No. 01-1732

IN THE

Supreme Court of the United States

BANK ONE, N.A.,

Petitioner,

v.

MYRA MAE SHUMAKE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondents' asserted immunity from the FAA has no basis in law.

Bank One's petition for writ of certiorari demonstrated that the Fifth Circuit's decision below merits this Court's plenary review because it erroneously expands the prudential, judge-made "tribal exhaustion" doctrine to displace the statutory command of the Federal Arbitration Act (FAA), 9 U.S.C. § 4. Respondents' Brief in Opposition only confirms the need for certiorari. Respondents do not deny that some fifty-two (52) federal district court decisions, applying the FAA to the same satellite dish transactions at issue in this case, have compelled arbitration under the very same arbitration provision. Thirty-three (33) of these decisions have already been affirmed by the Fifth Circuit.[1]

Every federal court to have reached the merits of the Bank One arbitration provision has held that it is legally enforceable under the FAA, that it is not procedurally or substantively unconscionable, and that there are no factual issues warranting discovery. These cases include *Bank One, N.A. v. Chickaway (In re Chickaway)*, No. 97-10630 EEG (Bankr. S.D. Miss. Feb. 26, 2002), in which a federal bankruptcy court has compelled arbitration under the FAA in a case involving Bank One and a member of the Choctaw tribe.

Respondents' principal argument is that the tribal exhaustion

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[1] *See, e.g., Bank One, N.A. v. Coates* 125 F. Supp.2d 819 (S.D. Miss. 2001), *aff'd without opinion*, No. 01-60059 (5th Cir. Apr. 5, 2002); *Bank One, N.A. v. Lake*, 5:00CV227BN (S.D. Miss. Jan. 5, 2001), *aff'd*, No. 01-60051 (5th Cir. Apr. 5, 2002); *Bank One, N.A. v. Quinn*, No. 3:01CV65BN (S.D. Miss. June 6, 2001), *aff'd*, Nos. 01-60543, *et al.* (5th Cir. July 18, 2002); *Bank One, N. A. v. Ashford*, 4:00CV248DB (N.D. Miss. May 21, 2002); *Bank One, N. A. v. Atterbury*, 1:00CV315DA (N.D. Miss. May 15, 2002); *Bank One, N. A. v. Burt*, 1:00CV315DA (N.D. Miss. June 4, 2002); *Bank One, N.A. v. George*, 4:01CV18DD (N.D. Miss. May 7, 2002); *Bank One, N.A. v. Hawkins*, 4:01CV17DD (N.D. Miss. May 9, 2002); *Bank One, N.A. v. Taylor*, No. 4:01CV15DD (N.D. Miss. May 6, 2002); *Bank One, N.A. v. Taylor*, No. 2:01CV035DA (N.D. Miss. June 12, 2002); *Bank One, N.A. v. Williams*, No. 3:01CV024DA (N.D. Miss. Apr. 29, 2002).

doctrine should be applied in this case to enable the Choctaw tribal courts to re-decide the validity of the arbitration agreement, which Respondents assert is "an issue controlled by Choctaw law." BIO 2. Respondents insist that they are not subject to the same rules as other Mississippi residents – or even as their fellow tribal member, Ms. Chickaway. Respondents assert that the fifty-two federal judicial decisions "did not judicially resolve anything" of relevance here (BIO 4) because they "did not involve Choctaw law." BIO 18. According to Respondents, the tribal courts are free to thumb their noses at the federal courts' unanimous holdings, and free to apply Choctaw law to declare the arbitration provision invalid, because the FAA supposedly "does not come into play until after a valid arbitration agreement is found." BIO 15.

Nothing in the Fifth Circuit's decision below endorses Respondents' argument, so Respondents' position hardly provides a reason to deny review. In fact, it only underscores the urgent need for certiorari. Respondents' assertion that the FAA is wholly agnostic on issues of contract validity and that the governing law of validity is determined solely by the forum court's choice of law rules (BIO 13) would have enormous implications for the enforceability of arbitration provisions nationwide. Moreover, it is flatly inconsistent with this Court's teaching that the validity of an arbitration agreement is governed not by state or tribal law but by Section 2 of the FAA, 9 U.S.C. § 2. The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). When deciding whether an arbitration provision is enforceable, "the court must look to the body of federal arbitration law." *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987). Congress intended the FAA "to preempt state antiarbitration laws to the contrary," precisely to ensure the broad and uniform validity of arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1312 (2001); *see also Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 638 n.8 (5th Cir. 1977) ("federal rather than state law is controlling as to its validity"); *Harvey v. Joyce*, 199 F.3d 790, 793

(5th Cir. 2000) ("The court is to make this determination by applying the federal substantive law of arbitrability.").[2]

In this case the federal courts have unanimously applied the FAA to hold that the arbitration provision is valid under Ohio law, which governs the Bank One cardmember agreement. *See, e.g.*, *Coates*, 125 F. Supp.2d at 831. Even Respondents acknowledge that "the original contracts' choice of law specification [was] Ohio law" and applicable federal law. BIO 18. The tribal exhaustion doctrine is inapplicable because remitting the parties to tribal court "would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). The Choctaw tribal courts should not be given the opportunity to defy the unanimous holdings of the federal courts that the arbitration provision is binding under the FAA.

The Choctaw tribe may be "a different law-making jurisdiction than the State of Mississippi," BIO 14, but not even the State of Mississippi has the power to hold that the Bank One arbitration provision is unenforceable under the FAA, when the federal courts have decided the contrary. Indeed, the State of Mississippi will not even have the opportunity to adjudicate the question, for under the FAA a federal court may not abstain from a suit to compel arbitration in favor of pending state-court litigation. *See Moses Cone*, 460 U.S. at 19-26; *Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002).

As a last resort, Respondents contend that the Fifth Circuit decisions in thirty-three (33) cases may be ignored because they are unpublished. BIO 18. Yet Fifth Circuit Rule 47.5.4 specifically provides that unpublished decisions may be cited as persuasive

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[2] To be sure, the FAA incorporates familiar "state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). But under the "federal substantive law of arbitrability," these principles must be applied with "due regard . . . to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468, 475-76 (1989) (internal quotation omitted).

authority. And Respondents completely overlook the fifty-two (52) district court decisions upholding the arbitration provision, as well as the *Chickaway* bankruptcy opinion. Regardless of whether this body of federal precedent is binding as a matter of nonmutual offensive collateral estoppel, it is certainly dispositive of Respondents' claims as a matter of stare decisis. It demonstrates that the tribal exhaustion doctrine is inapplicable here because it would serve no practical purpose.

2. The Fifth Circuit's decision is inconsistent with *Hicks*, *Neztsosie*, and other decisions applying the tribal exhaustion rule.

Respondents' remaining arguments simply ignore the showing in the Petition that the judge-made, prudential doctrine of tribal exhaustion should not be expanded to displace the statutory command of the FAA. Section 4 of the FAA creates a special right to a federal forum for speedy enforcement of arbitration clauses; Section 16 of the FAA establishes a special right of immediate appeal. The Fifth Circuit's expansion of the tribal exhaustion doctrine obliterates these statutory provisions. These are precisely the sorts of "serious anomalies" cited by this Court in *Hicks* as evidence that the tribal exhaustion doctrine does not apply to § 1983 actions. 533 U.S. at 368. Respondents' arbitrary attempt to confine *Hicks* to cases involving state officials (BIO 11-12) is pure ipse dixit.

If anything, Respondents' effort to suggest that *Hicks* relied on implicit values of state sovereignty undermines their own argument. For the Fifth Circuit's decision below improperly elevates tribal courts above state courts. It is undisputed that a federal court faced with a motion to compel arbitration may not abstain in favor of pending state-court litigation, *see Moses Cone*, 460 U.S. at 19-26; *Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002), yet the Fifth Circuit has held that a federal court in a similar position must defer to an Indian tribal court. Respondents cannot offer any reason that Congress would have wanted state-court actions to proceed promptly to arbitration while allowing Indian

tribal court suits to languish in litigation. The most Respondents can say is that "state sovereignty and tribal sovereignty markedly differ in both their origins and their attributes" (BIO 23) – a true statement, but one which cuts against Respondents. States are fully sovereign entities; Indian tribes are not. Respondents' efforts to analyze the removal statutes (BIO 23-24) are also off-base. This case was not removed from tribal court. This case is a separately filed federal-court suit to compel arbitration pursuant to 28 U.S.C. § 1332.

Notably, this Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), relied on an explicit parallel between state and tribal courts to conclude that the tribal exhaustion doctrine did not apply. *See id.* at 485-87. Respondents' argument that the result in *Neztsosie* turned on the "federalization" of state-law claims (BIO 10) and the presence of "a unique removal provision" regarding state-court suits (BIO 11) misses the crucial point: the Price-Anderson Act is utterly *silent* as to removal from tribal court of claims arising under tribal law. *Neztsosie* thus could not have turned on whether tribal claims were "completely preempt[ed]." BIO 20-21. Rather, this Court determined that the tribal exhaustion doctrine was inapplicable by analogy to the congressional treatment of state-court claims. *See* 526 U.S. at 485-87. The same reasoning is squarely applicable here: the fact that a pending state-court suit provides no basis for abstaining from a federal court motion to compel arbitration shows that "Congress prefers (not merely permits) – resolution of those private disputes in a federal forum." BIO 6.

Respondents' claim that "[e]very other federal circuit to address these issues has come out the same way" (BIO 6) is correct, but not in the way Respondents contend. All the cases have resolved the issue in a way that conflicts with the Fifth Circuit decision below:

• *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), held that tribal exhaustion was unnecessary because "Congress has expressed a preference for prompt federal adjudication of citizen suits to enforce the RCRA"

(*id.* at 1098), not because of any complete preemption of state law claims. *Contra* BIO 20. Indeed, the Eighth Circuit expressly noted that Congress "has not prohibited a citizen from raising claims under state law." 867 F.2d at 1098 (internal quotation omitted).

• Respondents acknowledge that the tribal exhaustion doctrine was held inapplicable in *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 83 (2d Cir. 2001); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992); and *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 754-55 (D.N.D. 1989), which "did not involve any issues of 'tribal law.'" BIO 21. The same is true here, for this case presents a question of federal law under the FAA.

• The other cases cited by Respondents likewise provide no support for the Fifth Circuit's decision. In *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212 (11th Cir. 1999) (earlier decision in same case cited BIO 22), for example, the court of appeals held that a federal district court had jurisdiction to entertain a suit for declaratory relief that all disputes between a bingo facility operator and a tribe were arbitrable. *Id.* at 1222-23. *Tamiami Partners* therefore conflicts with, rather than supports, the Fifth Circuit's holding. In *Ninigret Development Co. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 35 (1st Cir. 2000) (cited BIO 21), the court treated the contractual provision as a forum selection clause – *not* as an arbitration clause – and analyzed the tribal exhaustion issue without regard to the FAA. Unlike Bank One, Ninigret did not even bring a federal suit to compel arbitration.[3]

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[3] *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997) (cited BIO 21), did not present the question whether the FAA displaced the tribal exhaustion rule. Rather, the plaintiffs argued that exhaustion was not required on the ground that "the Tribal Court is a nullity because it was established in violation of the tribal constitution." *Id.* at 66.

3. This Court should resolve issues of tribal court jurisdiction left open in *Nevada v. Hicks*.

This case presents, in addition to the tribal exhaustion issue, an important question that is the natural successor to *Nevada v. Hicks*, 533 U.S. 353 (2001): whether Indian tribal court jurisdiction extends to civil suits arising out of alleged commercial relationships between members and non-members of the tribe, even where such assertions of jurisdiction are not necessary to protect tribal self-government or to control internal tribal relations. Respondents contend that *Hicks* is distinguishable because it involved a state officer subject to potential liability under § 1983. BIO 29-30. This Court's analysis in *Hicks*, however, is not so limited. Moreover, the ambiguity about the implications of *Hicks* for tribal civil jurisdiction over non-public defendants (in contrast to state officers) is plainly a reason to grant certiorari, not deny it.

Further, there are no issues of "waiver" or other procedural obstacles to this Court's review. Respondents' suggest that Bank One did not challenge tribal jurisdiction below. BIO 25. That is flatly incorrect. Even before this Court's decision in *Hicks*, Bank One expressly stated to the Fifth Circuit that it "preserv[ed] its right to contest tribal jurisdiction at the appropriate time in the appropriate forum." BIO 25. Respondents acknowledge that, after this Court's decision in *Hicks*, Bank One submitted a letter to the Fifth Circuit under Fed. R. App. Proc. 28(j) contesting tribal jurisdiction. BIO 26.

In any event, both the District Court and the Court of Appeals reached and decided the jurisdictional question, so the issue is

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Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1419-22 (8th Cir. 1996) (cited BIO 21-22), did not address whether the FAA displaced the tribal exhaustion rule but rather whether a separate statute (the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.) did so.

Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1127-30 (9th Cir. 1989) (cited BIO 22), did not analyze the FAA at all, much less consider whether it displaced the tribal exhaustion rule.

properly before this Court. The District Court held that "defendant has advanced the requisite colorable claim of tribal jurisdiction." Pet. App. 21a. The Fifth Circuit held that, "[a]s a threshold inquiry under the tribal exhaustion doctrine, we must determine whether the tribal court's jurisdiction is explicitly limited." Pet. App. 6a n.13. The Court of Appeals held that jurisdiction was proper under an exception to *Montana v. United States*, 450 U.S. 544 (1981): "One of its exceptions . . . applies here: 'A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" Pet. App. 6a-7a n.13 (quoting *Montana*, 450 U.S. at 565).

Hence, the Court of Appeals reached and decided the jurisdictional issue. This case squarely presents the question of whether this so-called "*Montana* exception" should be assimilated into the *Hicks* self-government test. Although Respondents suggest that this question could be revisited after the tribal court conclusively resolves its jurisdiction, BIO 26, there is no reason to await that proceeding. The relevant facts are not in dispute. The matter turns on a pure issue of law. Bank One should not be haled into a tribal forum that lacks jurisdiction over it as a matter of law. That is precisely why this Court granted declaratory relief in *Hicks* without awaiting the tribal court's assessments of its own jurisdiction.

The jurisdictional issue is underscored by the fact that Bank One had no notice that Respondents were members of the Choctaw tribe. Respondents do not live on a central Choctaw reservation, but rather on certain trust parcels spread over several Mississippi counties. Contrary to Respondents' claim (BIO 26), this issue was raised below: they themselves developed it on p. 11 of their Appellees' Brief in the Fifth Circuit. Moreover, the fair notice question is simply a facet of the jurisdictional issue and would therefore be cognizable under the "mere enlargement" doctrine, *see Dewey v. Des Moines*, 173 U.S. 193, 198 (1899); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972), even if had not been

raised below.[4]

CONCLUSION

This Court should either grant plenary review or GVR this case in light of *Nevada v. Hicks*, 533 U.S. 353 (2001). A GVR would be particularly appropriate because the Fifth Circuit incorrectly described *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as "the most recent Supreme Court case" relevant to the dispute. Pet. App. 7a. A GVR order is available even though the Fifth Circuit's opinion was released after *Hicks* was decided. This Court has frequently GVR'ed cases even when the appellate opinion postdated the governing Supreme Court decision.[5]

Respectfully submitted.

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[4] Respondents' bizarre claim that credit providers are free to discriminate against members of Native American tribes under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, *see* BIO 26, is surely not a position they would endorse in different circumstances.

[5] *See, e.g.*, No. 97-8284, *Schweninger v. Minnesota*, 142 L.Ed.2d 25 (1998) (remanded in light of *Kansas v. Hendricks*, 521 U.S. 346 (1997)); No. 97-7931, *Coleman v. Minnesota*, 118 S. Ct. 2318 (1998) (same); No. 97-5901, *Hodgkiss* v. *United States*, 118 S. Ct. 597 (1997) (remanded in light of *Bailey v. United States*, 516 U.S. 137 (1995)); No. 90-1936, *Parker Solvents v. Royal Ins. Cos. of Am.*, 502 U.S. 801 (1991) (remanded in light of *Salve Regina College v. Russell*, 499 U.S. 225 (1991), decided a few days before lower court's decision); No. 90-524, *Connecticut v. Geisler*, 498 U.S. 1019 (1991) (remanded in light of *New York v. Harris*, 495 U.S. 14 (1990), decided three weeks before lower court's opinion); No. 89-5991, *Patterson v. South Carolina*, 493 U.S. 1013 (1990) (remanded in light of *Griffith v. Kentucky*, 479 U.S. 314 (1987)); No. 89-401, *Wecht* v. *Inmates of Allegheny County*, 493 U.S. 948 (1989) (remanded in light of *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981)).

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