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

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

The United States District Court for the Northern District of Illinois held that, under the arbitration clause at issue, "the promise of a meaningful and fairly conducted arbitration is a sham and an illusion." (Pet. App. at 49a. See *Jackson v. Payday Financial LLC*, Appeal No. 12-2617 (7th Cir.), Doc. 62-2 at 10-19 (proposed findings of fact), and *id.* at 228-233 (District Court order).) The United States Court of Appeals for the Seventh Circuit agreed, holding the "very atypical" arbitration clause to be procedurally and substantially unconscionable, under laws not designed to attack arbitration, but under laws that apply to all contracts. *Jackson v. Payday Financial LLC*, 764 F.3d 765, 773-781 (7th Cir. 2014). (Pet. App. at 15a-32a.)

The Seventh Circuit's holdings conform to those made in *Inetianbor v. CashCall Inc.*, 962 F.Supp.2d 1303 (S.D.Fla. 2013), *aff'd*, 768 F.3d 1346 (11th Cir. 2014), *cert. pet. pending*, No. 14-775 (filed Dec. 31, 2014). These holdings are also in line with the conclusions of the Federal Trade Commission and the Attorney General of Illinois, both of whom were invited by the Seventh Circuit to serve as *amici curiae*, and also regulators in sixteen other states.

Contrary to petitioners' claims, no conflict exists between the Seventh Circuit and the decisions of this Court or other Circuits, either on arbitration or tribal court exhaustion. Neither the questions petitioners attempt to raise, nor anything else worthy of review,

are presented by this case. Therefore, a writ of certiorari should not be issued.

REASONS FOR DENYING PETITION

I. ARBITRATION

A. *M/S Bremen* and *Concepcion* are materially similar

Petitioners' chief complaint about the Seventh Circuit's ruling on the arbitration clause is that it supposedly created a new standard, by holding that arbitration clauses cannot be "unreasonable under the circumstances." *Jackson*, 764 F.3d at 776 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). (Pet. App. at 19a; see Pet. at 4, 14 and 16.) This issue truly does not exist.

The Seventh Circuit did not hold that the arbitration clause was "merely" unreasonable. (See Pet. at 4, 14 and 16.) It went farther, holding that the arbitration clause was profoundly fraudulent and unconscionable, and entitled to no protection from the Federal Arbitration Act (9 U.S.C. §1 *et seq.*), or any public policy favoring arbitration:

> the arbitration clause is both procedurally and substantively unconscionable under Illinois law. It is procedurally unconscionable because [respondents] could not have ascertained or understood the arbitration procedure to which they were agreeing because it did not exist. It is substantively

> unconscionable because it allowed the Loan Entities [controlled by petitioner Martin Webb] to manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules. It is clearly "unreasonable" under the standard articulated in *M/S Bremen*. Under such circumstances, the FAA does not preempt state law, nor does it operate to permit the creation, from scratch, of an alternate arbitral mechanism.

Jackson, 764 F.3d at 781. (Pet. App. at 31a-32a.) See *Inetianbor*, 768 F.3d at 1354-1357 (Restani, J., concurring).

In fact, petitioners are entitled to no protection from the FAA at all. The contract they rely on was designed to evade state interest rate and licensing requirements – like those set by the Illinois Interest Act (815 Ill. Comp. Stat. 205/0.01 *et seq.*) and the Illinois Consumer Installment Loan Act (205 Ill. Comp. Stat. 670/1 *et seq.*).[1] As part of their scheme,

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[1] Respondents allege that, because petitioners were not licensed by the State of Illinois to make loans, and thus were barred by state law from charging more than nine percent in annual interest on any loan, their loans – which imposed interest well beyond the statutory limit – violated the Illinois Interest Act, and also the Illinois Consumer Fraud and Deceptive Business Practices Act (815 Ill. Comp. Stat. 505/1 *et seq.*). On remand from the Seventh Circuit, the District Court held that petitioners stated claims on which relief could be granted. *Jackson v. Payday Financial LLC*, No. 1:11CV9288, ___ F.Supp.3d ___, 2015 WL 448528 (N.D.Ill. Feb. 3, 2015).

petitioners wrote form loan contracts which rejected the application of any state or federal laws. See *Jackson*, 764 F.3d at 769 n.1 ("no . . . state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation"). (Pet. App. at 3a.) No exception was made, however, for the Federal Arbitration Act, or for any state law governing arbitrations. Petitioners do not explain how they can disclaim all federal laws in their form contracts, and then invoke the FAA anyway.

The Seventh Circuit held that the arbitration clause (as "a type of forum selection clause") was unreasonable, and unenforceable under *M/S Bremen*. *Jackson*, 764 F.3d at 773-779. (Pet. App. at 13a-26a.) It also held that the arbitration clause (with a heightened standard of review, and a preference for enforcing arbitration agreements) was invalid because, in accord with 9 U.S.C. §2, there were grounds "at law or in equity for the revocation of any contract." *Jackson*, 764 F.3d at 779-781. (Pet. App. at 27a-32a.)

The Seventh Circuit relied on *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159-160 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994) – which cited *M/S Bremen*, 407 U.S. at 10-18 – and held that forum selection clauses are "unreasonable" if

> their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power . . . [or] the selected forum is so gravely difficult and inconvenient that the complaining party will

> for all practical purposes be deprived of its day in court . . . [or] enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.

Jackson, 764 F.3d at 776 (punctuation revised). (Pet. App. at 19a-20a.)

Jackson then turned to *Phoenix Insurance Co. v. Rosen*, 242 Ill.2d 48, 949 N.E.2d 639 (Ill. 2011), *Razor v. Hyundai Motor America*, 222 Ill.2d 75, 854 N.E.2d 607 (Ill. 2006) and *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1, 857 N.E.2d 250 (Ill. 2006) to determine what would make a contract unconscionable. *Jackson*, 764 F.3d at 777-778. (Pet. App. at 23a-26a.) Under Illinois law, a contract is procedurally unconscionable "if a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it . . . [if there was] a lack of bargaining power . . . [if] each party had [no] opportunity to understand the terms of the contract, [or if] important terms were hidden in a maze of fine print . . . [in light of] all of the circumstances surrounding the formation of the contract." *Id.* (citing *Razor*, 854 N.E.2d at 622, and *Phoenix Insurance*, 949 N.E.2d at 647). (Pet. App. at 23a-24a.) Substantive unconscionability exists when there are "contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Id.* (citing *Kinkel*, 857

N.E.2d at 267).[2] These provisions of Illinois law do not apply only to arbitration agreements. They govern all contracts.[3]

When it relied on these cases, the Seventh Circuit did precisely what it should have. Even if the FAA applies, *Rent-a-Center West Inc. v. Jackson*, 561 U.S. 63, 67 (2010) held that the FAA "reflects the fundamental principle that arbitration is a matter of contract." *Accord*, *Jackson*, 764 F.3d at 773. (Pet. App. at 15a.) Under *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), the FAA "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' [9 U.S.C. §2.] This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses,

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[2] The Seventh Circuit held that the same result would be reached if tribal law were used, instead of Illinois law. See *Jackson*, 764 F.3d at 779 n.37. (Pet. App. at 26a.)

[3] As to the question of unconscionability, *Razor* did not deal with arbitration provisions, while *Phoenix Insurance* and *Kinkel* did. However, both *Phoenix Insurance* and *Kinkel* ultimately relied on cases which did not consider whether an arbitration clause was unconscionable – including *Frank's Maintenance & Engineering Inc. v. C.A. Roberts Co.*, 86 Ill.App.3d 980, 989-992; 408 N.E.2d 403, 410-411 (Ill. App. Ct. 1980) on procedural unconscionability, and *Maxwell v. Fidelity Financial Services Inc.*, 907 P.2d 51, 58 (Ariz. 1995) on substantive unconscionability. See *Phoenix Insurance*, 949 N.E.2d at 647-648. Thus, these holdings of the Illinois Supreme Court, on which the Seventh Circuit relied, state Illinois's generally applicable contract law on unconscionability.

such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates Inc. v. Casarotto*, [517 U.S. 681, 687 (1996)]." *Accord*, *Jackson*, 764 F.3d at 779. (Pet. App. at 27a.) State common law principles are preempted by the FAA only if they are designed solely to attack arbitration contracts. If they are not targeted against arbitration, they may be applied, and may void an arbitration clause, despite any preference for arbitration. *Marmet Health Care Center Inc. v. Brown*, 132 S.Ct. 1201, 1204 (2012). Petitioners' claim that *Jackson* "would actually permit state law to trump the FAA" is overwrought. (Pet. at 25.) There is a place for state law in interpreting arbitration clauses and deciding whether to enforce them; *Jackson* did not err by using Illinois law.

Beyond that, petitioners never show how the "unreasonableness" standard of *M/S Bremen* is materially different from using "generally applicable contract defenses," as authorized by 9 U.S.C. §2 and *Concepcion*. Under Illinois law, any contract may be held void if it is fraudulent, is unconscionable, is illegal, is manifestly injurious to the public welfare, or violates a strong Illinois public policy – *i.e.*, Illinois's Constitution, statutes, and case law. See, *e.g.*, *Phoenix Insurance*, *Razor* and *Kinkel*, *supra*; *First Mortgage Co. LLC v. Dina*, 2014 IL App (2d) 130567, ¶¶18-21; 11 N.E.3d 343, 347-348 (Ill. App. Ct. 2014), *pet. denied*, 20 N.E.3d 1253 (Ill. 2014);

In re Estate of Feinberg, 235 Ill.2d 256, 265-266; 919 N.E.2d 888, 894-895 (Ill. 2009), *cert. denied*, 560 U.S. 939 (2010); *Chatham Foot Specialists PC v. Health Care Service Corp.*, 216 Ill.2d 366, 380-382, 837 N.E.2d 48, 57 (Ill. 2005); *First National Bank of Springfield v. Malpractice Research Inc.*, 179 Ill.2d 353, 358-359; 688 N.E.2d 1179, 1182 (Ill. 1997); *Kedzie & 103rd Currency Exchange Inc. v. Hodge*, 156 Ill.2d 112, 117-122; 619 N.E.2d 732, 736-738 (Ill. 1993) and *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244, 251-252; 98 N.E. 541, 544 (Ill. 1912).

Petitioners concede that "the defenses of fraud and coercion are universally recognized as sufficient to void an arbitration clause." (Pet. at 20.) This is more than enough to sustain the rulings below, for the arbitration clause was fraudulent. Yet as just shown, those are not the only contract defenses that apply here. If a contract is void for any reason recited above, it is likely to be "unreasonable," and *vice versa*. Based on the record, it makes no difference whether *M/S Bremen* and *Bonny* apply, or give way to *Concepcion* or similar cases. If *M/S Bremen* applies, petitioners' arbitration clause is unreasonable, and unenforceable. If *Concepcion* applies, the generally applicable contract law of Illinois does as well; under it, arbitration cannot be compelled, as the arbitration clause is fraudulent, unconscionable, illegal and contrary to public policy. Either way, the arbitration

provision falls. See *Jackson*, 764 F.3d at 775 n.23. (Pet. App. at 17a-19a.)

B. The Circuits uniformly permit generally applicable contract law to be applied to arbitration clauses

There is no split between *Jackson* and the other Circuits on the point that generally applicable contract defenses found in state law, which are not specifically designed to frustrate agreements to arbitrate, can apply to arbitration clauses. *Bezio v. Draeger*, 737 F.3d 819, 825 (1st Cir. 2013); *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 121 (2d Cir. 2010); *Quilloin v. Tenet Health System Philadelphia Inc.*, 673 F.3d 221, 228-229 (3d Cir. 2012); *Noohi v. Toll Brothers Inc.*, 708 F.3d 599, 606 (4th Cir. 2013); *Carey v. 24 Hour Fitness USA Inc.*, 669 F.3d 202, 205-209 (5th Cir. 2012); *Hergenreder v. Bickford Senior Living Group LLC*, 656 F.3d 411, 416-417 (6th Cir. 2011); *Donaldson Co. Inc. v. Burroughs Diesel Inc.*, 581 F.3d 726, 732 (8th Cir. 2009); *Smith v. Jem Group Inc.*, 737 F.3d 636, 641-642 (9th Cir. 2013); *Walker v. BuildDirect.com Technologies Inc.*, 733 F.3d 1001, 1004-1005 (10th Cir. 2014); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1231-1232 (11th Cir. 2012); and *Promega Corp. v. Life Technologies Corp.*, 674 F.3d 1352, 1355-1356 (Fed. Cir. 2012). See *Fox v. Computer World Services Corp.*, 920 F.Supp.2d 90, 97 (D.D.C. 2013) (citing *Rent-a-Center, Doctor's*

Associates, and *Urban Investments Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983)).[4]

Some of these cases rejected arbitration clauses. Others did not. Whether a state law contract defense defeats an arbitration clause depends on the facts. What each case demonstrates, however, is that the common law that applies to all contracts, and is not targeted at arbitration agreements, may be used in cases like this one to invalidate arbitration clauses. This is settled law.

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[4] State courts, in Illinois and elsewhere, also follow this rule. *Carter v. SSC Odin Operating Co. LLC*, 2012 IL 113204, ¶¶58-60; 976 N.E.2d 344, 360-361 (Ill. 2012), *cert. denied*, 133 S.Ct. 1998 (2013). See, *e.g.*, *Sonic-Calabasas A Inc. v. Moreno*, 132 S.Ct. 496 (2011) (vacating and remanding for reconsideration in light of *Concepcion*); 311 P.3d 184, 196-208 (Cal. 2013) (on remand); 134 S.Ct. 2724 (2014) (denying certiorari); *Baker v. Bristol Care Inc.*, 450 S.W.3d 770, 778-779 (Mo. 2014); *Atalese v. U.S. Legal Services Group LP*, 99 A.3d 306, 312 (N.J. 2014), *cert. pet. pending*, No. 14-882 (filed January 21, 2015); *Basulto v. Hialeah Automotive LLC*, 141 So.3d 1145, 1156-1161 (Fla. 2014); *Siopes v. Kaiser Foundation Health Plan Inc.*, 312 P.3d 869, 890-891 (Haw. 2013); *JPMorgan Chase Bank NA v. Bluegrass Powerboats*, 424 S.W.3d 902, 907 (Ky. 2014); *Kelker v. Geneva-Roth Ventures Inc.*, 303 P.3d 777, 780 (Mont. 2013); *Dinsmore v. Piper Jaffray Inc.*, 593 N.W.2d 41, 44 (S.D. 1999); *Venture Cotton Cooperative v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014); *Brown v. MHN Government Services Inc.*, 306 P.3d 948, 952-953 (Wash. 2013); and *Wisconsin Auto Title Loans Inc. v. Jones*, 714 N.W.2d 155, 176-177 (Wis. 2006).

C. The arbitration clause is fraudulent and unconscionable

The Seventh Circuit held that the arbitration clause petitioners try to defend

> is void not simply because of a strong possibility of arbitrator bias, but because it provides that a decision is to be made under a process that is a sham from stem to stern. Although the contract language contemplates a process conducted under the watchful eye of a legitimate governing tribal body, a proceeding subject to such oversight simply is not a possibility. The arbitrator is chosen in a manner to ensure partiality, but, beyond this infirmity, the [Cheyenne River Sioux] Tribe has *no rules* for the conduct of the procedure. It hardly frustrates FAA provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness.

Jackson, 764 F.3d at 779 (emphasis in original). (Pet. App. at 27a-28a.) See *id.*, 764 F.3d at 776 (similar). (Pet. App. at 20a-21a.)

These findings were partially based on the arbitration proceeding described in *Inentianbor*, which dealt with an arbitration clause identical to the one at issue. The consumer in that case was initially compelled to arbitrate. The arbitrator selected by the owner of Western Sky Financial LLC was not an attorney, and had no training as an arbitrator. He

was, however, the father of an employee of Western Sky Financial. *Jackson*, 764 F.3d at 770-771 (Pet. App. at 6a-9a); *Inetianbor*, 962 F.Supp.2d at 1305-1308.[5] The United States Court of Appeals for the Eleventh Circuit, concurring with the Seventh Circuit, held that "the fact that the arbitration clause calls for the arbitration to be conducted according to consumer dispute resolution rules that do not exist supports the conclusion that the Tribe is not involved in private arbitrations." *Inetianbor*, 768 F.3d at 1354.

Jackson, 764 F.3d at 781 (Pet. App. at 31a), further held that the arbitration clause was so inadequate that substitution under 9 U.S.C. §5 could not be done. Petitioners' form agreement

> contains a very atypical and carefully crafted arbitration clause designed to lull the loan consumer into believing that, although any dispute would be subject to an arbitration proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body. . . . [A] basic infirmity [exists]: One party,

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[5] The petition mentions *Inetianbor* only in passing. One of the petitioners here – CashCall Inc. – brought the petition for a writ of certiorari in *Inetianbor* (No. 14-775). CashCall failed to even acknowledge that *Jackson* existed in its petition, filed on December 31, 2014. Notwithstanding petitioners' desire to ignore the existence of *Inetianbor* in this case, and *vice versa*, the fact is that two Circuits have concurred on the unenforceability of the arbitration clause.

> namely the loan consumer, [is] left without a basic protection and essential part of his bargain – the auspices of a public entity of tribal governance. The loan consumers did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances – circumstances that never existed and for which a substitute cannot be constructed.

The Eleventh Circuit agreed. *Inetianbor*, 768 F.3d at 1350-1353.[6]

In accord with *Teva Pharmaceuticals USA Inc. v. Sandoz Inc.*, 135 S.Ct. 831, 836-838 (2015), findings of fact relied on below cannot be overturned unless they are clearly erroneous. Petitioners do not claim that the findings here are invalid. (See Pet. at 10.) Those findings are unequivocal: under the arbitration clause, "the promise of a meaningful and fairly conducted arbitration [was] a sham and an illusion." *Jackson*, 764 F.3d at 770. (Pet. App. at 7a, 49a; see *Jackson*, Doc. 62-2 at 232-233.) This conforms to conclusions on petitioners' fraudulent form contracts reached by the Eleventh Circuit, the Federal Trade Commission, the Attorney General of Illinois, the Illinois Department of Financial and Professional Regulation, and state officials in Colorado, Georgia, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New

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[6] The issue of substitution under 9 U.S.C. §5 is discussed further in Part I-E, *infra*.

York, Oregon, Pennsylvania, Washington and West Virginia. (*Jackson*, Doc. 50-2, Doc. 63-2 at 55-57 and Doc. 77-2.)

Contrary to petitioners' claim, the Seventh Circuit did not "apply a state-law defense in a fashion that disfavors arbitration . . . [or as] an obstacle to the accomplishment of the FAA's objectives," contrary to *Concepcion*. (Pet. at 15 (quotation marks omitted).) That Illinois contract law works to invalidate petitioners' arbitration clause is not evidence that arbitration was disfavored, but is a proper application of that law to the facts, which cannot be disturbed.

The petition states that, "more than a century ago in *The Elfrida*, 172 U.S. 186 (1898), this Court noted that under the common law, 'if the contract has been fairly entered into, ***with eyes open to all the facts, and no fraud or compulsion exists***, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside.' *Id.* at 198." (Pet. at 20-21.) Petitioners' citation to this decision, given the findings as to their fraudulent contract, is ridiculous. So are suggestions that denial of their petition would cause contractors to "lose the benefits of out-of-court dispute resolution, in effect nullifying the FAA's express language and the strong federal policy in favor of arbitration," or "could spell disaster for valid arbitration clauses across the country." (Pet. at 15, 23.)

D. Petitioners' citations show no Circuit split

Northrop Grumman Ship Systems Inc. v. Venezuela Ministry of Defense, 575 F.3d 491, 502-503 (5th Cir. 2009), dealt with a dispute over where an arbitration would be held. A ship building contract called for any arbitration to be held in Venezuela; the ship builder objected, given the social unrest in that nation. The Fifth Circuit remanded the case without deciding the issue, for "the record before us is insufficient to determine whether the present conditions in Venezuela render the arbitration forum clause unenforceable." *Id.*

On remand, after holding a hearing and considering evidence, the District Court held that the forum-selection clause was unreasonable, given the political turmoil Venezuela was experiencing. In particular, "the present conditions in Venezuela were not only unknown but also unforeseeable to Northrop Grumman at the time the contract was negotiated [in 1997]; the conditions at issue did not exist at the time of the contract. The Court, therefore, finds that enforcing the Caracas forum selection clause will for all practical purposes deprive Northrop Grumman of its day in court." *Northrop Grumman Ship Systems Inc. v. Venezuela Ministry of Defense*, No. 1:02CV785, 2010 WL 5058645 at *4 (S.D.Miss. Dec. 4, 2010).

The Venezuelan government's appeal was dismissed for lack of jurisdiction, and a petition for a writ of mandamus was rejected. In its order denying

a writ of mandamus, the Court relied on *M/S Bremen,* finding that "the Supreme Court has held that courts may generally set aside forum-selection clauses where enforcement would be 'unreasonable.'" *In re Venezuela Ministry of Defense*, 430 Fed.Appx. 271 (5th Cir. 2011).

The Seventh Circuit took similar action in this case when it remanded the matter to the District Court for fact-finding on "whether the Cheyenne River Sioux Tribe has an authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contract is actually available." *Jackson*, 764 F.3d at 770. (Pet. App. at 6a.) This led to the finding that such a mechanism did not exist, and that the arbitration clause was "a sham and an illusion." *Id.* (Pet. App. at 7a.)

The claim that "an arbitration provision must be enforced, even if unreasonable," does not actually reflect what happened in *Northrop Grumman*. (Pet. at 17.) Beyond that, both the Fifth Circuit and the Seventh Circuit found themselves without sufficient information to determine whether an arbitration clause was unenforceable; both Circuits remanded for fact-finding, and upheld conclusions reached by the District Courts on the subject.

Like *Northrup Grumman, USM Corp. v. GKN Fasteners Ltd.*, 574 F.2d 17 (1st Cir. 1978), *Liles v. Ginn-La West End Ltd.*, 631 F.3d 1242 (11th Cir. 2011) and *Silkworm Screen Printers Inc. v. Abrams*,

978 F.2d 1256 (Table), 1992 WL 317187 (4th Cir. 1992) involved contracts that required arbitration in foreign countries. This makes these cases distinguishable for two reasons.

First, the designated forums in these cases – Venezuela in *Northrop Grumman*, England in *USM*, the Bahamas in *Liles*, and China in *Silkworm* – have laws and rules that can be understood, interpreted and applied. *Jackson* found that no arbitration rules existed, and no mechanism to enforce such rules or ensure the proceeding's fairness existed, despite assurances to the contrary in the contract.

Second, this Court has said that, "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Mot. Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 n.19 (1985). *Accord*, *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2310-2311 (2013) (terms "in an arbitration agreement forbidding the assertion of certain statutory rights" impermissible). That is the case here.

Respondents seek relief under the laws of Illinois, which is where they live, where they entered into the loans, and where they received the proceeds of the loans. One Illinois law that protects respondents is the Illinois Consumer Fraud Act, which prohibits deceptive or unfair trade practices in

the course of trade or commerce – like petitioners' scheme to avoid Illinois's interest rate limits. 815 Ill. Comp. Stat. 505/2. The Illinois Consumer Fraud Act provides that "any waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable." 815 Ill. Comp. Stat. 505/10c. Petitioners' form agreement includes such an illegal waiver, and would require an arbitrator to enforce it. The Attorney General of Illinois suggested to the Seventh Circuit that enforcement of the agreement's provisions would lead to the result denounced in *Mitsubishi*. (*Jackson*, Doc. 68 at 22-26.) The Seventh Circuit agreed. *Jackson*, 764 F.3d at 775 n.23. (Pet. App. at 17a-19a.)

E. The holding that substitution is improper was correct, and creates no split among the Circuits

Jackson, 764 F.3d at 781, held that the respondents "did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances – circumstances that never existed and for which a substitute cannot be constructed." (Pet. App. at 31a.) In response, petitioners claim that a substitute arbitrator must be named, under 9 U.S.C. §5. (Pet. at 25-26.) Petitioners' form contract rejected the application of any federal law, making their reliance on the FAA improper. See *Jackson*, 764 F.3d at 769 n.1. (Pet. App. at 3a.) Yet even if that provision could be applied here, 9 U.S.C. §5 requires that a substitute "shall act under the said

agreement with the same force and effect as if he had been specifically named" in the agreement. The problem is that the arbitrator would apply the Cheyenne River Sioux Tribe's "consumer dispute rules" – rules which do not exist. 764 F.3d at 769 and 769 n.2. (Pet. App. at 4a.) As the Seventh Circuit recognized, any substitute arbitrator would have no judicial oversight, and would have no rules to enforce:

> the likelihood of a biased arbitrator is but the tip of the iceberg. Although the arbitration provision contemplates the involvement and supervision of the Cheyenne River Sioux Tribe, the record establishes that the Tribe does not undertake such activity. Furthermore, there are no rules in place for such an arbitration. Under these circumstances, the court cannot save the arbitral process simply by substituting an arbitrator.

Jackson, 764 F.3d at 780. (Pet. App. at 29a-30a.)

A Court cannot make a substitution for a second reason: the contract is "governed by . . . the laws of the Cheyenne River Sioux Tribe [and not] of the laws of any state. . . . [No] other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." *Jackson*, 764 F.3d at 769 and 769 n.1. (Pet. App. at 3a.) Enforcement of this provision would require enforcement of a waiver of the protections of Illinois law; this, under 815 Ill. Comp. Stat. 505/10c, cannot be done in a contract. Under *Kedzie & 103rd Currency Exchange*, 619

N.E.2d at 738, "enforcement of [an] illegal contract makes the court an indirect participant in the wrongful conduct."

If arbitration is to be done by a substitute, the Court must create a new arbitration provision. Tellingly, while petitioners assert that the Seventh Circuit "should have remanded for the District Court to appoint a substitute arbitrator," they never say what process that arbitrator should use. (Pet. at 28.) The "obstacle to the accomplishment of the FAA's objectives" (*id.* at 26) is not the Seventh Circuit's application of Illinois law, but the impossible conditions that petitioners wrote into their own form contracts.

Petitioners cite no law showing a split between the Circuits on the question of substitution under 9 U.S.C. §5, saying only that the issue comes up frequently. (Pet. at 28-29.) This provides no ground for claiming that certiorari on this issue is proper. As it is, *Jackson* is in line with *Inetianbor*, *supra*, and *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000), which held that "if the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern will the failure of the chosen forum preclude arbitration." (Quotation marks omitted.) *Accord*, *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012). See *In re Salomon Inc. Shareholders Derivative Litig.*, 68 F.3d 554, 561 (2d Cir. 1995); and *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481, 491 n.7 (5th Cir. 2012). See also *Carr v. Gateway Inc.*,

241 Ill.2d 15, 944 N.E.2d 327 (Ill. 2011) and *QuickClick Loans LLC v. Russell*, 407 Ill.App.3d 46, 943 N.E.2d 166 (Ill. App. Ct. 2011), *pet. denied*, 949 N.E.2d 1103 (Ill. 2011). Given the design of the arbitration clause, and its fatal flaws, substitution cannot be done. Compare *Green v. U.S. Cash Advance Illinois Inc.*, 724 F.3d 787, 789-793 (7th Cir. 2013) to *Jackson*, 764 F.3d at 780-781 (distinguishing *Green* and rejecting substitution). (Pet. App. at 30a-32a.)[7]

A closer look at 9 U.S.C. §5 shows that petitioners' claim that courts must always appoint a substitute falls short. (Pet. 25-28.) 9 U.S.C. §5 provides for substitution if "there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy." A "vacancy" exists when an officer leaves – or "vacates" – an office. *Black's Law Dictionary* (8th Ed., 2004) at 1584. Here, the Cheyenne River Sioux Tribe does not authorize arbitration, hire arbitrators, or have established arbitration rules. *Jackson*, 764 F.3d at 776. (Pet. App. at 20a-21a.) The office described by the arbitration clause's terms was never vacant, and never could be; petitioners fraudulently

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[7] *Green*, 724 F.3d at 791-793, does criticize the "integrality" requirement endorsed by several Circuits. However, the Seventh Circuit suggested there that, as an alternative, declaring the whole contract unenforceable under 9 U.S.C. §2, in line with *Concepcion* and *Marmet*, could yield the same result. *Green* noted that neither party sought to have the arbitration clause declared void under that part of the FAA. *Id.* Respondents did seek that relief in this case; the Seventh Circuit agreed with them.

represented that the office actually existed, when it did not. Likewise, a "lapse" occurs when "a person entitled to possession [of the office] has failed in some duty," or when an office "[reverts] to someone else because conditions have not been fulfilled." *Black's Law Dictionary* (8th Ed., 2004) at 896. Neither thing could have happened here. The existence of the office was an illusion.

The core of the "integrality" requirement endorsed in several Circuits is that the failure to appoint an arbitrator can be fixed by appointing another one. The problems with the arbitration agreement here are much more profound than that. Where the faults in the process agreed to in the contract are fatal and incurable, substitution cannot occur. Indeed, substitution at the insistence of a party perpetrating a fraudulent arbitration process would reward bad conduct by a contracting party.

Petitioners suggest that "parties inevitably will select persons or organizations to be their arbitrator, only to discover years down the road that the person or organization is not available." (Pet. 29.) Two reasons listed by petitioners were "the parties failed to identify adequately who would be the arbitrator, or the arbitral organization ceased operations or never came into existence." (*Id.*) This would be excusable if the parties made such a selection without ill intent. Petitioners, however, selected an organization that never existed, with rules that never existed, *on purpose*, as part of a broader scheme to defraud consumers. That cannot be permitted.

Petitioners claim they can set up an illusory arbitration scheme and use it to deter claims, until the point that someone (like respondents) calls them out on their fraud. Should that happen, they suggest that they can demand that a court rewrite the contract to create a "real" arbitration process, and force consumers into something they did not agree to. 9 U.S.C. §5 cannot be used as a "get out of fraud free" card; it should assist those caught in a problem that was come by honestly, and not those who would trick a contractor into believing that an arbitration process was real, neutral and fair.

II. TRIBAL EXHAUSTION

A. Background

As an initial matter, petitioners' claim of tribal sovereignty is dubious. Regarding the lending program at issue, the New Hampshire Banking Department found in June 2013 that

> respondents were engaged in a business scheme and took substantial steps to conceal the business scheme from consumers and state and federal regulators. The findings included the fact that Western Sky was nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity[8]

[8] As the Seventh Circuit noted, federal statutes, and case law, continue to refer to Native Americans as "Indians." (Pet. App. at 32a n.40.)

> to shield its deceptive practices from prosecution by state and federal regulators. The Department found a reasonable basis to believe the business scheme described constituted an unfair or deceptive act or practice used as a shield to evade licensure from the Department by exploiting Indian Tribal Sovereign Immunity.

(Pet. App. at 48a; see *Jackson*, Doc. 62-2 at 160-169 (New Hampshire order).)

This is not the first time petitioner CashCall Inc. has attempted to use the laws of a different jurisdiction in an attempt to evade state usury laws. CashCall is actually before this Court on another petition for writ of certiorari, in *CashCall Inc. v. Morrisey*, No. 14-894 (filed Jan. 23, 2015). There, the Supreme Court of West Virginia affirmed a judgment against CashCall for violations of state lending and usury laws. CashCall specifically contracted with a bank based in South Dakota that would nominally make loans on behalf of CashCall, with CashCall taking on all of the risk and burden, "on the belief that its business scheme would successfully evade state usury laws and it could reap the benefits of the excessive interest rates charged on each loan. . . . The purpose of the lending program was to allow CashCall to hide behind [a bank's] South Dakota charter and [the] resulting right to export interest rates under federal banking law, as a means for CashCall to deliver its loan product to states like West Virginia, who have lender licensing and usury

laws." *CashCall Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300 at *6-*7 (W.Va. May 30, 2014); see *id.* at *14-*20 (affirming judgment on lending and usury claims). The involvement of Western Sky Financial in the lending process is just as nominal, as is the true effect on tribal sovereignty of the lending program at issue.

CashCall is a California corporation with no tribal identity. While Martin Webb is a member of the Tribe, the lending entities he owns and operates – including Western Sky Financial, who provided loans to respondents – are all organized as limited liability companies under South Dakota law. Webb is not a Tribal official or employee, and none of his lending entities are owned or operated by the Tribe; any involvement with Tribal government was disclaimed by each lender. (See Pet. App. at 51a-53a.)

Even if tribal sovereignty applies at all to petitioners, the record shows that no respondent is a member of the Cheyenne River Sioux Tribe. None were on Tribal land when they entered into their transactions. Nor did their activities affect the Tribe's sovereignty, or the ability of Tribal authorities to govern its territory and regulate the activities of people located there. Respondents live in Illinois – where they entered into the loans, and where they received the proceeds of the loans. Under *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), respondents are not subject to the Tribal Court's jurisdiction, and need not exhaust their claims before proceeding.

B. *Jackson* created no conflicts

Plains Commerce Bank, 554 U.S. at 330, considered *Montana v. United States*, 450 U.S. 544 (1980), and held that a tribe's "adjudicative jurisdiction does not exceed its legislative jurisdiction." Following this holding, *Jackson* concluded that "if a tribe does not have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim based on that activity." *Jackson*, 764 F.3d at 782. (Pet. App. at 34a.) The Seventh Circuit, *id.*, held that,

> in *Plains Commerce Bank*, the Court explicitly noted that the nature of tribal court authority over non-Indians is circumscribed: "We have frequently noted, however, that the sovereignty that the Indian tribes retain is of a unique and limited character. *It centers on the land held by the tribe and on the tribal members within the reservation.*" [*Plains Commerce Bank*, 554 U.S. at 327] (emphasis added) (citation omitted) (internal quotation marks omitted). In short, "*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests."

(Emphasis in original.)

DISH Network Service LLC v. Laducer, 725 F.3d 877 (8th Cir. 2013) is distinguishable, because the consumers of the service being provided lived on tribal land. DISH Network sent equipment into, and

provided service in, the reservation of the Turtle Mountain Band of Chippewa. On the billing dispute between the parties, *Laducer*, *id.* at 884, found that the location of the tort – the imposition of allegedly unfair charges – is deemed to have taken place where an aggrieved consumer lived. This does not apply to respondents. Nor does *Dolgencorp Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014). There, a sexual assault took place in a store on Choctaw land. As with *Laducer*, the misconduct giving rise to a claim took place on the reservation, whereas the persons harmed by petitioners' conduct did not live on, and did not visit, the Tribal reservation. *Dolgencorp*, 746 F.3d at 169, 173-177.

Otoe-Missouria Tribe v. New York State Department of Financial Services, 769 F.3d 105 (2d Cir. 2014) provides support to respondents, and not to petitioners as they claim. (Pet. at 35.) The Second Circuit, *id.* at 114, held that "a tribe has no legitimate interest in selling an opportunity to evade state law." Petitioners are involved in a scheme whereby they purchased just that. Furthermore, "New York's usury laws apply to all lenders, not just tribal lenders, and [the regulator's] letters . . . made clear that New York regulators disapproved of the facilitation by banks of high-interest payday lending from outside the state." *Id.* The Illinois Department of Financial and Professional Regulation has behaved similarly, as it

has applied Illinois law to in-state, out-of-state and tribal lenders equally.[9]

Petitioners cite *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2043 (2014) for the

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[9] Western Sky Financial itself was ordered to cease and desist from unlicensed lending in March 2013 by the Illinois Department of Financial and Professional Regulation. *In re Western Sky Financial*, No. 13 CC 265 (IDFPR Mar. 8, 2013). It was not alone. *In re Federal Acceptance*, 13 CC 511 (IDFPR Dec. 17, 2013); *In re Courtesy Loans*, 13 CC 513 (IDFPR Dec. 17, 2013); and *In re Bell Funding*, 12 CC 560 (IDFPR Nov. 5, 2012) concerned lenders based in Illinois. Out-of-state lenders were subjected to discipline in *In re Saint Armands Services*, 14 CC 100 (IDFPR Apr. 4, 2014) (Kan.); *In re Insight Capital*, 13 CC 512 (IDFPR Dec. 19, 2013) (Ala.); *In re Goldline Funding*, 13 CC 515 (IDFPR Dec. 12, 2013) (Kan.); *In re Joro Resources*, 13 CC 504 (IDFPR Nov. 15, 2013) (British Virgin Islands and Texas); *In re Hydrafund.org*, 13 CC 339 (IDFPR May 3, 2013) (Nev.); *In re Hammock Credit Services*, 12 CC 581 (IDFPR Nov. 26, 2012) (Fla.); *In re Integrity Advance*, 12 CC 444 (IDFPR Oct. 5, 2012) (Del.); *In re Kenwood Services*, 12 CC 445 (IDFPR Oct. 5, 2012) (Del.); *In re Mountain Top Services*, 12 CC 423 (IDFPR Oct. 5, 2012) (Nev.); and *In re Global Payday Loan*, 07 CC 119 (IDFPR May 30, 2007) (Utah). Tribal lenders also received disciplinary orders from the IDFPR, in *In re MNE Services*, 13 CC 499 & 13 CC 503 (IDFPR Dec. 17, 2013) (based on the reservation of the Miami Tribe in Oklahoma); *In re Great Eagle Lending*, 13 CC 508 (IDFPR Nov. 18, 2013) (Big Valley Pomo (Cal.)); *In re North Star Finance*, 13 CC 501 (IDFPR Nov. 18, 2013) (Fort Belknap (Mont.)); *In re American Web Loan*, 13 CC 450 (IDFPR Oct. 10, 2013) (Otoe-Missouria (Okla.)); *In re Bottom Dollar Payday*, 13 CC 395 (IDFPR June 19, 2013) (Flandreau Santee Sioux (S.D.)); *In re Fireside Cash*, 12 CC 567 (IDFPR Dec. 10, 2012) (Oglala Sioux (S.D.)); *In re Red Leaf Ventures*, 12 CC 569 (IDFPR Dec. 5, 2012) (Flandreau Santee Sioux); and *In re VIP Loan Shop*, 12 CC 573 (IDFPR Dec. 5, 2012) (Flandreau Santee Sioux).

proposition that the federal government has an interest in making "tribes more self-sufficient, and better positioned to fund their own sovereign functions." (Pet. at 33.) While the federal government has that interest, *Bay Mills* was dealing specifically with the Indian Gaming Regulation Act (25 U.S.C. §2701 *et seq.*), and involved casinos located on tribal land. Gaming compacts are entered into by tribal governments and states, overseen by a federal commission. This is distinguishable from both *Plains Commerce Bank* and this case, given the private actors involved.[10]

Tribal self-governance is not harmed by *Jackson* in any way. When private individuals, and entities with no tribal identity, sell their loan products to people outside of a reservation, they are subject to the laws of the jurisdictions where those consumers reside. Officials in seventeen states, including Illinois, concur in this view. The Seventh Circuit's rejection of petitioners' arguments was sound, and need not be reviewed.

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[10] More broadly, while respondents are cognizant of the harsh economic conditions on Native American reservations (see Pet. at 33-34), they maintain that private businesses are not entitled to ignore the laws of the states where they do business, as petitioners have done.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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