tribal exhaustion doctrine, federal courts must stay a case until a plaintiff has exhausted all available tribal remedies. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Appellants' argue that the tribal exhaustion doctrine is not implicated because the tribe has no jurisdiction in this matter, despite the loan agreement's explicit submission to the jurisdiction of the Cheyenne River Sioux Tribal Court. *Appellants' Reply Brief* at 10.

Appellants miss the point. The tribal court must have "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. *Id.* at 856. The orderly administration of justice in the federal court will 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; Basil Cook Enterprises, Inc.,* 117 F.3d at 65 (2d Cir. 1997). The Supreme Court explained the tribal exhaustion doctrine as follows:

> "Requiring that litigants present their jurisdictional arguments to tribal courts in the first instance promotes tribal autonomy and dignity and encourages administrative efficiency by permitting the tribal courts to develop a full record prior to potential federal court involvement. The exhaustion requirement also bolsters the legitimacy of tribal courts, encourages them to articulate fully the claims of jurisdiction, and enables later reviewing courts to take advantage of their expertise." *National Farmers Union*, 471 U.S at 845.

This rule furthers Congress's policy of "supporting tribal self-government and self-determination." *Id.*

B. This Court Should Explicitly Reject Appellant's Racially Discriminatory Arguments

Appellants indulge in racial discrimination at the expense of the tribal court; claiming tribal courts are incapable of being neutral, competent, and unbiased finders of fact when the dispute involves a Native American party. *Appellants' Brief* at 21. Litigants cannot blindly allege tribal court bias or court incompetency to avoid tribal court jurisdiction. *Iowa Mutual*, 480 U.S. at 18-19 ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers*

Union"); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1994) ("Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial").

Appellants' arguments are out of place in contemporary jurisprudence—undignified and demeaning to this Court and the entire tribal court institution. Unsupported averments that "non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) ("A tribal court, presumably, is as competent to interpret federal law as it is state law."). The requirements for a bias exception are rigorous: absent tangible evidence of bias a party cannot skirt the tribal exhaustion doctrine "by invoking unfounded stereotypes." *Ninigret,* 207 F.3d at 30. Appellants have not offered any evidence of bias sufficient to overcome tribal law precedent and the strong policy favoring tribal exhaustion to decide matters of tribal court jurisdiction. The case is appropriately dismissed following the tribal exhaustion doctrine.

CONCLUSION

Appellants attempt an end-run around broad and well-settled principles of law and policy, arguing little more than bias and disparaging tribal venues

for dispute resolution in general. Long-standing precedent mandating the enforcement of private arbitration agreements under the FAA counsels that this Court affirm the finding of the court below and respect the parties' contractual agreement to arbitrate and resolve disputes in a tribal venue and applying tribal law. Further, bowing to Appellants' cries of bias undermines Native American economic development and the universal validation of the sovereign jurisdiction and authority of tribal venues by the federal courts. Judging the selection of tribal venues and laws to be something less, or inherently different, than the myriad of other unique venues and sources of law upheld by courts throughout the country will cause wide-reaching harm to tribal governments and economic development in Indian Country. The *Amicus* urges this Court to reject Appellants' arguments and affirm the district court's dismissal below.

Dated: June 24, 2013

Respectfully Submitted,

/s/T. Michael Guiffre
T. Michael Guiffre
Edward D. Gehres, III*
Andrew Zimmitti*
Lesley B. Sachs
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
202-457-6000

Counsel for Amicus Curiae

*Pending admission to the Seventh Circuit Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2013, I electronically filed the *Amicus Curiae* Brief of Gavin Clarkson, Ph.D. in Support of Defendant-Appellee foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Michele Arington
FEDERAL TRADE COMMISSION
Office of the General Counsel
Room H-582
600 Pennsylvania Avenue N.W.
Washington, DC 20580-0000

Claudia Callaway
KATTEN MUCHIN ROSENMAN LLP
Suite 200
2900 K Street NW
Washington, DC 20007-5118

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
Thomas E. Soule
EDELMAN COMBS LATTURNER & GOODWIN
Suite 1800
120 S. LaSalle Street
Chicago, IL 60603-0000

Jane E. Notz
OFFICE OF THE ATTORNEY GENERAL
12th Floor
100 W. Randolph Street
State of Illinois Center
Chicago, IL 60601-3218

/s/T. Michael Guiffre
T. Michael Guiffre