IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HENGLE, SHERRY BLACKBURN, WILLIE ROSE, ELWOOD BUMBRAY, TIFFANI MYERS, STEVEN PIKE, SUE COLLINS, LAWRENCE MWETHUKU, *on behalf of themselves and all individuals similarly situated*,	)	
Plaintiffs,	)	Civil Action No. 3:19-250
v.	)	
SCOTT ASNER; JOSHUA LANDY; SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; TRACEY TREPPA, VICE-CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; KATHLEEN TREPPA, TREASURER OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; IRIS PICTON, SECRETARY OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity;* SAM ICAY, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in his official capacity*; AIMEE JACKSON-PENN, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; AMBER JACKSON, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*;	)	
Defendants.	)	

REPLY IN SUPPORT OF TRIBAL DEFENDANTS'
MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' various arguments against dismissal rest on a shared premise: Tribes, Tribal government officials, and Tribal law are not entitled to the same respect as states, state government officials, and state law. That premise animates Plaintiffs' claims that:

- It is illegitimate to apply Tribal law, but not state law, to loan contracts, even where both sources of law do not set a usury rate;
- Tribal government officials, but not state government officials, can be sued for violations of state law by private plaintiffs invoking *Ex parte Young*; and
- It is appropriate to sue Tribal government officials, but not state government officials, where doing so directly attacks the government's fisc.

The problem for Plaintiffs is that these distinctions run directly contrary to precedent.

For one thing, it is well-established that tribal and state sovereigns are entitled to similar respect and treatment under the law. Just two years ago, the Supreme Court resolved a case involving tribal government officials by relying on established law regarding suits against state government officials, concluding that there was "no reason to depart from these general rules in the context of tribal sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). The Fourth Circuit echoed these principles even more recently in concluding that a different tribe's lending businesses are entitled to sovereign immunity. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019). The law thus precludes treating the Tribe and its government officials as second-class sovereigns.

Similarly, the Supreme Court has repeatedly reaffirmed that only Congress can authorize new incursions on Tribal sovereign immunity. Plaintiffs claim that in *Michigan v. Bay Mills*, the Supreme Court created the novel theory of liability against tribal government officials that Plaintiffs are pursuing here. But in that very opinion, the Court acknowledged the longstanding principle that tribes are entitled to "the common-law immunity from suit traditionally enjoyed by

sovereign powers," which requires "dismiss[al of] any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014) (quotations omitted).

Contrary to Plaintiffs' suggestion, the question this case turns on is not whether Tribal lending is good or bad policy. It is *who gets to decide* if Tribal lending should be prohibited. The answer is Congress, and Congress alone. And across their forty-five pages of briefing, Plaintiffs do not identify anything remotely approaching Congressional authorization for their lawsuit against tribal government officials—who clearly share in the Tribe's sovereign immunity—let alone a lawsuit to stop the operation of businesses entitled to sovereign immunity under binding Fourth Circuit precedent. To the contrary, Congress has made clear that tribes and states should be treated alike when it comes to consumer protection, *see* Mem. in Supp. of Mot. to Dismiss ("Mem."), ECF No. 65, at 8, and that, "consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely" in their pursuit of political self-determination and economic self-sufficiency, *see* 25 U.S.C. § 4301(2)(a)(4); Mem. 9; *see also Big Picture*, 929 F.3d at 185.

Ultimately, Plaintiffs are left arguing that the Court should ignore not only the caselaw and Congressional policy favoring tribes described above, but also (1) Virginia Supreme Court precedent requiring that the parties' choice of law be honored; (2) Supreme Court precedent foreclosing state-law suits against government officials; (3) decisions from the Fourth Circuit and its district courts recognizing that the only federal law Plaintiffs invoke, RICO, does not permit the prospective relief they seek here; (4) Fourth Circuit precedent stating that parties to a contract are necessary in suits to invalidate that contract; *and* (5) basic Article III principles requiring an

actual case or controversy for a case to proceed in federal court. Controlling case law cannot be cast aside so lightly. The Amended Complaint should be dismissed with prejudice.

ARGUMENT

I. TRIBAL LAW APPLIES TO THE LOAN AGREEMENTS.

Plaintiffs do not dispute that all their claims must be dismissed unless the Court disregards the choice of law provision they agreed to. As Tribal Defendants have explained, if Tribal law applies, then Plaintiffs' usury claims under Virginia law fail, and there is no "unlawful debt" under RICO. *See* Mem. 5–6.

Plaintiffs' efforts to deride the choice of law provision as an unenforceable "choice-of-no-law" clause are not well-taken. To begin, here is what the clause (which is identical in relevant part for each of the agreements) actually says:

> This Agreement is made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake, and shall be governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance. You hereby agree that this governing law provision applies no matter where You reside at the time You request Your Loan from Mountain Summit Financial, Inc.

Affidavit of Sherry Treppa ("Treppa Aff."), Ex. 93, ECF No. 45-43, at 8. Other than the fact that the clause invokes Tribal law, it is indistinguishable from choice of law provisions found in contracts signed every day in this country. In fact, the language is materially identical to what Plaintiffs term the "standard governing law provision in an arbitration agreement": "This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of _____, exclusive of conflict or choice of law rules." Pls.' Opp. to Mot. to Compel Arb., ECF No. 96, at 9 n.6.

Under the Virginia choice of law principles this Court is bound to apply, this is a straightforward case. In *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436, 439

(2007), the Virginia Supreme Court adhered to longstanding precedent holding that the "parties' choice of substantive law should be applied" where "a contract specifie[d] that the substantive law of another jurisdiction governs its interpretation or application." *Id.* at 438. In particular, the Court held that it was error to "refus[e] to apply Utah law in the construction of [a] loan agreement," even though Utah law—like Tribal law—contains no "limits on maximum rates of interest for consumer loans," *id.* at 439.[1] Given that Plaintiffs' primary objection to Tribal law is that it contains no usury limit, *see* Pls.' Opp. to Mot. to Dismiss, ECF No. 98, at 13 ("Opp."), *Settlement Funding* requires dismissal of their claims.

It is Plaintiffs who "misdirect the Court" by "grossly [under]stating the scope and holding of *Settlement Funding*." Opp. 13. Plaintiffs aver that the Virginia Supreme Court held only that "the trial court erred in concluding that the parties failed to present Utah law for the trial court's consideration." *Id.* It is true that the Virginia Supreme Court determined that the circuit court had "sufficient information regarding the substance of Utah law," including the absence of any interest rate limits, and was wrong to suggest otherwise. *Settlement Funding*, 645 S.E.2d at 439. But what Plaintiffs ignore is what the Virginia Supreme Court said next: "Therefore, the circuit court erred in refusing to *apply Utah law* in the construction of the loan agreement." *Id.* (emphasis added). Confirming the point, the Virginia Supreme Court *reversed*, rather than simply vacating, the lower court's decision. *Id.* And on remand, the lower court responded accordingly, by applying Utah law to determine that the loan agreement at issue was "not usurious" due to Utah's lack of a usury limit. *Commonwealth, State Lottery Dep't v. Settlement Funding, LLC*, 75 Va. Cir. 248, 2008 WL 6759945, at *2 (Fairfax Circuit Ct. 2008). The facts and subsequent history of *Settlement Funding* thus confirm that the choice of law provision each Plaintiff signed must be enforced.

[1] Plaintiffs do not dispute that Utah law mirrors Tribal law in this respect. *See* Opp. 3 n.2.

Plaintiffs likewise miss the mark in asserting that *Settlement Funding* did not address the borrower's argument that applying Utah law would violate Virginia public policy. *See* Opp. 14. There is no dispute that the borrower in that case presented the Virginia Supreme Court with that argument. *See id.* Plaintiffs assert that Virginia has a "strong public policy against usurious loans"—so strong, that on their account, *any* contract that exposes a borrower to usurious rates under Virginia law "shall be deemed to be against public policy and void." Opp. 12. But that is just what the contract did in *Settlement Funding*, and the Virginia Supreme Court both acknowledged that fact and then ruled that "the circuit court erred in refusing to apply Utah law." *Settlement Funding*, 645 S.E.2d at 439; *see id.* ("Utah has not established any limits on maximum rates of interest for consumer loans."). Plainly, the Virginia Supreme Court adhered to the foundational principle that parties' choice of law agreements should be honored, notwithstanding the public policy animating Virginia's interest rate cap.

Plaintiffs' policy argument also fails for another, independent reason. If Plaintiffs are right that Virginia has an overwhelming public policy against usury, it is hard to fathom why Virginia would have issued a letter stating that the Tribal businesses are "not required to be licensed" under Virginia law and are not subject to regulation by the state. Mem. 8. Despite having notice of this letter in the Tribal businesses' Motion to Dismiss, Plaintiffs have offered no response to it in either their Amended Complaint or their Opposition.

Similarly, Plaintiffs' claim that state and tribal laws without usury limits "shock[] the conscience," Opp. 20, cannot be squared with *Settlement Funding*. To prove unconscionability, Plaintiffs must demonstrate that "no man in his senses and not under a delusion" would choose tribal law. *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 870–71 (E.D. Va. 2011) (quoting *Mgmt. Enters., Inc. v. Thorncraft Co., Inc.*, 416 S.E. 2d 229, 231 (Va. 1992)). The fact

that other jurisdictions such as Utah have made the same choice to forgo a usury limit, and the fact that the Virginia Supreme Court did not bat an eye at applying said law, makes clear that Plaintiffs cannot carry their burden to show unconscionability based on the lack of a usury limit.[2]

Plaintiffs' direct attacks on Tribal law are similarly groundless. As an initial matter, the idea that Tribal law is a lawless void (or "no law," Opp. 4) is simply inaccurate (and an affront to the Tribe, its lawmakers, and Native American sovereigns more generally). As Tribal Defendants have explained—with no apparent contradiction from Plaintiffs—Tribal law explicitly incorporates, without limitation, the protections of numerous federal consumer protection statutes, including the Truth in Lending Act, the Fair Debt Collection Practices Act, and Section 5 of the Federal Trade Commission Act, which prohibits all "unfair or deceptive acts or practices in or affecting commerce." *See* Mot. to Compel Arb., ECF No. 63, at 11; *see also* Br. of Tribal Consumer Financial Regulatory Services Commission as *Amicus Curiae* ("Br. of Commission"), ECF No. 76, at 6–7 (noting that some of those federal laws reference and include the protections of yet other federal laws, thus increasing the scope of federal protections incorporated into Tribal law). Plaintiffs likewise ignore that in many ways, Tribal law goes *beyond* the protections provided by federal law—for example, by setting stricter standards for data security and greater protection against misrepresentations. *See* Br. of Commission 6 & n.2. Plaintiffs simply have no

[2] Indeed, Congress and the Supreme Court have made clear that sovereigns may pass laws reflecting different banking or loan policies (such as interest rates), and that those policies must be respected. *See* National Bank Act, 12 U.S.C. § 85 (allowing banks to charge consumers the interest rate allowed by the law of the state where the bank is located, regardless of where the consumer is located); *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 312 (1978) (National Bank Act was grounded in the importance of predictability in banking transactions); *see also* Br. of Tribal Consumer Financial Regulatory Services Commission as *Amicus Curiae*, ECF No. 76, at 16–17.

plausible basis for alleging that this legal regime was "intentionally crafted to ensure no legal accountability to borrowers." Opp. 4.

Plaintiffs' broadside attack on Tribal law also ignores what Congress and the Supreme Court have said about it. As Tribal Defendants explained—with no contradiction from Plaintiffs—Congress specifically recognized Tribal sovereignty and Tribal law in a consumer protection statute related to financial services.[3] *See* 12 U.S.C. § 5481(27) (Consumer Financial Protection Act defines "State" to include states and tribes). The Supreme Court has also recognized the legitimacy of Tribal law in acknowledging Tribes' authority to regulate certain activities of nonmembers, including consensual contractual relationships like the ones Plaintiffs entered into with the Tribal businesses. *See Montana v. United States*, 450 U.S. 544, 565 (1981).

Plaintiffs' remaining arguments about Tribal law, echoed verbatim from their opposition to Tribal Defendants' motion to compel arbitration, gain no force from repetition.[4] All rest on misconceptions or misrepresentations—for example, that the loan agreements prospectively waive all applicable federal laws (they do not), or that the Tribal Consumer Financial Services Regulatory Commission is biased (a claim unsupported by any evidence and inconsistent with the independent

[3] That statute is no outlier. Congress regularly encourages the enactment and enforcement of Tribal law as on par with state law by defining "states" to include Tribes, such that they are treated alike. *See, e.g.*, 33 U.S.C. § 701h (environmental statute defining "states" to include "Federally recognized Indian tribes"); 42 U.S.C. § 1397n-12 (same in Social Security Act); 7 U.S.C. § 2012 (similar for the Food Stamp Program); 25 U.S.C. § 4103 (similar with regard to federal housing assistance); 42 U.S.C. § 1786 (for purposes of the Special Supplemental Nutrition Program for Women, Infants, and Children (known as "WIC"), defining "State agency" to include "the health department or comparable agency of . . . an Indian tribe, band, or group recognized by the Department of the Interior; an intertribal council or group that is the authorized representative of Indian tribes, bands, or groups recognized by the Department of the Interior; or the Indian Health Service of the Department of Health and Human Services").

[4] Tribal Defendants incorporate by reference their arguments regarding the substance of Tribal law from their Reply in Support of Their Motion to Compel Arbitration. *See* Defs.' Reply Mem. at I, III–IV.

and well-credentialed staff who work for the Commission). Because those arguments fail on the merits, they cannot come close to providing a basis for concluding that the choice of Tribal law provisions in the contracts are "grossly inequitable." Opp. 18.

The bottom line is simple. Plaintiffs freely chose to access services provided from the Tribe's jurisdiction and agreed that Tribal law would apply to any disputes. The law requires this court to respect that agreement. Tribal law is valid and cannot be dismissed based on Plaintiffs' preferences for the policy choices made by different sovereigns.

II. PLAINTIFFS' CLAIMS AGAINST SOVEREIGN GOVERNMENT OFFICIALS ARE BARRED BY SOVEREIGN IMMUNITY.

Plaintiffs offer no response to Tribal Defendants' arguments that: (1) the members of the Tribe's governing body are entitled to absolute immunity for enacting Tribal law and establishing the Tribal businesses, *see* Mem. 3, 12; (2) those businesses are entitled to sovereign immunity in light of the Fourth Circuit's ruling in *Big Picture*, *see* Mem. 12, 15–16; and (3) their lawsuit targets the Tribe itself in a way that directly impacts the tribal fisc, *see, e.g.*, Opp. 2, 23. Their only response to these uncontested, case-determinative points is their invocation of the "exception to sovereign immunity" set forth in "the Supreme Court's seminal decision in *Ex parte Young*." Opp. 21. As the Supreme Court has made clear time and again, that "exception" does not apply here.

A. *Ex parte Young* Is A Limited Tool For Enforcing Federal, Not State, Law.

Ex parte Young is not a freestanding cause of action allowing private plaintiffs to seek all manner of injunctive relief against state officials—indeed, it is not a cause of action at all. Instead, *Ex parte Young* recognized a narrow equitable principle, grounded in the Supremacy Clause of the Constitution, to allow courts to ensure the supremacy of federal law. *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The baseline under the Constitution is that government officials have sovereign immunity for their official actions. *Pennhurst State Sch.*

& Hosp. v. Halderman, 465 U.S. 89, 98–100 (1984). *Ex parte Young* allows courts to pierce that immunity if a state official takes an action that is unlawful under *federal* law. *See, e.g.*, *Pennhurst*, 465 U.S. at 104–06. The rationale for allowing such suits to go forward is that because the state official's action is illegal under federal law, it is "'void' and therefore does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States.'" *Id.* at 102 (quoting *Young*, 209 U.S. at 160). In short, *Ex parte Young* allows a limited intrusion on state or tribal sovereign immunity only where "necessary to permit the federal courts to vindicate *federal rights* and hold state [or tribal] officials responsible to 'the supreme authority of the United States.'" *Id*. at 105 (emphasis added) (quoting *Young*, 209 U.S. at 160).

Plaintiffs do not appear to dispute these points. As they correctly note, courts allow lawsuits to proceed under *Ex parte Young* in order "to vindicate the federal interest in assuring *the supremacy of federal law*.'" Opp. 24 (quoting *VOPA v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring)) (emphasis added) (quotations omitted). And so in deciding whether a claim invoking *Ex parte Young* can go forward, the "court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of *federal law* and seeks relief properly characterized as prospective." Opp. 25 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)) (emphasis added) (quotations omitted).

Plaintiffs' lawsuit does not meet that standard, because it seeks an injunction against alleged violations of *Virginia* law. *See supra* at I; Mem. 5–6. And the entire basis for *Ex parte Young* vanishes in suits that seek to enforce state law. Unlike with federal law, the Constitution does not set forth any principle that would justify piercing government officials' sovereign immunity to enforce state law, let alone haling them into federal court to do so. That is why the Supreme Court held, over three decades ago, that the "deeply rooted principle" Plaintiffs seek to

invoke, Opp. 5, has no force in lawsuits seeking to apply state law to sovereign officials, *Pennhurst*, 465 U.S. at 106. In *Pennhurst*, the Court held that such lawsuits have no place in federal court. *Id.* Because those suits do not "vindicate the supreme authority of federal law," the *Ex parte Young* exception to sovereign immunity is "inapplicable." *Id.*

Plaintiffs attempt to distinguish *Pennhurst* by rewriting it. According to Plaintiffs, *Pennhurst* "declined to extend the *Ex parte Young* rationale to suits seeking to hold state officials accountable for violations of that state's laws." Opp. 22 (quoting *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 122 (2d Cir. 2019) (emphasis in Plaintiffs' brief). Plaintiffs do not quote *Pennhurst* for this proposition, because they cannot—a limitation of the holding to "state officials" violating "that state's laws" appears *nowhere* in *Pennhurst* (underlined or not). To the contrary, *Pennhurst* held that the "need to reconcile [the] competing interests" of the supremacy of federal law and state sovereign immunity—in other words, the rationale for *Ex parte Young*—is "wholly absent . . . when a plaintiff alleges that a state official has violated *state* law," regardless which state's law is at issue. *Pennhurst*, 465 U.S. at 106 (emphasis in original). That is exactly what Plaintiffs allege here. And it is hard to see any reason (Plaintiffs provide none) why it would be less of an intrusion on state or tribal sovereignty to require an official to comply with *another state's* laws as opposed to the state or tribal law with which they are duty-bound to comply. *Pennhurst*, and the cases since that have reaffirmed the grounding and limitations of *Ex parte Young*, thus bar Plaintiffs' claims.

B. *Bay Mills* Did Not Upend Several Decades Of Supreme Court Precedent.

Plaintiffs' suggestion that in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2015), the Court departed from this longstanding consensus and allowed "*Ex parte Young*-by-analogy suits against tribal officials for violations of state law," Opp. 21 (quotations omitted), is premised on a selective and incorrect reading of the decision.

As an initial matter, Plaintiffs' theory rests not on "sentences" from the "holding" of *Bay Mills*, Opp. 22, but a phrase and citation in a paragraph of dicta. As they acknowledge, the question at issue in *Bay Mills* was whether a federal statute, the Indian Gaming Regulatory Act ("IGRA"), abrogated tribal sovereign immunity so as to allow Michigan's lawsuit seeking to enjoin a tribe from building a casino on state fee lands outside its reservation (*i.e.*, on land governed by the state, rather than the tribe). Opp. 21. The Court, relying on the statute's text and structure, held that it did not. *Bay Mills*, 572 U.S. at 791–94. After reaching that holding, the Court stated:

> And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. See *Santa Clara Pueblo*, 436 U.S., at 59.

572 U.S. at 796 (emphasis added). The principle that federal courts can enjoin tribal officials from violations of *federal* law is a straightforward application of *Ex parte Young* (hence the Court's note that the principle had been "stated before"). And that is all the two cited cases (*Ex Parte Young* and *Santa Clara Pueblo*) say—that government officials, including tribal government officials, can be sued when their actions violate federal law. *See* Mem. 19 n.6. So Plaintiffs' theory is this: Simply by referencing Michigan law in the underlined phrase and citation, the Court held—for the first time ever—that, notwithstanding *Pennhurst*, government officials can indeed be sued for violations of state law.

Reading *Bay Mills* in its entirety confirms that Plaintiffs' interpretation makes no sense. The paragraph above is from Section III of the opinion. In Section II, which comes right before, the Court confirmed the longstanding principle that tribal sovereign immunity can be abrogated only by an act of Congress. *See Bay Mills*, 572 U.S. at 788 ("Thus, unless and until Congress acts,

the tribes retain their historic sovereign authority.") (quotations omitted); *id.* at 791 ("The upshot is this: Unless Congress has authorized Michigan's suit, our precedents demand that it be dismissed."). But on Plaintiffs' theory, in the very next section of the opinion, the Court took tribal immunity out of "Congress's hands," *id.* at 789, and announced—through one phrase and citation—a new abrogation of that immunity.

Further, Section IV of the Court's opinion—which comes right after the paragraph quoted above—is all about the importance of adhering to precedent. As an alternative to its statutory argument, Michigan urged the Court to overrule its precedent recognizing tribal sovereign immunity for commercial activity outside of tribes' sovereign territory (similar to what Plaintiffs urge here). *See id.* at 797 (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998)). In the seven pages that follow the passage above, the Court explained why it was not willing to depart from precedent. *See id.* at 797–803. Among those reasons was *stare decisis*—the well-established principle that the "Court does not overturn its precedents lightly." *Id.* at 798. But again, on Plaintiffs' theory, that is exactly what the Court did just pages earlier. If Plaintiffs are right, the Court—again, through a phrase and a citation—created a new, direct path to state court for private plaintiffs that overruled not one or two, but *four* lines of precedent: (1) the line of cases holding that only Congress can abrogate tribal sovereign immunity[5]; (2) *Pennhurst* and subsequent cases reaffirming the limited scope of *Ex parte Young*; (3) the line of cases from before

[5] Indeed, in deciding not to overturn its precedent, the Court again emphasized that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*, 572 U.S. at 800; *see also id.* ("The special brand of sovereignty the tribes retain—both its nature and its extent—rest in the hands of Congress."). And as the Court pointed out, in the case of tribal sovereign immunity for off-reservation commercial activity, Congress has considered limiting such immunity and declined to do so. *See id.* at 801–03 (detailing various proposals that have come before Congress since the Court's decision in *Kiowa*).

(and after) *Bay Mills* holding that tribes and states are to be treated alike, *see* Mem. 19–20 (citing *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017)[6]; and (4) the Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which recognized the right of an Indian tribe to regulate on-reservation activities differently from how the surrounding state regulates those same activities, *id.* at 219.[7]

For all these reasons, the sentence that Plaintiffs rely on is best understood as dicta. *See* Mem. 17–19. And whatever the Second Circuit may have decided in *Gingras*, *see* Opp. 22–23, the Fourth Circuit has made clear that, when faced with dicta that conflicts with decades of Supreme Court precedent, precedent wins. *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 572–73 (4th Cir. 2005); *see also, e.g.*, *United States v. Pasquantino*, 336 F.3d 321, 329 (4th Cir. 2003) (*en banc*) ("[D]icta . . . cannot serve as a source of binding authority in American jurisprudence."), *aff'd,* 544 U.S. 349 (2005) (citation omitted). In *Yamaha*, the district court rejected a dormant Commerce Clause challenge to a state statute, relying on dicta in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). The Fourth Circuit concluded that the language in *Tracy* was dicta, because it was not necessary to the outcome of that case. *See Yamaha*, 401 F.3d at 572. Because that dicta conflicted with decades of Supreme Court holdings, the Fourth Circuit

[6] Notably, Plaintiffs offer no explanation for why the Court would have created a tribal-only cause of action in *Bay Mills*, but then held, just a few years later, that tribal and state officials should be treated alike for sovereign immunity purposes. *See Lewis*, 137 S. Ct. at 1291; Mot. 20.

[7] In *Cabazon*, the Court held that tribes could enact their own on-reservation gaming regulations even when those regulations conflicted with state gaming laws that applied outside the reservation (contrary to Plaintiffs' suggestion that Virginia law must control their loans). *See* 480 U.S. at 218. The Court reached that conclusion notwithstanding California's argument that the tribe was "merely marketing an exception from" state law," finding that the state's interests could not override the tribe's interest in "rais[ing] revenues and provid[ing] employment for [its] members." 480 U.S. at 219.

set it aside and reversed the district court decision based on those longstanding Supreme Court *precedents*. *Id.* at 572–73. The same outcome is required here.

In all events, even Plaintiffs' overreading of *Bay Mills* cannot get them all the way to court. As Tribal Defendants explained in their opening brief, *Bay Mills* at most recognized the ability for *fellow sovereign states* to seek injunctions against tribal government officials. Mem. 20. *Bay Mills* said nothing about allowing *private plaintiffs* to inject themselves into essential intergovernment relationships between states and tribes. *Id.* at 20–21. Plaintiffs offer no response to this argument, other than to suggest, in the introduction to their brief, that they indeed are advancing the sovereign prerogatives of Virginia. Opp. 1–3. But as Tribal Defendants have explained, Virginia has shown proper deference to its fellow sovereign and has acknowledged that the Tribal businesses do not fall within the regulatory authority of the state and need no license from the state. Mem. 8. This case thus presents the opposite of the hypothetical scenario set forth in the *Bay Mills* dicta, which involved a state suing to enforce its licensing requirements. Again, Plaintiffs offer no response.

Similarly, and as Plaintiffs implicitly acknowledge, *see* Opp. 25–29, no court has allowed private plaintiffs to sue tribal officials for conduct occurring on tribal land. As a general matter, the location of a loan contract is the place of the last act to complete the contract, which here is the Tribe's acceptance and processing of a loan application. *See Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005); Treppa Aff. ¶¶ 221–25 (discussing loan application process). But as is almost always the case, parties can provide for more specific rules in their contracts. *See Silicon Image, Inc. v. Genesis Microchip, Inc.*, 271 F. Supp. 2d 840, 849 (E.D. Va. 2003), *aff'd,* 176 F. App'x 109 (Fed. Cir. 2006); *Western Branch Holding Co. v. Trans Marketing Houston,* 722 F. Supp. 1339, 1341 (E.D. Va. 1989). Here, Plaintiffs agreed that their

loans were "made and accepted *in the sovereign territory of the Habematolel Pomo of Upper Lake*." Treppa Aff. ¶ 237 (emphasis added). Plaintiffs offer no response to this clear contractual language, and there is no basis for them to argue otherwise now.[8]

III. CONGRESS HAS MADE CLEAR THAT PLAINTIFFS' RICO CLAIMS CANNOT PROCEED.

The *Ex parte Young* theory has limits even in suits seeking to enforce *federal* law. As the Supreme Court has explained, "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. In other words, lawsuits invoking *Ex parte Young* cannot extend federal statutes beyond their boundaries. As Plaintiffs acknowledge, the *Ex parte Young* theory "does not create a right to an injunction where the substantive law being enforced does not allow for one." Opp'n 31 (quoting *Armstrong*, 135 S. Ct. at 1385).

As Tribal Defendants explained, Mem. 5–6, the only federal statute Plaintiffs have invoked—RICO—does not apply. Plaintiffs' loans are permitted under tribal law, and so there is no "unlawful debt" to be enjoined. *Id.* Even setting that fatal problem aside, however, RICO contains two "statutory limitations" that preclude Plaintiffs' claims: it does not permit private plaintiffs to obtain injunctive relief, and it does not permit suits against governments. Mem. 22–25. Plaintiffs provide no good reason to disregard those limitations.

A. Plaintiffs Have No Right To Seek An Injunction Under RICO.

As the Fourth Circuit has observed, RICO does not permit private parties to obtain injunctive or declaratory relief. In *Johnson v. Collins Entertainment Co.*, the Fourth Circuit

[8] In light of this clear contractual language, Plaintiffs' characterizations of an affidavit filed by Chairperson Treppa in a different case, and of this Court's factual findings in *Big Picture*, Opp. 27–29, are immaterial, though they are also inaccurate in multiple respects.

addressed the validity of an injunction limiting the payouts for video poker players in South Carolina. 199 F.3d 710, 715 (4th Cir. 1999). In reversing that injunction as legally unsupportable, the Fourth Circuit rejected the suggestion that RICO could have provided a basis for it: "While section 1964(c) of RICO grants private parties a right to seek treble damages from a RICO violator, *it makes no mention whatever of injunctive or declaratory relief*." *Id.* at 726 (emphasis added). In reaching that conclusion, the Fourth Circuit invoked the views of a previous Fourth Circuit panel that expressed "substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief." *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *see Johnson*, 199 F.3d at 726.

There is some irony in Plaintiffs' contention that this clear statement in Fourth Circuit precedent is dicta that "did not decide the issue." Opp'n 31. Plaintiffs, after all, are the ones simultaneously urging the Court to create a new cause of action based on a snippet from dicta in *Bay Mills* as well as out-of-circuit cases. *See infra* II. But more importantly, Plaintiffs' reading of *Johnson* ignores the role of the quoted passage in the Fourth Circuit's decision. Whether language has precedential effect depends on whether it is "necessary to [the] result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). In *Johnson*, the Fourth Circuit invalidated the district court's injunction because it had "relied on its 'inherent equitable power' to grant the injunction," but the Fourth Circuit would not have needed to reach that question if RICO had provided a "statutory basis on which to proceed." *Johnson*, 199 F.3d at 726. The unavailability of injunctive relief under RICO was thus a predicate for the Fourth Circuit's decision, and should guide this Court's analysis.

It is therefore unsurprising that Plaintiffs have failed to identify a *single* decision in this Circuit permitting a private plaintiff to obtain injunctive relief under RICO. Plaintiffs quote

sentence fragments from district court opinions for the proposition that *Johnson*'s statements about RICO are dicta, but they ignore that those cases went on to hold that RICO does not permit such relief. *Galaxy Distrib. of W. Va., Inc. v. Standard Distrib., Inc.*, No. 2:15-cv-4273-JRG, 2015 WL 4366158, at *3 (S.D. W. Va. July 16, 2015) ("RICO, though providing for a civil cause of action in damages, does not expressly or implicitly create a private right of action for equitable relief . . . ."); *R.J. Reynolds Tobacco Co. v. Mkt. Basket Food Stores, Inc*., No. 5:05-cv-253-V, 2007 WL 319965, at *8 (W.D.N.C. Jan. 30, 2007) ("Congress expressly provided for equitable relief in civil RICO actions where the Government commences the action but did not with respect to civil RICO actions initiated by private citizens."); *see also Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 796 (D. Md. 2009) ("[T]his Court holds that there is no private right of injunctive relief under civil RICO . . . ."). There is no reason for this Court to depart from the intra-circuit consensus and be the first court to recognize a private right of action for injunctive relief under RICO.

A decision to that effect would also run against the weight of out-of-circuit precedent. While Plaintiffs identify two cases from the Second and Seventh Circuits that have accepted their interpretation, their claims would likely fail in the majority of other circuits around the country. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088–89 (9th Cir. 1986) (squarely holding that there is no right to a private injunction under RICO); *see also McCulloch v. PNC Bank Inc*., 298 F.3d 1217, 1227 n.14 (11th Cir. 2002) (observing the impropriety of granting private injunctive relief under civil RICO because Congress has made clear that courts are not to do so); *Ganey v. Raffone*, 91 F.3d 143 (table), 1996 WL 382278, at *4 n.6 (6th Cir. July 5, 1996) ("It is questionable whether the franchisees, as private litigants, are even entitled to injunctive relief in this RICO action."); *In re Fredeman Litig.,* 843 F.2d 821, 830 (5th Cir. 1988) ("Congress indeed

had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy.").

Following the decisions that have rejected a private right to injunctive relief also makes sense as a matter of first principles, because that is the result dictated by the plain text of the RICO statute and well-established canons of interpretation. Section 1964(a) contains a list of civil remedies that district courts can order under RICO, including the issuance of "appropriate orders"—such as orders to divest from an enterprise and orders "imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in." 18 U.S.C. § 1964(a). Section 1964(b) then makes clear *who* can pursue those remedies: "The *Attorney General* may institute proceedings under this section." *Id.* § 1964(b). Only in those actions can the court issue the "restraining orders or prohibitions" envisioned in Section 1964(a). *Id.* Section 1964(c)—the only provision to mention private plaintiffs—allows them to obtain treble damages (which Plaintiffs recognize are unavailable here), but does not mention the equitable relief permitted for the Attorney General in adjacent subsections (a) and (b). *Id.* § 1964(c).

If Plaintiffs' reading is right, the statute is a confused jumble. For one thing, if anyone can pursue the remedies set forth in Section 1964(a), then the language in Section 1964(b) that "The Attorney General may institute proceedings under this section" is redundant. Interpretations that would render part of a statute surplusage are to be avoided, especially where, as here, the alternative reading (that only the Attorney General can pursue the remedies set forth under Section 1964(a)), "gives effect to every clause and word of a statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quoting *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2248 (2011)). At the same time, "inclusion of a single statutory reference to private plaintiffs [in §

1964(c)], and the identification of a damages and fees remedy for such plaintiffs . . . logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Minter*, 593 F. Supp. 2d at 795 (emphasis in original) (quoting *Wollersheim,* 796 F.2d at 1082–83); *see N.L.R.B. v. SW Gen., Inc*., 137 S. Ct. 929, 940 (2017) (explaining interpretive doctrine of *expressio unius est exclusio alterius* with the example that "[i]f a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health").

The legislative history also confirms the point. In enacting RICO, Congress "rejected an amendment, described as 'additional civil remedy,' which would expressly permit private parties to sue for injunctive relief under section 1964(a)." *Minter*, 593 F. Supp. 2d at 795 (quoting *Wollersheim,* 796 F.2d at 1085). The very next year, "Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief." *Id.* (quoting *Wollersheim,* 796 F.2d at 1085); *see also Wollersheim*, 796 F.2d at 1086 ("The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.") (emphasis in original). This legislative history is not some passing mention in Congressional reports or floor debates, but the considered judgment of Congress *rejecting* language that would provide for the remedy plaintiffs are invoking here. To find, based on heavy emphasis of a statute's purpose, that Congress meant to create, through ham-fisted drafting, a private right that it explicitly rejected when presented in plain language, is to turn accepted principles of statutory construction on their head.

In sum, the case law in the Fourth Circuit (and the majority of other circuits), the statutory text, and the legislative record all support Tribal Defendants' position that RICO does not create a

private right of action for injunctive relief. Under these circumstances, the Court should decline to "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). Because RICO does not authorize injunctive relief, Plaintiffs have no basis for seeking it under *Ex parte Young*.[9]

B. RICO Also Does Not Apply To Tribal Defendants.

Plaintiffs' RICO claim also fails because RICO does not apply to governments. Plaintiffs have elected to sue the entirety of the Tribal government in their official capacities, meaning their suit is no different from one against the government. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).[10] As several circuits have held, RICO bars suit against governments because, as artificial entities, they cannot form any fraudulent intent. *See Newport v. Fact Concerts, Inc*., 453 U.S. 247, 261 (1981) (noting the existence of "respectable authority" that municipal corporations "can not [*sic*], as such, do a criminal act or a willful and malicious wrong"); *see also* Mem. 23

[9] Plaintiffs' argument that Virginia law allows them to seek injunctive relief is not well-taken, because the *Ex parte Young* theory permits enforcement only of federal rights. *See supra* II.A. The argument is also incorrect. Plaintiffs cite Virginia cases establishing that parties can obtain injunctions that are not expressly permitted by a statute where they establish the "traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law." *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44, 61 (2008) (quoting *Virginia Beach S.P.C.A., Inc. v. S. Hampton Roads Veterinary Ass'n*, 329 S.E.2d 10, 13 (1985)). But none of the cases they cite permit injunctions to enforce statutes that *preclude injunctive relief*. As Tribal Defendants explained in their motion, the Virginia statutes Plaintiffs invoke permit injunctive relief only against a "lender." *See, e.g.*, Va. Code § 6.2-1541. Plaintiffs do not suggest that Tribal Defendants qualify under this statutory language (or any other Virginia statute), nor do they provide any Virginia authority for the proposition that courts can use their equitable powers to alter the statutory scheme enacted by the state legislature.

[10] Some district courts have foreclosed attempts to use officer suits as an end-run around RICO's limitations on suits against governments. *See LaFlamboy v. Landek*, 587 F. Supp. 2d 914, 937 (N.D. Ill. 2008) (dismissing RICO suit because "'official capacity' suits are merely a way of pleading an action against a municipality that cannot be held liable under a respondent superior theory"); *Lathrop v. Juneau & Assocs*., *Inc. P.C*., 220 F.R.D. 330, 335 (S.D. Ill. 2004) ("Because the City of Granite City cannot be held liable under RICO for the reasons stated above, the suit against the government officials in their 'official capacity' also cannot be maintained.").

(collecting cases in which courts found RICO did not apply to government entities because they cannot form the requisite *mens rea*).[11]

Plaintiffs present no compelling reason to conclude otherwise. They first assert that "the Tribe is 'capable of holding a legal or beneficial interest in property,'" such that it "falls within the definition of a 'person' that can violate" RICO. Opp. 29–30 (quoting 18 U.S.C. § 1961(3)). Even if this reasoning had merit, the fact of the matter is that Plaintiffs *have not sued the Tribe*—they have sued the Tribe's government officials. And under Tribal law, neither the officials nor the elected government as a whole can hold property. Only the Tribe can. *See, e.g.*, Treppa Aff. Ex. 3, ECF No. 44-4, HPUL Const. Article XI, § 2 (title to all lands is vested in the Tribe); *see also id.* Ex. 11, ECF No. 44-12, Article 8 (Silver Cloud Articles of Incorporation stating that Silver Cloud will issue only one share of stock, which is to be owned by the Tribe).

Plaintiffs fare no better in asserting that governments must be subject to liability because private corporations are. As the Supreme Court has recognized, governments and private corporations are not the same for liability purposes. *See Newport*, 453 U.S. at 261–62 ("[T]here is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations." (quoting *Hunt v. City of Boonville*, 65 Mo. 620, 625 (1877)). This

[11] Plaintiffs cannot avoid this reasoning by virtue of the fact that they have sued the members of the Tribal government. Because they sued the government as a whole, this distinction makes no difference. Further, the relevant "intent" by those government officials was to enact legislation creating the Tribe's lending operation and to establish a commission to regulate those operations, but there is no doubt that Tribal Defendants have absolute immunity for their legislative actions. "The principle that legislators are absolutely immune for their liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (recognizing absolute legislative immunity for local legislators); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (extending legislative immunity to "individual members of [a] Tribal Council").

distinction makes good sense, because lawsuits against governments ultimately harm the general public served by those governments. *Newport*, 453 U.S. at 267 (a punitive damage award against the municipality "punishes" only the general public who ordinarily did not participate in the commission of the offense); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991) (declining to extend RICO liability to a municipal corporation); *Lancaster Comty. Hosp. v. Antelope Valley Hosp. Dist*., 940 F.2d 397, 404 (9th Cir. 1991) (dismissing suit against government entity because "[t]he 'body politic,' that is, the taxpayers, will pay if [plaintiff's] RICO claim is successful").

Plaintiffs' claim that there are no financial consequences to the Tribal fisc because they seek an injunction, Opp. 31, ignores the nature of the relief they seek. The revenue the Tribal businesses generate funds the vast majority of the Tribal budget. *See* Treppa Aff. ¶ 255. Plaintiffs' goal is to shut down that business, depriving the Tribe of its primary source of revenue. *See* First Am. Compl., ECF No. 54, ¶ 54 (lawsuit seeks "to shut down the operations of the Tribal Lending Entities"). It is hard to imagine a greater burden on the members of the Tribe.[12]

IV. PLAINTIFFS' SUIT SHOULD BE DISMISSED FOR FAILURE TO JOIN THE TRIBAL BUSINESSES.

In attempting to salvage their suit post-*Big Picture*, Plaintiffs have crafted a lawsuit that excludes the Tribal businesses with whom they contracted and to whom they owe their debts. Plaintiffs do not appear to dispute that *if* the Tribal businesses are necessary parties, then their

[12] Plaintiffs' claim that this lawsuit would not have this effect because it pertains only to tribal lending in the state of Virginia, Opp. 3, is a red herring. The parties here agree that a majority of states contain interest rate caps for loans governed by state law. And Plaintiffs themselves argue that the Tribe's lending business is inconsistent with other states' laws. *See* Opp. 3 n.2. If plaintiffs were to prevail here, it is hard to imagine that their counsel or other litigants would not attempt to mount copy-cat lawsuits based on the laws of other states—as they have done in lawsuits against other Tribes.

claims must be dismissed. *See, e.g.*, *Kescoli v. Babbitt,* 101 F.3d 1304, 1311 (9th Cir. 1996) ("If the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" (quoting *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)). And Fourth Circuit precedent makes clear that this case cannot proceed without the Tribal businesses because, in cases involving a contract dispute, the contracting parties are necessary and indispensable under Rule 19. *See, e.g.*, *Nat'l Union Fire Ins. Co. v. Rite Aid, Inc*., 210 F.3d 246, 252 (4th Cir. 2000) ("[P]recedent supports the proposition that a contracting party is the paradigm of an indispensable party.") (citation omitted); *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir. 1999) (parties to a contract are necessary parties to a suit on the contract); *Delta Fin. Corp. v. Paul D. Comanduras & Assocs.*, 973 F.2d 301, 305–06 (4th Cir.1992) (same); *see also Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.").

Plaintiffs' citations to out-of-circuit cases provide no basis for disregarding clear Fourth Circuit precedent, particularly because none of the cases they invoke involve contracts. In *Vann v. U.S. Department of the Interior*, former Cherokee slaves sued the Principal Chief of the Tribe to recover their tribal membership in the Cherokee Nation and the right to vote. 701 F.3d 927, 928 (D.C. Cir. 2012). The D.C. Circuit concluded that the "Cherokee Nation and the Principal Chief in his official capacity are one and the same," such that the "Principal Chief can adequately represent the Cherokee Nation in this suit" and grant membership and rights if warranted. *Id.* at 929–30. Similarly, in *Salt River Project Agricultural Improvement & Power District v. Lee*, two non-Indian entities sought to prevent Navajo Nation officials from applying tribal law to them in

tribal courts. 672 F.3d 1176, 1177–78 (9th Cir. 2012). The Ninth Circuit concluded that "the district court [could] accord the complete relief sought by the plaintiffs in the Navajo Nation's absence," such that the tribe was not a necessary party. *Id.* at 1180; *see also Kansas v. United States*, 249 F.3d 1213, 1226 (10th Cir. 2001) (absence of tribe "does not prevent the State from obtaining its requested relief or an adequate judgment"). These cases at most stand for the proposition that when a tribal official is named in a suit not involving a contract, the Tribe itself need not also be joined.

But as the Fourth Circuit has recognized, where, as here, Plaintiffs are suing to invalidate a contract, it is impossible to order effective relief without the counter-party to that contract being present in court. The Fourth Circuit relied on similar reasoning in dismissing a similar contract suit for failure to join a sovereign Tribe, concluding that the Tribe's absence would preclude the plaintiff from obtaining "complete relief." *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552–53 (4th Cir. 2006). This case presents even stronger reasons for dismissal because—as Plaintiffs acknowledge—the actual contractual parties were both present in the lawsuit in *Yashenko*. *See* Opp. 42–43.

It is apparent that Plaintiffs removed the Tribal businesses from the Amended Complaint in recognition of their sovereign immunity under *Big Picture*. But that choice has a consequence. Plaintiffs seek invalidation of their loan contracts and an injunction against collection of their debts. That relief cannot be granted by an order against Tribal Defendants alone, which is why the Tribal businesses are necessary parties under Fourth Circuit precedent.[13] And contrary to

[13] The same is true with respect to Plaintiffs' claims against Asner and Landy. Any determination that Asner and Landy are liable would require the Court to conclude that the loans issued by the Tribal businesses were usurious or unlawful. An order to that effect would directly

Plaintiffs' claim, following that precedent would not "gut the *Ex parte Young* doctrine," Opp. 41 (citation omitted), because there is no legitimate invocation of *Ex parte Young* here.

V. PLAINTIFFS CANNOT SATISFY ARTICLE III'S REQUIREMENTS.

Article III requires, without exception, that a plaintiff seeking access to federal court prove (1) an "injury in fact"—that is, "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that there is "a causal connection between the injury and the conduct" of which plaintiff complains; and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotations omitted). Across two complaints and one lengthy opposition brief, Plaintiffs have failed to proffer any legitimate way in which an injunction against *future* lending would redress any harm they have suffered or will continue to suffer. Nor could they, as there is no reason to believe that these Plaintiffs will take out future loans from the Tribal businesses after bringing this suit. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (plaintiff lacked standing because, "[e]ven assuming his past purchases . . . resulted in injury and that he may continue to suffer consequences as a result, he has not shown that he is likely to be subjected to further sales by [the defendant] of" the product in question); *see also Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019) ("[A] plaintiff seeking prospective injunctive relief may not rely on prior harm to establish Article III standing.") (quotations omitted).

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interfere with the Tribal businesses' legally protected interests as contracting counter-parties on those loans.

Plaintiffs' only response—that RICO and *Ex parte Young* permit injunctive relief—is no response at all. Even if Plaintiffs were right about RICO and *Ex parte Young* (and they are not, *see supra* II–III),[14] they would still have to comply with Article III's prerequisites for a federal suit. The fact that a cause of action may exist does not mean that a plaintiff is entitled to one without an actual case or controversy. *See Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing" Article III standing); *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc*., 821 F.3d 352, 358 (2d Cir. 2016) (explaining the difference between the "immutable [standing] requirements of Article III" and a cause of action, which is not an issue of standing and is merely a question of whether a plaintiff has a right to sue under a statute); *see also Kenny v. Wilson*, 885 F.3d 280, 287–88 (4th Cir. 2018) (observing that plaintiffs who sought an injunction pursuant to 42 U.S.C. § 1983, which provided for such relief, were still required to establish standing in the form of an ongoing or future injury in fact).

Nor have the Plaintiffs who paid off their debts provided a justification for allowing themselves to remain in court. These Plaintiffs first assert that there may still be efforts to collect the nothing they owe, but they provide no support whatsoever for this assertion. The Supplemental Treppa Affidavit makes clear that the Tribal businesses are no longer attempting collection from

[14] Far from supporting Plaintiffs' position, the RICO statute poses yet another obstacle to Plaintiffs' efforts to satisfy Article III. As noted above, Section 1964(a) of RICO applies only to relief sought by the Attorney General of the United States. Even if Section 1964(a) were understood to lower the Article III threshold for government enforcement actions, the availability of prospective relief when sought by *the government* does not extend to private plaintiffs, especially considering that RICO specifies a wholly different set of remedies for private plaintiffs in Section 1964(c). *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982) (explaining that Attorneys General are given special power to bring suit on behalf of the citizens of their states when they are able to "articulate an interest apart from the interests of particular private parties"); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 129 (2014) ("[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.") (quotations omitted).

Plaintiffs Blackburn, Bumbray, and Collins. *See* Supp. Treppa Aff., ECF No. 66, ¶ 15. Plaintiffs do not submit anything to the contrary—conspicuously absent from their filings in this case are any affidavits or even allegations supporting an injury in fact for the Plaintiffs who are no longer facing collections from the Tribe. These Plaintiffs then assert that voiding all past loans might benefit their credit score, but do not allege that their loans even factor into their credit score. These Plaintiffs also claim that voiding their past loans might facilitate their claims against third parties. Here too, they provide no plausible factual basis for how they might benefit, and no legal support for the idea that supporting potential claims against another party is a valid Article III interest. Plaintiffs bear the burden of establishing Article III standing, *Lujan*, 504 U.S. at 561, and unsupported speculation in a response brief does not come close to carrying that burden.

Last, and least, Plaintiffs assert that even if they are at no real risk of future harm, they are entitled to seek an injunction on behalf of others who might seek loans from the Tribe. This argument fails the basic premise of Article III standing. The Supreme Court has imposed a clear "prohibition on a litigant's raising another person's legal rights." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) ("Particularization is necessary to establish an injury in fact," and "[f]or an injury to be particularized, it "must affect the plaintiff in a personal and individual way.") (quoting *Lujan*, 504 U.S. at 560 n.1); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant [the] exercise of jurisdiction.");

In cobbling together a series of unlikely scenarios, Plaintiffs appear to suggest that they are permitted to seek an injunction that has *any possibility*, however vanishing, of preventing them future harm. But "the judicial remedy cannot encompass every conceivable harm that can be traced

to alleged wrongdoing." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983). Because an order canceling past loans would do nothing for the three Plaintiffs who have no debt with the Tribe, and because enjoining future lending would not address an injury to *any* Plaintiffs, the Court should dismiss these claims.

CONCLUSION

For the reasons stated above and in Tribal Defendants' Memorandum in Support of their Motion to Dismiss, Plaintiffs' claims should be dismissed with prejudice in their entirety.

DATED: October 4, 2019

Respectfully Submitted.

/s/ Matthew Skanchy
Matthew Skanchy (Bar No. 89575)
mskanchy@wilkinsonwalsh.com
Rakesh Kilaru (*pro hac vice*)
rkilaru@wilkinsonwalsh.com
James Rosenthal (*pro hac vice*)
jrosenthal@wilkinsonwalsh.com
Kosta Stojilkovic (*pro hac vice*)
kstojilkovic@wilkinsonwalsh.com
Beth Wilkinson (*pro hac vice*)
bwilkinson@wilkinsonwalsh.com
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW
Washington DC, 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to all counsel of record.

DATED: October 4, 2019

Respectfully Submitted.

/s/ Matthew Skanchy
Matthew Skanchy (Bar No. 89575)
mskanchy@wilkinsonwalsh.com
Rakesh Kilaru (*pro hac vice*)
rkilaru@wilkinsonwalsh.com
James Rosenthal (*pro hac vice*)
jrosenthal@wilkinsonwalsh.com
Kosta Stojilkovic (*pro hac vice*)
kstojilkovic@wilkinsonwalsh.com
Beth Wilkinson (*pro hac vice*)
bwilkinson@wilkinsonwalsh.com
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW, 10th Floor
Washington, D.C. 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants