No. 12-2617

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEBORAH JACKSON, ET AL.,	)	Appeal from the United States District Court for the Northern
Plaintiff-Appellants,	)	District of Illinois, Eastern
v.	)	Division.
PAYDAY FINANCIAL, LLC, ET AL.,	)	Case No. 1:11-cv-09288
Defendant-Appellees.	)	Charles P. Kocoras, Judge

MOTION OF PROFESSOR GAVIN CLARKSON AND OTHER INDIAN LAW PROFESSORS FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF *INSTANTER*

Dr. Gavin Clarkson, along with several other prominent Indian Law professors from around the country, respectfully requests leave of this Court to file an *amici curiae* brief *instanter*. The *amici* brief would support Defendant-Appellees motion for rehearing *en banc*, but would assert grounds not fully developed by any party. In support of this Motion, *amici* state:

1. Dr. Gavin Clarkson is one of the nation's leading scholars on tribal finance and economic development and is joined by several noted Federal Indian Law professors from around the nation.

2. *Amici's* interest in this case arises because of a shared desire for tribal economies to be self-sustaining. Many of the *amici* are themselves tribal members, and all of the *amici* recognize the challenges that poor, rural tribal communities have in terms of generating economic activity. The impairment of

reservation based electronic commerce threatens to perpetuate an appalling level of grinding poverty throughout Indian Country.

4. *Amici's* brief is appropriate in this case for two principal reasons. First, the *amici* have first-hand experience with the challenges tribal entrepreneurs already face and can assist the court in understanding the deleterious impact of the Panel's decision (the "Decision") on tribal electronic commerce outside the lending industry.

5. Second, a*mici* can highlight for the court several federal policies as well as international law requirements not identified by the parties that may be instructive for this Court.

6. *Amici* will argue that the Decision, particularly the Panel's new requirement that a non-Indian must enter the reservation in order for a tribal court to have jurisdiction or for tribal law to apply, will decimate opportunities for tribal electronic commerce. Amici also argue that the Decision will contravene well established Congressional policy and Supreme Court jurisprudence supporting tribal economic development, as well as international law requirements prohibiting discrimination against indigenous peoples.

WHEREFORE, Professor Gavin Clarkson and the other Federal Indian Law professors respectfully request leave to participate in this appeal as *amici curiae* and file *instanter* the accompanying brief.

Respectfully submitted,

/s/ *Gavin Clarkson*

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September 8, 2014

No. 12-2617

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEBORAH JACKSON, ET AL.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiff-Appellants,	)	
v.	)	
PAYDAY FINANCIAL, LLC, ET AL.,	)	Case No. 1:11-cv-09288
Defendant-Appellees.	)	Charles P. Kocoras, Judge

BRIEF OF AMICI CURIAE IN SUPPORT OF REHEARING *EN BANC*

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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.**

[X] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(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):

I am only representing myself and not New Mexico State University. Similarly, each law professor that has signed on to this amicus brief does so in their individual capacity and not as representatives of their respective universities

(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:

N/A

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

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

NA

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

NA

Attorney's Signature: /s/ Gavin Clarkson Date: September 5, 2014

Attorney's Printed Name: Gavin Clarkson

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

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INTEREST OF AMICI CURIAE

Amicus Dr. Gavin Clarkson, joined by several other law professors with expertise in Federal Indian Law, respectfully ask as *amici curiae* for either the Panel to withdraw its decision (the "Decision") and affirm the judgment of the district court dismissing this case, or for the full Court to grant rehearing *en banc* in this matter. Dr. Clarkson, an Associate Professor of Finance in the College of Business at New Mexico State University, is a nationally recognized expert on tribal finance and economic development and has published extensively on matters of tribal sovereignty and jurisdiction, as have the other *amici*. 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 American Indian Capital and as interim director of the Indian Resource Development Program at New Mexico State University. He holds the Series 7, Series 24, and Series 66 Securities licenses from the Financial Industry Regulatory Authority (FINRA). He 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. 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. Nowhere is this need more critical than on the Cheyenne River Indian Reservation, where the unemployment rate is 88%, and 100% of those who are employed are still below the poverty level.[1]

Amici's interest in this case arises because of a shared desire for tribal economies to be self-sustaining. Many of the *amici* are themselves tribal members, and all of the *amici* recognize the challenges that poor, rural tribal communities have in terms of generating economic activity. *Amici* recognize 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 predictability in contracting, including when the parties mutually agree to apply tribal law or utilize tribal courts to resolve disputes. Uniform interpretation and enforcement

[1] *See* Bureau of Indian Affairs, *2005 American Indian Population and Labor Force Report*, *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf

of such agreements are critical to ensuring continued investment in tribal businesses. With over one quarter of American Indians living in poverty, nearly twice the national average,[2] it has never been more important to promote confidence in the American Indian economy—this confidence is threatened when courts do not give full force and effect to contracting parties' desire to resolve their private disputes using tribal courts and tribal law.

ISSUES PRESENTED FOR REVIEW

The Decision will have disastrous consequences for Indian Country businesses and their ability to engage in off-reservation electronic commerce, whether the business is tribally owned or owned by an individual tribal member, in contravention of well-established Congressional policy and Supreme Court jurisprudence supporting tribal economic development.

SUMMARY OF ARGUMENT

Amici argue that the Panel's decision, particularly the Panel's new requirement that a non-Indian must enter the reservation in order for a tribal court to have jurisdiction or for tribal law to apply, will decimate opportunities for tribal electronic commerce. *Amici* also argue that the Decision will contravene well established Congressional policy and Supreme Court jurisprudence supporting tribal economic development, as well as international law requirements prohibiting discrimination against indigenous peoples.

[2] *See* U.S. Census Bureau, *Poverty Rates: 2007–2011*, *available at* http://www.census.gov/prod/2013pubs/acsbr11-17.pdf

ARGUMENT

The ability of tribes and tribal members to engage in electronic commerce on equal footing with their off-reservation counterparts is critical to tribal economic development in the modern era. *Amici* are gravely concerned that the Decision fundamentally mischaracterizes the scope of tribal court jurisdiction over non-member activity and therefore requests either (1) that this Panel withdraw its decision and affirm the judgment of the district court, or (2) that the Court review this matter *en banc*.

American Indian economic development – whether driven by tribally-owned businesses or those owned by individual tribal members located in tribal communities – depends upon fair treatment and interpretation of contracts between American Indian entities and their partners and customers. Parties contracting with American Indian 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.

The Decision's wholesale rejection of tribal court jurisdiction over non-Indians is based on flawed reading of both *Montana v. United States*, 450 U.S. 544 (1981) and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). Nowhere in *Montana* does the Court limit the consensual relations exception to conduct occurring on tribal lands or require that the

non-Indian physically enter the reservation. In *Plains Commerce Bank*, the Court limited its holding to whether the tribal court could assert jurisdiction over the sale of non-member fee land within reservation boundaries. 554 U.S. at 320. The Court reasoned that the sale of land and conduct "are two very different things," and while it held that first exception inapplicable to the sale of fee land, it did not otherwise alter *Montana's* consensual relations exception. *Id.* at 340. Thus *Montana's* consensual relations exception is still valid and should be dispositive as to tribal court jurisdiction in this case. Both the Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 176 n.7 (5th Cir. 2014) and Eight Circuit in *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877, 844 (8th Cir. 2013), explicitly reject the notion that physical entry onto the reservation by the non-Indian is required. Such a requirement seems arcane and anachronistic in light of the state of electronic commerce in the 21st century. It would be wrong for this Court to impose such a discriminatory requirement, particularly on remote tribal communities mired in horrendous levels of grinding poverty.

The following example illustrates the disastrous consequences of the Decision. Dr. Clarkson is currently working with the Native American Business Students Association at New Mexico State University to develop an online marketplace to connect American Indian artisans with potential off-reservation purchasers. Many of these artisans have little or no experience with e-commerce, and almost all of them are below the poverty level. If an American Indian artisan is asked through the exchange to produce a piece of jewelry by a

potential non-Indian from Illinois, it is perfectly reasonable for the parties to incorporate into their contract that disputes will be settled in tribal court and under tribal law. Under the new rule imposed by the Decision, however, such forum selection and choice of law provisions would be inapplicable if the non-Indian purchaser does not travel nearly 1,500 miles to physically enter the reservation. Instead, in order to pursue a legal remedy, this Panel expects the artisan to travel that same distance, at his own expense, or hire an attorney in a jurisdiction that he has never visited, simply because he is an Indian living on a reservation. No other business in the United States is subject to such an arcane requirement in selecting its preferred forum and choice of law. It is improper and discriminatory for this Court to impose such a restriction on a tribal artisan, or any reservation-based business.

If this Decision stands, on-reservation businesses will be at a significant disadvantage whenever they attempt to engage in electronic commerce off-reservation. For that reason alone, the Panel should withdraw its opinion and affirm the judgment of the district court dismissing this case, or in the alternative, the full Court should grant rehearing *en banc* in this matter.

Furthermore, well-established Congressional policy[3] and Supreme Court jurisprudence[4] shows strong support for tribal economic development, which the Decision would substantially impair. In the arena of electronic commerce,

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[3] *See* e.g. *Felix Cohen's Handbook of Federal Indian Law* (Nell Jessup Newton ed., 2012), § 21.04 Government Programs to Promote Development (listing numerous federal programs promoting tribal economic self-sufficiency)

[4] *See e.g. Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024 2043 (2014) (Sotomayor, J. concurring) (""A key goal of the Federal Government is to render Tribes more self-sufficient … rather than relying on federal funding")

the Decision would thwart federal efforts already underway as part of the National Broadband Plan, such as Fast-Forward New Mexico, which helps Navajo and Pueblo Indians develop electronic commerce capabilities.[5]

Finally, the United States has endorsed the United Nations Declaration on the Rights of Indigenous Peoples. Article 9 of the Declaration states that

> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.[6]

The Decision clearly discriminates against tribal courts and tribal entrepreneurs that select tribal courts and tribal law in their electronic commerce endeavors off-reservation. Thus, as a matter of public policy, the Panel should withdraw its opinion and affirm the judgment of the district court dismissing this case, or in the alternative, the full Court should grant rehearing *en banc* in this matter.

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 counsels that this Court affirm the finding of the court below and respect the parties' contractual agreement to resolve disputes in a tribal venue and apply tribal law. Further, bowing to Appellants' cries of bias undermines American Indian economic

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[5] *See* Federal Communications Commission, National Broadband Plan, p. 170 (March 17, 2010) *available at* http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf

[6] Declaration on the Rights of Indigenous Peoples, Article 9 (2008), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

development, particularly in terms of electronic commerce. Judging 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, individual Indian entrepreneurs, and economic development in Indian Country. *Amici* urge either that the Panel withdraw the Decision and affirm the judgment of the district court dismissing this case, or that the full Court grant rehearing *en banc* in this matter.

Respectfully submitted,

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September 8, 2014

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the limitation on length in Fed. R. App. P. 29(d) because this brief contains less than seven and a half pages, and is no more than one-half the maximum length authorized by the rules for the petition in support of rehearing.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Bookman Old Style, Font Size 12.

Dated: September 8, 2014

/s/ *Gavin Clarkson*
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CERTIFICATE OF SERVICE

I, Gavin Clarkson, certify that on September 8, 2014, I submitted the foregoing Brief of *Amici Curiae* in Support of Rehearing *En Banc* and accompanying Motion for Leave To File an *Amici Curiae* Brief to the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by electronic mail sent to <USCA7_Clerk@ca7.uscourts.gov>. I also certify that I will cause two copies of the above-referenced brief and motion to be served upon the parties listed below via FedEx overnight delivery.

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