2020 WL 4453576 (C.A.4) (Appellate Brief)
United States Court of Appeals, Fourth Circuit.

George HENGLE; Sherry Blackburn; Willie Rose; Elwood Bumbray; Tiffani Myers; Steven Pike; Sue Collins; and Lawrence Mwethuku; on behalf of themselves and all others similarly situated, Plaintiffs - Appellees,

v.

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; Carol Munoz, Secretary of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; Jennifer Burnett, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; Aimee Jackson-Penn, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; Veronica Krohn, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity, Defendants - Appellants,

and

Scott Asner; Joshua Landy, Defendants.

Nos. 20-1062(L), 20-1063, 20-1358, 20-1359.
July 23, 2020.

On Appeal from the United States District Court for the Eastern District of Virginia at Richmond

Opening/Response Brief of Appellees

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CASES

***1 INTRODUCTION**

This case concerns online loans made and collected in Virginia by lending entities owned by the Habematolel Pomo of Upper Lake, a federally recognized Native American tribe. These loans impose triple-digit interest rates, exponentially higher than the 12% interest rate cap under Virginia law. One of the plaintiff's loans charged an interest rate of 919.9%, requiring him to pay $2,225 in finance charges on a $700 loan over a period of 8 months. These unlawfully high interest rates violate federal and Virginia law.

This appeal primarily concerns the enforceability of the defendants' efforts, through their loan contracts with consumers, to draft their way out of all legal accountability. Over the last decade, courts across the country - including this one, on four separate occasions - have repeatedly "confronted transparent attempts to deploy tribal sovereign immunity to skirt state and federal consumer protection laws." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019). A key component of this scheme involves crafting arbitration contracts "in which borrowers are forced to disclaim the application of federal and state law in favor of tribal law," which is often "exceedingly favorable to the tribal lending entity" and its business partners. *Id.* at 126-27.

This appeal is the latest attempt to enforce one of these tribal arbitration contracts. *Four times*, however, this Court has labeled these attempts a "farce," ***2** designed specifically "to avoid state and federal law," and deployed "to game the entire system." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674-76 (4th Cir. 2016); *see also* *Gibbs v. Haynes Invs., LLC*, __ F.3d __, 2020 WL 4118239, at *5 (4th Cir. July 21, 2020); *Gibbs v. Sequoia Cap. Operations, LLC*, __ F.3d __, 2020 WL 4118283, at *6 (4th Cir. July 21, 2020); *Dillon v. BMO Harris Bank*, 856 F.3d 330 (4th Cir. 2017). Other courts of appeals have uniformly refused to enforce them multiple times. *See* *Gingras*, 922 F.3d at 127; *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 232 (3d Cir. 2018); *Williams v. Medley Opportunity Fund II, LP*, 2020 WL 3968078, at *1 (3d Cir. July 14, 2020). This unanimous view is no surprise, given that the same law firm crafted these tribal arbitration contracts in a "brazen" attempt to avoid federal and state laws. *Hayes*, 811 F.3d at 676.

The contracts in this case are no different. Although members of a different enterprise now seek their enforcement, the contracts' terms here are materially indistinguishable from the ones that have been repeatedly struck down. For instance, they expressly forbid the arbitrator from applying "any other law other than the laws of the [tribe]" - a clause that "almost surreptitiously waives a potential claimant's federal rights" and "flatly and categorically renounce[s]" the authority of federal law. *Hayes*, 811 F.3d at 675. In other words, because the contracts "mandate[] that only tribal law applies in arbitration, federal law does not." *Williams*, 2020 WL 3968078, at *7.

***3** The defendants' second bid to dismiss this case - by isolating the choice-of-law provision in the contracts - fails for similar reasons. It is also independently unenforceable because it violates § 6.2-306(A) of the Virginia Code - which expressly provides that "[a]ny agreement or contract in which the borrower waives the benefits of this chapter or releases any rights he may have acquired under this chapter shall be deemed to be against public policy and void." This anti-waiver provision, located in the chapter on "Interest and Usury," means what it says: A lender may not enforce a contract that compels borrowers to forego the benefits of Virginia's interest-rate caps and "undo what the General Assembly has determined to be the public policy of the Commonwealth." *Blake Const. Co, Inc./Poole & Kent v. Upper Occoquan Sewage Auth.*, 587 S.E.2d 711, 718 (Va. 2003).

The tribal defendants raise tribal sovereign immunity as a final basis for avoiding liability. They characterize a suit for only prospective injunctive relief to restrain violations of Virginia law as an "astounding proposition" that is an affront to their sovereignty. But it is the tribal officials who are infringing on a fundamental aspect of Virginia's sovereignty: its ability to protect its residents within its borders. That is why the Supreme Court has already declared that a suit "for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct" is available to "shutter, quickly and ***4** permanently"

unlawful conduct involving tribes. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014). A tribe's sovereignty does not allow it to go "beyond reservation boundaries" and ignore "non-discriminatory state law otherwise applicable to all" businesses. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1367, and 18 U.S.C. § 1964. The district court denied the defendants' motion to compel arbitration on January 9, 2020, and they timely appealed on January 21, 2020. This Court has appellate jurisdiction over the denial of the motions to compel arbitration under 9 U.S.C. § 16(a)(1)(B). The Court also has jurisdiction over the district court's sovereign immunity ruling under the collateral order doctrine.

In addition, the defendants timely and successfully petitioned to certify the choice-of-law issue for appeal under 28 U.S.C. § 1292(b). *Asner v. Hengle*, No. 20-161 (4th Cir.), Order, Dkt. 13; *Treppa v. Hengle*, No. 20-164 (4th Cir.), Order, Dkt. 18. The district court granted this motion and certified "the question of whether enforcement of the Choice-of-Law Provision would violate Virginia's compelling public policy against unregulated usurious lending." JA1851. On its ***5** own initiative, the Court also certified the question of whether RICO "permits *Ex parte Young*-style relief against the Tribal Officials." JA1851.

STATEMENT OF THE ISSUES

1. Whether, consistent with this Court's controlling decisions in *Hayes*, *Dillon*, *Haynes*, and *Sequoia*, the district court correctly refused to enforce the tribal-arbitration contracts because they expressly forbid an arbitrator from applying any relevant state or federal law.

2. Whether enforcement of the loan contracts' tribal choice-of-law provisions violates Virginia's public policy as expressed by the plain text of § 6.2-306(A) of the Virginia Code and the Virginia Supreme Court.

3. Whether, consistent with *Bay Mills* and *Gingras*, a suit for prospective relief against tribal officials for alleged violations of state law can proceed under *Ex parte Young*.

4. Whether the district court erred when it held, contrary to the text and structure of the statute, that RICO does not permit injunctive relief for claims brought by private plaintiffs.

STATEMENT OF THE CASE

1. The plaintiffs' loans. The eight plaintiffs are Virginia consumers who each received online loans originated by one of the Tribe's lending entities while residing in Virginia. JA1487, JA1710. The plaintiffs used their Virginia ***6** addresses to apply for the loans, and the payments on the loans were collected from the plaintiffs while they were located in Virginia from their Virginia bank accounts. XXXXXXXXX, XXXXXX. These loans carried interest rates ranging from 543% to as high as 919%, making them 45 to 75 times the amount permitted by Virginia law. *See* JA1487, JA1710. As such, the loans violated Virginia's general usury laws and licensing requirements, rendering them contrary to public policy and void. *See* JA1486-87, JA1710.

2. The tribal lending model. Even though the loans were made to Virginia consumers and collected from Virginia bank accounts, the tribal lending entities do not attempt to comply with Virginia's usury statutes, including the 12% interest rate cap. The defendants' conduct is representative of a broader national trend to engage in unlawful lending under the guise of authority to operate via the Internet without regard for applicable law. JA1473.

Payday lenders have attempted to skirt applicable usury laws since the early 2000s, when they partnered with national banks to avoid complying with state laws. JA1473. When those "rent-a-bank" arrangements were no longer viable due to a federal crackdown, several payday lenders developed a similar tribal lending model to continue their unlawful lending. JA1473.

For example, in January 2009, one of the legal pioneers of the tribal lending model, Claudia Callaway, recommended that her clients "move to a ***7** 'tribal model"' because tribal lenders "could make these loans," "sell the loans to a non-tribal entity," and "collect[] upon [them] at the contract rate" without being "subject to state regulation." JA1473 (quoting *CFPB v.* *CashCall, Inc.*, 2016 WL 4820635, at *2 (C.D. Cal. Aug. 31, 2016)). Callaway claimed that "the loans would be made under the laws of the tribe and would not have to comply with licensing and usury laws in states where borrowers resided." JA1474.

Callaway presented herself to her clients as someone who could enable payday lenders "to diversify and structure a lending model within requirements of law to 'avoid enforcement actions by state and federal regulators."' JA1474 (quoting *CFPB v.* *CashCall, Inc.*, 2018 WL 485963, at *2 (C.D. Cal. Jan. 19, 2018)). Callaway is one of several attorneys who represented the nontribal payday lenders in these transactions. JA1474. Often on the other side of the table was Robert Rosette and representatives of his law firm, Rosette, LLP. JA1474, JA1707. His clients include Great Plains Lending and American Web Loan - two entities whose arbitration agreements have been deemed unenforceable. JA1482; *see also Dillon*, 856 F.3d 332; *Williams*, 2020 WL 3968078, at *1. Mr. Rosette represented the Tribe from 2008 through June 2016, *i.e.*, during the time the Tribe was developing its tribal lending business. JA1475-76, JA1707.

8** ***3. The tribal lending entities. Consistent with the tribal lending model, Golden Valley, Inc. was established in August 2012, and consumers were able to obtain a loan from the website, www.goldenvalleylending.com, as early as August 29, 2012. JA1477, JA1707. Shortly thereafter, Silver Cloud, Inc. was established and consumers were able to obtain identical loans from the website, www.silvercloudfinancial.com. JA1478, JA1707. Two other lending entities, Mountain Summit and Majestic Lake, were later formed. JA1466, JA1478, JA1707.

The homepage of each of the lending entities claimed that the company was "wholly owned and *operated*" by the Tribe. JA1477-78 (emphasis added). Despite these representations, nearly all of the activities between 2012 and 2014 were performed by other companies. JA1707. These companies were, directly or indirectly, owned by the non-tribal defendants, Asner and Landy, who operated the lending operations out of Overland Park, Kansas, the hotbed of the online payday lending industry. JA1479, JA1708. The vast majority of the revenue was distributed to non-tribal outsiders, including the defendants Landy and Asner. JA1480, JA1708.

In 2014, investigative journalists visited the reservation and observed that the tribal entities' "one-story office just off California's Highway 20 doesn't look like much," certainly not what you would expect of "four thriving financial ***9** enterprises." JA1479 (quoting Julia Harte & Joanna Zuckerman Bernstein, *When Tribes Team Up With PayDay Lenders, Who Profits?*, Al Jazeera America (June 17, 2014)). They further observed that "little of the revenue that flows through these tribal businesses ends up in the rancheria or benefiting tribal members, as attested by the cluster of rundown houses nearby, where some members live." JA1479 (quoting Harte et al., *supra*). And interviews with tribal members confirmed that "none of them had any jobs related to payday lending." JA1479 (quoting Harte et al., *supra*).

4. The merger. Not long after the entities began operating, the New York State Department of Financial Services "issued a cease and desist letter to thirty-five online lending companies, including Golden Valley, after discovering that those companies offered payday loans to New York consumers with annual interest rates as high as 1,095 percent, in violation of New York law." JA1708. "In response, several other tribal lending entities and the respective tribes that formed them sued NYDFS," seeking injunctive relief. JA1708. The next month, a federal court denied the tribal plaintiffs' request for a preliminary injunction, "finding that the

tribes' loans were not exempt from New York's nondiscriminatory usury laws." JA1708 (citing *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 361 (S.D.N.Y. 2013), aff'd, 769 F.3d 105 (2d Cir. 2014)).

***10** Following this and other similar enforcement actions by state and federal regulators, *see* JA1709, Rosette's tribal clients began restructuring their businesses in response to the crackdown. JA1484 & n.11. As a result, Asner and Landy's companies, National Performance Agency, Nagus Enterprises, and their affiliated entities, were sold to newly created tribal entities, Clear Lake TAC G and Clear Lake TAC S. JA1484-85 & n.11. Shortly after the merger, those two entities dissolved and their assets were ultimately acquired by ULPS, a new tribal company that continues to operate in Overland Park, Kansas. JA1485.

Despite the merger, the lending business is largely operated by 111 people located in Overland Park, Kansas. JA33, JA1709. These employees - non-tribal members working thousands of miles away from the Tribe's reservation - handle the vast majority of the day-to-day administrative operations of the Tribe's lending businesses, such as underwriting, risk assessment, compliance, customer complaints, accounting, lead generation, collections, and website management. JA1468.

5. The defendants' contracts attempt to shield their scheme from scrutiny. The tribal lending model revolves around a contractual web of liability shields - an integrated (and often inconsistent) set of choice-of-law provisions, forum-selection clauses, and arbitration requirements - deployed, as this Court recently put it, to "game the entire system." *Hayes*, 811 F.3d at 676. ***11** Because there is no "serious[] dispute" that these sorts of loans "violate[] a host of state and federal lending laws," *id.* at 669, "[p]art of this scheme involves crafting arbitration agreements like the ones here, in which borrowers are forced to disclaim the application of federal and state law in favor of tribal law," *Gingras*, 922 F.3d at 126.

Here, the defendants' boilerplate contracts similarly include an arbitration agreement that purports to assure consumers an opportunity "to present their evidence" to a "neutral third person" with authority to issue a "final and binding decision resolving the dispute." JA1087. However, even though all federal and state claims are defined to fall under the agreement, the arbitrator is only permitted to apply tribal law. The arbitration agreement states:

The parties ... will be governed by the laws of the [Tribe] and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the [Tribe], including the limitations on the arbitrator below.

.... You have the right to request that arbitration take place within thirty (30) miles of Your residence ... provided, however, that such election ... shall in no way ... allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake.

JA1088. To further insulate the Tribe, the arbitration agreement requires exclusive enforcement of any arbitration award before "the applicable ***12** governing body" of the Tribe, but it lacks any specific details regarding this undefined "Tribal Forum." JA1088; *see also* JA269 (tribal code provision mandating that a "consumer must be provided a template" loan contract that contains "disclosures regarding exclusive tribal jurisdiction"). On top of those provisions, the Tribe's Consumer Financial Regulatory Ordinance ("Tribal Law") also limits an arbitrator's authority to award damages beyond "the maximum value of the Loan at issue" and prohibits the awarding of any punitive damages or equitable relief. JA281 § 11.5(a)(15).

6. The defendants' motions to compel and dismiss. On July 12, 2019, the plaintiffs filed their First Amended Complaint challenging the enforceability of their loans. JA1465-1511. The plaintiffs seek only prospective relief against the Tribal defendants, *i.e.*, the Tribe's officials. JA1499-1511. The plaintiffs also seek relief against Asner and Landy for their violations of RICO, Virginia's usury laws, and for unjust enrichment. JA1489-94. On August 9, 2019, the defendants separately moved

to compel arbitration and to dismiss. With respect to the motion to dismiss, the central argument was that the Plaintiffs' usury claims must be dismissed because the Tribe's laws do not have an interest-rate cap. *See* Dkt. 65 at 5; Dkt. 60 at 14-15.

7. The district court decision. The district court rejected the defendants' attempt to enforce their arbitration contracts because they prospectively ***13** waived statutory remedies otherwise available to the plaintiffs. JA1740. The district court also held that the delegation clause was unenforceable for the same reason. JA1734. In refusing to sever the offending provisions, it found that "[t]he Tribal Lending Entities took advantage of their superior bargaining power to extract Plaintiffs' assent to terms couched in an Arbitration Provision that plainly functioned to violate public policy by depriving Plaintiffs of statutory remedies otherwise available to them." JA1735, JA1741.

The district court also held that the choice-of-law provision in the consumer loan agreements was unenforceable because it "violate[d] Virginia's compelling public policy against the unregulated lending of usurious loans." JA1755. The district court reasoned, in part, that Virginia's legislature has "affirmed its intention that its usury laws should apply to all contracts without waiver." JA1755 (citing Va. Code § 6.2-306(A)). In addition, it explained that "the apparent absence of any comparable protection for aggrieved consumers under the Tribe's laws rises to the level of 'shocking one's sense of right' such that enforcement of the Choice-of-Law Provision would violate Virginia's compelling public policy against usurious lending practices." JA1755-56.

The district court then rejected the defendants' appeal to tribal sovereign immunity, explaining that "*Bay Mills* permits *Ex parte Young*-style claims against tribal officials for violations of state law that occur on non-Indian lands." ***14** JA1767. In doing so, it rejected the defendants' arguments that the statements in *Bay Mills* were "mere dictum" that would "upset decades of immunity jurisprudence." JA1768. Instead, the Court reasoned that allowing these claims would best respect sovereignty by facilitating the peaceful resolution of disputes between domestic sovereigns. JA1768.

Finally, the district court held that the text of the RICO statute does not permit private plaintiffs to bring claims for injunctive relief, departing from the reasoning of those courts of appeals - the Second, Seventh, and Ninth Circuits - that had previously considered the issue. *See* JA1778-88.

STANDARD OF REVIEW

The Court's review of an order denying a motion to compel arbitration is plenary. *Hayes*, 511 F.3d at 671. The choice-of-law, sovereign immunity, and statutory interpretation issues are questions of law, which this Court reviews de novo. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019); *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 591 (4th Cir. 2004).

SUMMARY OF THE ARGUMENT

I. The defendants wrongly claim that their contracts do not constitute an impermissible prospective waiver. The federal courts of appeals have unanimously held that these types of tribal-arbitration contracts are unenforceable under the FAA because they contravene federal and state ***15** consumer protection laws. *See* *Haynes*, 2020 WL 4118239, at *9 (invalidating materially identical tribal arbitration contract); *Sequoia*, 2020 WL 4118283, at *6 (same); *Williams*, 2020 WL 3968078, at *9 (same) *Gingras*, 922 F.3d at 127 (same); *Dillon*, 856 F.3d at 336 (same); *Hayes*, 811 F.3d at 675-76 (same). None of the defendants' efforts to evade this weight of authority can prevail. Although the FAA gives parties considerable freedom to structure arbitration agreements, that freedom does not extend to a prospective waiver of a party's statutory rights.

II. The district court was also right to reject the defendants' alternative bid to enforce just their contractual choice-of-law clause, which illegally forces Virginia borrowers to forego their statutory rights. It is also independently unenforceable because it violates § 6.2-306(A) of the Virginia Code, which expressly provides that "[a]ny agreement or contract in which the borrower waives the benefits of this chapter or releases any rights he may have acquired under this chapter shall be deemed to be against public policy and void." This anti-waiver provision is clear: No matter the circumstance, a lender "may not" enforce a contract that compels borrowers to forego the benefits of Virginia's interest-rate caps and "undo what the General Assembly has determined to be the public policy of the Commonwealth." *Blake Const.*, 587 S.E.2d at 718.

***16 III.** Recognizing the problems created by their contracts, the tribal defendants raise tribal sovereign immunity as a final basis for reversal. But the Supreme Court has expressly acknowledged that there are a "panoply of tools" available to "shutter, quickly and permanently" unlawful conduct involving tribes, including lawsuits under *Ex parte Young* "for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796. Because "tribal immunity does not bar" that type of suit, the district court correctly concluded that "*Bay Mills* permits *Ex parte Young-style* claims against tribal officials for violations of state law that occur on non-Indian lands." JA1768.

IV. The tribal defendants' final attempt to narrow the plaintiffs' claims relies on atextual limitations not found in RICO. The district court improperly construed RICO to not provide for injunctive relief to private plaintiffs - a reading that defies the text, history, and purpose of an intentionally powerful statute. And although the district court did not reach the question, as other courts of appeals have made clear, there is little doubt that under a plain reading of RICO, individuals acting in their official capacity are subject to suit.

*17 ARGUMENT

I. The arbitration contracts are unenforceable.

A. The defendants' arbitration contracts prospectively waive federal rights and remedies.

1. The defendants' effort to compel arbitration fails for one simple reason: By its terms, the contracts forbid the application of any federal or state laws in the arbitration proceeding between the parties. The FAA forbids that. Although the FAA has a broad reach, courts will not enforce a contract that operates as a "prospective waiver of a party's right to pursue statutory remedies." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). This Court has repeatedly applied this rule to invalidate similar efforts by payday lenders to enforce nearly identical tribal-arbitration contracts disavowing state and federal law. *Haynes*, 2020 WL 4118239, at *5; *Sequoia*, 2020 WL 4118283, at *4; *Hayes*, 811 F.3d at 674; *Dillon*, 856 F.3d at 334. The message is clear: When an arbitration contract is drafted "in a calculated attempt to avoid the application of state and federal law," the "entire arbitration agreement is unenforceable." *Dillon*, 856 F.3d at 337. None of the defendants' arguments overcome this controlling rule.

Courts will invalidate any contract - arbitration or otherwise - that attempts to foreclose "the assertion of certain statutory rights," because such a ***18** contract would jeopardize a party's "right to pursue statutory remedies." *Am. Express*, 570 U.S. at 236. Although the FAA permits arbitration to enhance the "simplicity, informality, and expedition" of the matter, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682-83 (2010), it does not allow a contract to employ arbitration to sacrifice substantive claims. *See* 9 U.S.C. § 2 (providing for enforcement of contract "to settle by arbitration a controversy"). "By agreeing to arbitrate a statutory claim," a "party does not forgo the substantive rights afforded by the statute" but "submits to

their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S 614, 628 (1985).

2. The district court correctly found that the arbitration provision here includes "no ambiguities as to the exclusive application of tribal law." JA1731. In reaching this conclusion, the court simply read the contracts. First, they say:

> The parties to such dispute will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, *to the extent those rules and procedures do not contradict* the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, *including the limitations on the arbitrator below*.

JA1088 (emphasis added). Then, in the very next paragraph, another provision places specific "limitations on the arbitrator," announcing that electing to ***19** arbitrate "shall in no way be construed" as allowing "for the application of any other law other than the laws of the" Tribe. JA1088.

As the district court explained, these provisions unambiguously "disclaim the application of federal or state defenses to arbitrability, thereby prospectively waiving Plaintiffs' federal statutory remedies under § 2 of the FAA in violation of public policy." JA1731. The "two provisions function to limit the application" of "any other law," including federal and state defenses. JA1732. "To read the clauses otherwise," the court recognized, "would create an impermissible and illogical conflict between the terms." JA1734.

The district court's conclusion represents a faithful application of this Court's decisions in *Hayes*, *Dillon*, and now *Haynes* and *Sequoia*. Indeed, the offensive language contained in the defendants' contracts is virtually identical to that in *Hayes*, which contained a limitation that the arbitrator could not apply "any law other than the law of the Cheyenne River Sioux Tribe of Indians." *Hayes*, 811 F.3d at 675. There, this Court held that this language, standing alone, "almost surreptitiously waives a potential claimant's federal rights" and "flatly and categorical renounce[s] the authority of [] federal statutes." *Id*.

That language was central to *Hayes*. And when confronting a similar contract in *Dillon*, the Court began by discussing the significance of that same "any law other than" provision. 856 F.3d at 334 (observed that *this language* ***20** "almost surreptitiously waives a potential claimant's federal rights through the guise of a choice of law clause" and "flatly and categorically renounce[s] the authority of the federal statutes") (emphasis added). Because the language here is materially indistinguishable, so is the result: The contracts renounce federal law and so are invalid. *See also Williams*, 2020 WL 3968078, at *7 (holding that where an "arbitration agreement mandates that only tribal law applies in arbitration, federal law does not," resulting in an "impermissible prospective waiver of statutory rights").

Four years ago, this Court surmised that its decision in *Hayes* might prompt "future companies" to "craft [their] arbitration agreements on the up-and-up and avoid the kind of mess" in that case. 811 F.3d at 676. Not here. Instead, the defendants have continued to use the very same form contracts that this Court rejected in *Hayes*. *Compare* JA1276-85 (loan contract from 2013); *with* JA1262-74 (loan contract from 2018). The district court was right to reject them.

3. Faced with this reality, the defendants attempt to distinguish *Hayes* and *Dillon* by claiming that the contracts in those cases "*expressly disclaimed* federal law." App. Br. at 36 (emphasis in original) (pointing to, among other things, the contract's preamble

in *Dillon*). This argument is foreclosed by all three of *Dillon*, *Haynes*, and *Sequoia*. As this Court just explained, even tribal arbitration ***21** contracts that "do not explicitly preclude the application of federal law" still "violate the prospective waiver doctrine by providing that tribal law preempts the application of contrary law, including any contrary federal statutory law," preventing plaintiffs from "effectively vindicat[ing] certain federal statutory claims." *Haynes*, 2020 WL 4118239, at *7; *see also Sequoia*, 2020 WL 4118283, at *4 (same). A prospective waiver, in short, may be "implicitly accomplish[ed]." *See Dillon*, 856 F.3d at 335-36 (holding that a contract that attempts to "apply tribal law *to the exclusion of federal and state law*" is unenforceable). [1]

The contracts' references to the FAA, then, do not overcome the basic problem. The defendants claim that these references make "clear that Tribal law applies *only where* it is 'consistent with the Federal Arbitration Act.'" App. Br. at 30 (emphasis added). This theory defies both the plain language and structure of the contracts and adds nonexistent terms to them. By their plain text, the contracts impose a mandatory duty on the arbitrator to apply the substantive law of the Tribe; they never suggest that this duty applies "only where it is consistent with" the FAA. As the district court explained, the words ***22** "consistent with the [FAA]" do not "require that the Tribe's laws *be* consistent with the FAA or that the FAA should be applied in lieu of the Tribe's laws." *Id*.

The district court correctly determined that the "most harmonious reading" of the "'governed by the FAA' clause" and the preceding clause disclaiming "the application of any other law other than the laws of the [Tribe]," is that: (1) the FAA clause ensures the contracts "fall[] within the purview of the FAA" for enforcement purposes before a court; and (2) the disclaimer requires the arbitrator to "apply only the laws of the Tribe to the exclusion" of all others once the arbitration had begun. *Id*. "To read the clauses otherwise," the court explained, "would create an impermissible and illogical conflict between the terms" of these provisions. *Id*.

This Court's recent decision in *Haynes*, along with other courts' decisions, confirms the point. *See Haynes*, 2020 WL 4118239, at *7 (holding that a tribal arbitration contract's reference to the FAA does not eliminate the prospective waiver); *see also Williams*, 2020 WL 3968078, at *6 (rejecting any reliance on similar boilerplate language because in context, "it becomes clear that that phrase does not provide a separate rule of decision for arbitration"); *Hayes*, 811 F.3d at 668 (accepting the defendants' claim that the FAA controlled and invalidating the contract).

***23 B. The existence of other inadequate remedies under tribal law does not save the defendants' contracts.**

The substance of the tribe's law only reinforces that the contracts' main goal is to waive the application of all federal and state laws. The selected law - primarily embodied in the Tribe's Consumer Financial Regulatory Ordinance - contains two key features that block vindication of federal rights and remedies: an express limitation on remedies, and a provision eliminating any judicial oversight of the dispute resolution process.

To begin, "the relevant tribal codes would not permit" the borrowers here "to effectively vindicate the federal protections and remedies they seek." *Haynes*, 2020 WL 4118239, at *8. In *Haynes* - which involved virtually identical tribal law provisions to those at issue here - this Court expressed concern that RICO was "noticeably absent" from the list of federal statutes in the tribal codes. *Id.* The same is true here. *See* JA267-68 at § 7.2 (listing "Federal Consumer Protection Laws"). In addition, *Haynes* found that a borrower's ability to sue entities, specifically non-tribal entities, "remain [ed] ... elusive" under Tribal Law, given the "explicit exempt[ions]" of a "range of entities and persons from its licensing requirements." 2020 WL 4118239, at *8. The tribe's code here mirrors that provision. *See* JA267 at § 6.1 (listing "persons or entities" who are "otherwise exempt from any other provision or application of this Regulatory ***24** Ordinance"). *Haynes* also identified a third problem with

the tribal codes at issue there: They precluded consumers from "meaningfully pursu[ing] any claims under" its law. 2020 WL 4118239, at *8. That is also true with respect to the code here. Just like the invalidated provision in *Haynes* that limited damages to "actual damages," § 11.5(a) of the code here limits remedies to "the maximum value of the Loan at issue and no punitive damages will be awarded, and no equitable relief may be awarded." JA281 at § 11.5(a)(15). This law effectively caps recovery to $1,000 or less, then, depending on the loan amount. *See, e.g.*, JA1208 ($1,000 loan to Collins); JA1151 ($600 loan to Hengle); JA1262 ($500 loan to Rose).[2] And it therefore effectively waives virtually all federal remedies including the uncapped damages available under dozens of federal consumer protection statutes. *See, e.g.*, 18 U.S.C. § 1964(c) (allowing treble damages for RICO violations).

The contracts and tribal law also combine to strip federal courts of any back-end review of the arbitration proceeding under § 10 of the FAA. *See generally* 9 U.S.C. § 10. Instead, tribal law provides that the "AAA's Consumer Arbitration Rules" will "govern the arbitration subject to" certain ***25** "modifications," one of which provides that "[n]o state or federal court will have jurisdiction to intervene in an arbitration arising under this Ordinance or any agreement between a Consumer and a [tribal lender]." JA280 at § 11.5(a)(2). A different section of the Ordinance further confirms that consumers "must be provided" a "template" loan contract and "related disclosures regarding exclusive tribal jurisdiction" JA269 at § 8.2(a).

That is enough to invalidate the contracts. *See Vimar Seguros y Reaseguros, S.A., v. M/V Sky Reefer, her Engines, etc., et al.*, 515 U.S. 528, 540-41 (1995) (cautioning that, where there is "no subsequent opportunity for review," a court should invalidate a contract that operates as a prospective waiver). A contract that attempts to override the "textual features" of the FAA by altering the scope of judicial review - for example, by permitting a court "to review for legal error" - is invalid. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008).[3]

***26 C. The delegation clause does not save the arbitration contracts.**

A contract's "prospective waiver of statutory rights renders the entire arbitration agreement (delegation clause included) unenforceable." *Williams*, 2020 WL 3968078, at *9. Because the contracts expressly forbid the arbitrator from applying any other law other than the Tribe's, enforcing them places the arbitrator "in the impossible position of deciding the enforceability of the agreement without authority to apply any applicable federal or state law." *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 786 (E.D. Pa. 2016). These contracts require precisely that by: (1) defining "disputes" to include challenges to the validity and scope of the arbitration provision, (2) requiring "all disputes" to be resolved by "binding arbitration only," (3) mandating that the "parties to such dispute will be governed" by tribal law, and (4) prohibiting the "application of any other law other than the laws of the [Tribe.]" JA1087-88. As a result, the delegation clause is unenforceable "for virtually the same reason" that the rest of the arbitration agreement is unenforceable. *MacDonald v. Cashcall, Inc.*, 2017 WL 1536427, at *4 (D.N.J., Apr. 28, 2017).

This Court's recent decisions confirm this settled rule. In *Haynes* and *Sequoia*, this Court squarely rejected the defendants' arguments that "any threshold questions as to the enforceability of the arbitration agreements should have first been sent to an arbitrator." *Haynes*, 2020 WL 4118239, at *2; ***27** *Sequoia*, 2020 WL 4118283, at *2. Instead, this Court explained that where a claimant "specifically attacks the validity of the delegation clause itself, a court may consider that clause's enforceability." *Haynes*, 2020 WL 4118239, at *3; *Sequoia*, 2020 WL 4118283, at *2. The Second Circuit's recent decision in *Gingras* similarly explained that where "'a party challenges the validity under [9 U.S.C.] § 2" of the arbitration contract, courts "must consider the challenge before ordering compliance with that agreement under § 4"' - even where a delegation

clause "appears to give the arbitrator blanket authority over the parties' disputes." 922 F.3d at 126 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)).

This Court, among others, has likewise rejected defendants' invocation of *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) to argue that the delegation clause "end[s] the matter." App. Br. at 27. In *Haynes*, this Court called *Schein* "inapposite," embracing the Second Circuit's reasoning in *Gingras* that *Schein* "dealt with an exception to the threshold arbitrability question" and was "not a challenge to the validity of an arbitration clause itself." *Haynes*, 2020 WL 4118239, at *4, n.4 (quoting *Gingras*, 922 F.3d at 126 n.3); *see also Williams*, 2020 WL 3968078 at *4, n.7 (same).

***28 D. The offensive provisions are not severable.**

In rejecting the defendants' request to simply sever the offending provisions, the district court followed this Court's decisions in *Hayes* and *Dillon*. JA1734. As *Hayes* teaches, the "offending provisions go to the core of the arbitration agreement" because "one of the animating purposes" of the agreement was to ensure that the defendants and their "allies could engage in lending and collection practices free from the strictures of any federal law." *Hayes*, 811 F.3d at 676. Severance and allowance for the application of federal law would therefore "defeat the purpose of the arbitration agreement in its entirety." *Dillon*, 856 F.3d at 336 (citations omitted).

The same is true here. In fact, *every* circuit to have considered it has agreed with this Court. *See, e.g.*, *Gingras*, 922 F.3d at 128 (finding no basis for severance of provisions because "given the pervasive, unconscionable effects of the arbitration agreement interwoven within it, nothing meaningful would be left to enforce"); *MacDonald*, 883 F.3d at 232 (joining "sister circuits in concluding that the CRST arbitral forum clause is integral to the entire arbitration agreement and cannot be severed"); *Williams*, 2020 WL 3968078, at *9 (refusing to sever "the invocations of tribal law").

***29 II. The choice-of-law provision is unenforceable.**

Shifting gears, the defendants seek dismissal of this case based on the choice-of-law provisions in each of the contracts. As they see it, those provisions require the application of the substantive laws of the Tribe, which permit uncapped interest. But that provision is unenforceable for three independent reasons.

A. Unregulated usurious lending violates the public policy of the Commonwealth of Virginia.

1. Virginia will not enforce a choice-of-law clause that violates its public policy. *See, e.g.*, *Willard v. Aetna Cas. & Sur. Co.*, 193 S.E.2d 776, 778 (1973) ("Comity does not require the application of another state's substantive law if it is contrary to the public policy of the forum state."). In Virginia, like many other jurisdictions, "it is the responsibility of the legislature, not the judiciary, to formulate public policy" and "to strike the appropriate balance between competing interests." *Wood v. Bd. of Supervisors of Halifax Cty.*, 372 S.E.2d 611, 618 (1988). Courts may not "second-guess the law makers" on public policy, as those "considerations belong exclusively in the legislative domain." *Infants v. Va. Hous. Dev. Auth.*, 272 S.E.2d 649, 671 (1980).

Here, the defendants' choice-of-law provision is unenforceable because it violates Virginia's public policy - expressly codified by Virginia's legislature - ***30** against usurious lending. *See* Va. Code § 6.2-306(A) (prohibiting any contract from waiving

the interest-rate and usury protections established under Virginia law and deeming any contract that attempts to do so "against public policy and void"). The district court correctly concluded that this statute affirms the General Assembly's "intention that its usury laws should apply to all contracts without waiver." JA1755 (citing Va. Code § 6.2-306(A)).

This Court's decision in *Volvo Construction* confirms that § 6.2-306(A) precludes waiver of Virginia's interest and usury protections through a choice-of-law provision. 386 F.3d at 587-88. In that case, a manufacturer terminated three separate dealer agreements, each of which contained a provision authorizing the manufacturer to unilaterally terminate the agreement. *Id*. at 588. Despite those provisions, the dealers argued that they were "protected by the state dealer protection statutes" of each of their respective states (Texas, Louisiana, and Arkansas). *Id* at 591. The district court rejected this argument and entered summary judgment in favor of the manufacturer due to the South Carolina choice-of-law provision in the contracts. *Id*.

On appeal, this Court affirmed summary judgment on the Texas and Louisiana plaintiffs' claims. As to the Texas dealer, the Texas statute "excluded from its protection" purchasers of off-road construction equipment, including the plaintiff. *Id*. at 604. And while the Louisiana dealer technically fell within the ***31** state's Dealer Act's protections, *see* La. Stat. Ann. § 51:482, the Court still affirmed the grant of summary judgment because it determined that Louisiana's statute did not embody a fundamental public policy of the state sufficient to "override a choice-of-law contract provision" selecting South Carolina law. *Id*. at 609. Specifically, unlike other dealer protection statutes, Louisiana's statute did "not contain an anti-waiver provision" or equivalent legislative pronouncement that the statute reflected the state's public policy. *Id*. at 608.

The Court, however, reached a different result for the Arkansas dealer. "[U]nlike the Louisiana Act," the Court explained, the Arkansas Act contained "an anti-waiver provision" providing that a franchisor could not "require a franchisee at the time of entering into a franchise agreement to assent to a ... waiver" that "would relieve any person from liability" under the Arkansas statute. *Id*. at 609. The Arkansas Act also had an "emergency clause" stating it was enacted to preserve "public peace, health, and safety" of its residents. *Id*. at 610. Both of these provisions, the Court held, rendered the unilateral termination of a dealer agreement to be "a violation of the fundamental policy of Arkansas." *Id*.

In reaching this conclusion, the Court noted that "a legislature simplifies the task of determining whether a state statute embodies fundamental policy ***32** when it expressly states that the statute constitutes such policy." *Id*. at 609; *see also id.* at 609-10 (citing the Seventh Circuit's analysis in *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376 (7th Cir. 2003) that a provision deeming contracts "in violation of this chapter" to be "against public policy and [] void and unenforceable" meant that Maine law applied regardless of waiver through choice-of-law provision).

In the same vein, the Virginia Supreme Court has strictly enforced similar anti-waiver provisions. *See* *Blake Const.*, 587 S.E.2d at 719; *see also Martin Bros. Contractors v. Va. Military Inst.*, 675 S.E.2d 183, 186 (Va. 2009). In *Blake Construction*, that court considered a similar anti-waiver statute that established that any "provision" in a public construction contract that "purports to waive, release, or extinguish" a contractor's rights to "damages for unreasonable delay ... shall be void and unenforceable as against public policy." *Blake Constr.*, 587 S.E.2d at 715-16 (quoting Va. Code § 2.2-4335(A)). Despite the importance of freedom to contract, the Virginia Supreme Court held that "parties may not contract to the contrary, and undo what the General Assembly has determined to be the public policy of the Commonwealth." *Id*. at 718. The court added that the anti-waiver statute reflected the General Assembly's determination that "damages for unreasonable delay may not be ***33** extinguished as a matter of public policy," and that only the "General Assembly and not the parties or the judiciary" could modify that prohibition. *Id*.

Here, the anti-waiver provision is comparable to the statute in *Cromeens* and even stronger than the one in *Volvo Construction*. This provision unequivocally states that a contract that attempts to "waive[] the benefits" or "release [] any rights" provided by Virginia's usury laws is against public policy and void.[4] Thus, the district court correctly determined that Virginia's legislature has "affirmed that its usury laws should apply to all contracts without waiver." JA1755 (citing Va. Code § 6.2-306(A)).

In response, the defendants assert that "Plaintiffs *never* acquired any benefits or rights under Virginia law because they agreed to apply Tribal law instead." App Br. at 51 (emphasis added). Not so. As residents of the Commonwealth who obtained the loans on their home computers, the plaintiffs ***34** are entitled to the benefits and protections of Virginia law. The plaintiffs had them to begin with - just like the dealers in *Volvo Construction*.[5]

2. Further supporting the district court's conclusion is the longstanding view of the Virginia Supreme Court that Virginia's "usury laws are founded upon considerations of public policy." *Town of Danville v. Pace*, 66 Va. 1, 10 (1874); *see also Radford v. Cmty. Mortg. & Inv. Corp.*, 226 Va. 596, 601 (1984) ("[U]sury laws serve a beneficial public purpose and are to be liberally construed with a view to advance the remedy and suppress the mischief."). The Virginia Supreme Court has repeatedly stressed the Commonwealth's substantial interest in protecting vulnerable borrowers from usurious loans. *See* *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 429 (1985) ("The need to scrutinize with care loans made to borrowers caught in financial distress continues to be a valid concern.").

***35 B. Enforcement of the choice-of-law provision would be unconscionable.**

In Virginia, a choice-of-law provision may also be unenforceable if enforcing it would be unconscionable. *See* JA1753 (quoting *Tate v. Hain*, 25 S.E. 2d 321, 325 (Va. 1943)); *see also March v. Tysinger Motor Co.*, 2007 WL 4358339, at *4 (E.D. Va. 2007) ("As a matter of policy, Virginia refuses to enforce unconscionable contracts."); *Flint Hill Sch. v. McIntosh*, 2020 WL 33258, at *5 (Va. 2020) ("Courts may void a contract provision that is unconscionable.").

Unconscionability arises where the contract is "so grossly inequitable that it 'shocks the conscience.'" *March*, 2007 WL 4358339, at *4 (quoting *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 305-06 (4th Cir. 2001) (applying Virginia law)). Unlike other jurisdictions, Virginia does *not* require both procedural and substantive unconscionability. *Id.* at *4, n.5. Rather, a contract may "be unconscionable by virtue of the way it was formed" (procedural unconscionability), or where it is "egregiously unfair" (substantive unconscionability). *Id.* at *4 & n.5. Here, the choice-of-law provision is both.

1. To determine procedural unconscionability, Virginia courts consider "all attendant circumstances, including the relationship and duties between the parties." *Id.* Although a party "may be free of fraud," it may still be "guilty of overreaching or oppressive conduct in securing an agreement" to render it ***36** unconscionable. *Id.* Under Virginia law, a party may prove overreaching "by showing that the circumstances surrounding the bargaining process were inequitable" and the presence of "bad faith in the form of 'concealments, misrepresentations, undue advantage, [or] oppression'" by a benefiting party. *Kesser v. Kesser*, 92 Va. Cir. 209, 2015 WL 13048012, at *3 (2015) (quoting *Sims v. Sims*, 55 Va. App. 340, 349 (2009)). Another "relevant factor to consider is whether the contract was an adhesion contract." *Flint Hill*, 2020 WL 33258, at *5.

Here, the agreement is procedurally unconscionable because it is a "boilerplate" contract of adhesion. Borrowers must sign the contract to receive a loan, with no ability to modify its terms. *Flint Hill*, 2020 WL 33258, at *5. Moreover, there are many

inconsistencies between the arbitration contracts and Tribal law, rendering them confusing and misleading. *See* *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (2001) (form arbitration contract unconscionable because it was both confusing and misleading). For example, the contracts provide that "the arbitrator may award statutory damages and/or reasonable attorneys' fees and expenses." JA1088 at ¶ 5. Tribal law, however, forbids the award of either. JA281 (establishing that the "arbitrator's award is limited to the maximum value of the Loan at issue and no punitive damages" may be awarded); JA280 at § 11.4(i) (providing that the commission "may not award attorney fees or costs to either party").

***37** The contracts also create the false impression that consumers will be afforded an opportunity to adjudicate their claims immediately under the administration of AAA or JAMS. In truth, under the selected tribal law, a consumer must first pursue claims through the Tribe's Mandatory Dispute Resolution Procedure. And, once a consumer satisfies this requirement, the arbitrator's authority is "limited to a review of the Licensee and Commission decisions." JA282 § 11.5(c). The contracts, however, mention nothing about this process. In similar circumstances, the Seventh Circuit found that the inconsistency between the loan contracts and the applicable tribal dispute resolution process "ma[de] it difficult for borrowers to understand exactly what form of dispute resolution they [we]re agreeing to." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014).

2. The choice-of-law provision is also substantively unconscionable. For starters, "as with any other price term," an "interest rate may be deemed unconscionable" in and of itself. *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1009 (Ca. 2018); *State ex rel. King v. B & B Inv. Grp., Inc.*, 329 P.3d 658, 670 (N.M. 2014) (holding offers of installment loans at 1,147.14 to 1,500% interest "grossly unreasonable and against public policy"); *James v. Nat'l Fin., LLC*, 132 A.3d 799, 816 (Del. Ch. 2016) (holding that an APR of "838.45%" was enough to "shock[] the conscience"); ***38** *Drogorub v. Payday Loan Store of WI, Inc.*, 826 N.W.2d 123 (Wis. 2012) (holding that a 294% interest rate on a $994 loan was "oppressive, unreasonable, and unconscionable"); *In re Donohue*, 2020 WL 419727, at *3 (Bankr. N.D. Cal. Jan. 27, 2020) (same for 240% interest rate on a $4,000 line of credit). The loans here contain triple-interest rates ranging from 543% to as high as 919%, JA1487, JA1710, which are grossly unreasonable and seek to exploit "desperately poor people from the consequences of their own desperation," *Otoe-Missouria*, 974 F. Supp. 2d at 356.

In addition to the unconscionability of the interest rates, the chosen tribal law would "effectively insulates the tribe from any adverse award and leaves prospective litigants without a fair chance of prevailing[.]" *Gingras*, 922 F.3d at 128. Although the contracts create the appearance that either party may elect to arbitrate their dispute, arbitration is not available under tribal law unless a consumer first participates in the Tribe's Mandatory Dispute Resolution Procedure. A consumer must first lodge a complaint directly with the tribal lender. JA277 at § 11.2(a). After the lender rejects the complaint, a consumer may then request an "administrative review" of that decision by the Tribal Financial Services Regulatory Commission. JA278 at § 11.3(a).

This second step of this procedure is almost as rigged as the first. For starters, the Commission is "under the direction and control of the Executive Council," JA1306 - the very same people that oversee and control the tribal ***39** lending entities. *See, e.g.*, App. Br. at 7 ("Tribal Appellants, as members of the Executive Council, serve as the Directors of all Tribal corporate entities to oversee operations.") (citing JA118-22). As part of this authority, the Executive Council appoints and may remove the Commissioner. JA256 at § 4.5(a); *see also* *Edmond v. U.S.*, 520 U.S. 651, 664 (1997) (explaining the "power to remove officers" is "a powerful tool for control"). The Executive Council also determines the compensation and operating budget. JA1310 at § 4.11. This unrestricted control means that the Executive Council (which oversees the lending entities) could punish a Commissioner who rules against the lending entity or remove them at any point in the proceeding, thereby preventing any adverse ruling at all.

To make matters worse, the Commission is afforded unfettered authority to "investigate the dispute *in any manner it chooses*." JA278 at § 11.3(b) (emphasis added). As part of this process, the Commission "may conduct interviews as needed" or "take other action necessary or advisable to make its determination." JA278. The Commission could thus limit its investigations to only include favorable facts, impose unreasonable one-sided rules, and limit a consumer's access to information regarding his or her claims. It could also simply not investigate certain claims, such as claims that the loans were ***40** unconscionable or violate the public policy of another jurisdiction. Indeed, the Ordinance expressly contemplates this and provides:

In any proceeding in which a [tribal lender] is a party in interest with respect to any transactions with a consumer, the [tribal lender's] rights and remedies *shall be granted* based upon prima facie proof and entitlement based upon the terms of the written transaction documents and the payment and business records maintained by the [tribal lender] in the ordinary course of business.

JA273 at § 8.2(l) (emphasis added). In other words, the lender wins in "any proceeding" if it: (1) produces the loan contract; and (2) any documents relating to payments. This law - enacted by the same people running the lending business - ensures that even an unbiased commissioner's hands would be tied.

As even further insulation, the tribal law limits any arbitration to "a review of a Commission decision," not a fresh start. JA280 at § 11.5(a)(15); *see also* JA282 at 11.5(c). What's more, it is unlikely that a consumer could enforce any adverse award, because the contracts require any arbitration award to be enforced before "the applicable governing body of the Habematolel Pomo of Upper Lake Tribe ('Tribal Forum')." JA1088. Although it is unclear what this means, [6] this final step ensures that the Tribe will have the final say over any ***41** adverse decision in the arbitration, such as a decision to award actual damages or attorneys' fees. *See* *Gingras*, 922 F.3d at 127 (finding contracts that provided a neutral arbitrator still unconscionable because "the mechanism of tribal court review hollow[ed] out those protections").

C. The attempted waiver of federal rights renders the entire agreement unenforceable.

Although the district court correctly concluded that the arbitration agreement unambiguously waived federal law, it incorrectly found that the "offending language" does not "affect application of federal law to the loan agreements outside of arbitration." JA1750. Because the "arbitration provision is severable from the remainder of the contract," the court determined that it "may enforce the Choice-of-Law Provision unless its own terms prospectively waive the application of federal law to the loan agreements." JA1750. In other words, the court read the choice-of-law provision in isolation, concluding that it did not "expressly disavow the application of federal law." JA1751.

That reading was incorrect. First, arbitration provisions "are a species of forum-selection clauses." *Stolt-Nielsen*, 559 U.S. at 698. And while they are severable, "it is only natural" to interpret an "arbitration agreement in light of the broader contract in which it is situated." *Hayes*, 811 F.3d at 676; *see also* *Dillon*, 856 F.3d at 336 (citing the contract's general choice-of-law clause as ***42** reinforcing its interpretation of the arbitration agreement). The same should be true for the choice-of-law provision, which is intended to work in tandem with the choice-of-forum provision to apply tribal law to the exclusion of all other laws.

Second, the district court's determination - that the governing law provision did not prospectively waive federal rights - ignored the prospective waivers of federal law created by substantive tribal law. As explained above, the Tribe's Mandatory Dispute Resolution Procedure implicitly accomplishes the prospective waiver by limiting potential damages to the value of the loan and eliminating access to statutory damages, equitable relief, and attorneys' fees. Indeed, enforcement of the tribal choice-of-

law provision would eliminate the *only* relief available against a tribe or its entities, *i.e.*, a suit "for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796.

In short, the choice-of-law provision, arbitration agreement, and chosen law operate together, not as isolated provisions. Although the choice-of-law provision does not explicitly waive federal law, it nonetheless produces that substantive effect when read in conjunction with the other provisions. To find otherwise would be to uphold a key component of this "integrated scheme" that "contravene[s] public policy." *Hayes*, 811 F.3d at 676.

***43 D. The defendants misconstrue *Settlement Funding* and Virginia's Consumer Finance Act.**

1. The defendants' arguments regarding the contractual choice-of-law provision turn on a misreading of the Virginia Supreme Court's decision in *Settlement Funding, LLC v. Von-Neumann-Lillie*, 274 Va. 76 (2007). They contend that *Settlement Funding* held that any usurious contract - regardless of the validity of the choice-of-law provision - does not violate Virginia's public policy against usurious loans so long as the selected law does not have a maximum rate of interest. *See generally* App. Br. at 46-50. This badly overstates the scope and holding of *Settlement Funding*.

In that case, a lender argued that its loan was subject to Utah law based on a choice-of-law provision, rendering Virginia's usury laws inapplicable. *See* *State Lottery Dep't v. Settlement Funding, LLC*, 70 Va. Cir. 203, 2006 WL 727873, at *2 (2006). The circuit court rejected that assertion on a single basis - that "there was no proper proof produced at trial [with] respect to Utah law." *Settlement Funding*, 274 Va. at 80. On appeal, the Virginia Supreme Court determined that the "record in th[e] case" did "not support the circuit court's conclusion," explaining that "two post-hearing memoranda" with "citations to Utah law provided the circuit court with sufficient information regarding the substance of Utah law." *Id.* at 81. The Virginia Supreme Court simply ***44** presupposed the existence of a valid and enforceable choice-of-law clause because of the trial court's determination of insufficient information. *See id.*

Here, the district court correctly found that "*Settlement Funding* addressed only the evidentiary issue" of whether the lender had "prove[n] the substance of Utah law." JA1753. This conclusion, the district court added, was further supported by the Virginia Supreme Court's footnote explicitly indicating that it "did not address Settlement Funding's second assignment of error," which left open "the possibility that the choice-of-law provision nonetheless violated public policy." JA1753. (citing *Settlement Funding*, 645 S.E.2d at 438-39, n.2). [7]

Therefore, contrary to the defendants' assertion that *Settlement Funding* rejected "the same public policy argument raised by Plaintiffs," App Br. at 48, the Virginia Supreme Court did not address that argument. *Id.* Instead, the public policy argument was improper because it did not form "the basis of the trial court's rulings which" were under appeal. *Settlement Funding*, Reply Brief ***45** of Appellant at *2, 2007 WL 2296007. [8] This explains why the opinion never even mentions that argument casting doubt that the Virginia Supreme Court overturned years of precedent without ever using the words "public policy."

What is more, the facts in *Settlement Funding* are entirely inapplicable here because the financial institution there, a bank, was expressly exempt from Virginia's usury laws. Va. Code § 6.2-309 (creating an exception for "a bank or savings institution"); *see generally* Va. Code § 6.2, Chap. 3 at Art. IV ("Loans Exempt from Limit on Contract Rate of Interest."). No such exception applies to the loans here. [9]

2. In addition to *Settlement Funding*, the Tribal defendants assert that the Virginia Consumer Finance Act does not require a license for lenders without a ***46** physical presence in the Commonwealth. App. Br. at 53. This novel theory - that the CFA does not cover online loans - should be rejected because it defies both the CFA's plain language and structure and requires reading into the statute terms that do not exist. Virginia Code § 6.2-1501(A) provides "[n]o person *shall engage in the business of making loans* to individuals for personal, family, household, or other nonbusiness purposes ... without first having obtained a license from the Commission." Va. Code § 6.2-1501(A) (emphasis added). By its own terms, the statute draws no distinction between "storefront" or "online" loans.

The CFA's purpose reinforces this plain reading of § 6.2-1501(A). This statute was enacted to "protect needy consumers from unjust terms and exploitation surrounding lending practices." *Commonwealth v. Car Pawn of Va., Inc.*, 37 Va. Cir. 412, *4 (1995). Exempting online loans would eviscerate the very protections and purpose of the statute. As the Virginia Supreme Court has explained:

> We reject Wiesen's argument that by making a small loan in the form of a mortgage loan a lender can avoid the application of the Act. Were we to adopt Wiesen's position, we would gut the Act because we would thereby allow a lender to escape the Act by doing exactly what it forbids. This would be an absurd result which would render the Act virtually meaningless.

***47** *Glasby*, 230 Va. at 431. The same is true here. The Act is not designed to protect the medium through which the loan is originated, but "[the] needy consumers from unjust terms and exploitation." *Car Pawn*, 37 Va. Cir. at *4. Whether made at a storefront, over the telephone, or via the internet, the result is the same: The loan exploits the needy consumer to unjust terms.

Even if the statutory text were remotely ambiguous, the CFA "is a remedial statute" that must be construed "liberally" so as "to avoid the mischief at which it is directed and to advance the remedy for which it was promulgated." *Greenberg v. Commonwealth ex rel. Atty. Gen. of Va.*, 255 Va. 594, 600 (1998). Because the CFA's primary purpose is to protect vulnerable consumers from unscrupulous lenders and ensure oversight, any ambiguities should be construed to effectuate these purposes. Exempting online loans would destroy this remedial scheme, insulating lenders simply because of the medium of the loan's origination. [10]

***48** Finally, even the defendants' own interpretation of the CFA does not help them. The CFA is an exception to the general usury laws embodied in Virginia's chapter entitled "Interest and Usury," including the requirement that "no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year." Va. Code § 6.2-303(A). Thus, even if online loans fall outside the CFA's coverage, they are still within the coverage of Virginia's general usury laws. *See* *Burger King*, 471 U.S. at 473.

III. Tribal sovereign immunity does not bar injunctive-relief claims against tribal officials in their official capacity.

The defendants also challenge the district court's holding that tribal sovereign immunity "does not shield the tribal officials from plaintiffs' *Ex parte Young*-style claims under state law." JA1762. They instead contend that tribes enjoy absolute immunity absent "Congressional authorization" of suit. App. Br. at 60. That is wrong. The Supreme Court expressly "recognized an

important exception" to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), which allows official-capacity suits against government officials for injunctive or declaratory relief. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). And, as both the Supreme Court and courts of appeals have uniformly ***49** made clear, there is no "tribal" exception to *Ex parte Young*. The district court was right to reject the defendants' bid to depart from that settled rule.

A. The Supreme Court and the courts of appeals have uniformly confirmed the availability of injunctive-relief claims against individual tribal officials in their official capacity for violations of state law.

The defendants' principal attempt to avoid *Ex parte Young* turns on the argument that the absence of explicit Congressional authorization shields tribal defendants because of their immunity. But the Supreme Court's decision in *Bay Mills* forecloses this argument. There, the Court explicitly confirmed that "tribal immunity does not bar" a "suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796 (citing *Ex parte Young*). *Bay Mills* therefore flatly contradicts the defendants' argument that *Ex parte Young* requires a party to allege "an ongoing violation of federal law." App. Br. at 61-62.

To avoid the obvious consequences of *Bay Mills*, the defendants claim the Court's declaration to be mere "dicta" that "cannot overcome decades of Supreme Court precedent." App. Br. at 64. That is doubly wrong: The Court's pronouncement of the availability of injunctive relief was both critical to *Bay Mills*' holding and consistent with longstanding Supreme Court precedent.

***50** To start, the Court explicitly relied on the availability of *Ex parte Young*-style suits to ensure that states like Michigan would still have remedies to halt illegal conduct. *Bay Mills*, 572 U.S. at 796. The Court explained that Michigan could deny Bay Mills a license, and then bring "suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license" - a state law violation - instead of suing the tribe itself. *Id.* In declining Michigan's request to overturn *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Court similarly relied on that alternative mechanism in explaining that "[a]dhering to stare decisis is particularly appropriate" where Michigan, "as we have shown, has many alternative remedies." *Bay Mills*, 572 U.S. at 799 n.8. And in rejecting Michigan's argument that its suit was preferable to these alternatives from a perspective of tribal immunity, the Court explained that "[d]ispensing with the immunity of a sovereign for fear of pursuing available remedies against its officers" would "upend all known principles of sovereign immunity." *Id.* at 796 n.7.

These passages were not mere dicta, then, as the parties explicitly briefed the availability of injunctive-relief suits and that issue was necessary to the Court's holding. *See* *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 n.5 (1993) (defining dicta as statements "uninvited, unargued, and unnecessary to the Court's holdings"); ***51** *Lennear v. Wilson*, 937 F.3d 257, 273 (4th Cir. 2019) (recognizing that a principle is not dicta when it is "clearly integral to the analytical foundations" of a holding) (internal quotation marks omitted)).

But even if the statements in *Bay Mills* were "dicta," this Court "give[s] great weight to Supreme Court dicta." *NLRB v. Bluefield Hosp. Co., LLC*, 821 F.3d 534, 541 n.6 (4th Cir. 2016); *see* *McCravy v. Met. Life Ins. Co.*, 690 F.3d 176, 181 n.2 (4th Cir. 2012) (explaining that when evaluating dicta, this Court "cannot simply override a legal pronouncement endorsed" by the Supreme Court). What's more, not a single Justice in *Bay Mills* - including those in concurrence and in dissent - disagreed. *See* *Gingras*, 922 F.3d at 122 ("Three distinct opinions in *Bay Mills* recognized the availability of *Ex parte Young* actions for

violations of state law.") (citing the majority opinion, Justice Sotomayor's concurrence, and Justice Thomas's dissent in *Bay Mills*). Dicta or not, *Bay Mills* was unequivocal about the availability of *Ex parte Young*-style suits in cases like this one.

Nor was *Bay Mills* an isolated event. The Supreme Court has repeatedly acknowledged the availability of injunctive-relief claims against tribal officials to stop state law violations. In *Puyallup Tribe, Inc. v. Department of Game*, the Court recognized that despite sovereign immunity, "a suit to enjoin violations of state law by individual tribal members is permissible." 433 U.S. 165, 171 (1977). Then, in *Santa Clara Pueblo v. Martinez*, the Court relied on both *Puyallup* and *Ex parte Young* to declare that "an officer of the Pueblo" was "not protected by ***52** the tribe's immunity from suit" for declaratory and injunctive relief. 436 U.S. 49, 59 (1978). So, too, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, where the Court affirmed that "individual agents or officers of a tribe" are amenable to suit under *Ex parte Young*. 498 U.S. 505, 514 (1991); *see also* *id.* at 515 (Stevens, J., concurring) (describing "claims for prospective equitable relief" as falling within this exception); Conference of Western Attorneys General, American Indian Law Deskbook § 7:21 (June 2020) (concluding that *Bay Mills* "made clear that prospective relief is available for violation of otherwise applicable state law").

None of the defendants' supposed "decade(s)" of authority contradicts this settled rule. Instead, many of the cases the defendants cite involve suits against *a tribe*, not individual officials. *See, e.g.*, *Kiowa*, 523 U.S. 751 (involving a suit against the Kiowa Tribe); *Williams*, 929 F.3d 170 (same against Lac Vieux Desert Band of the Lake Superior Chippewa Indians). The defendants' misunderstanding is clear from their assertion that "[c]hanging the case caption should not change the outcome." App. Br. at 59. *Ex parte Young* held exactly the opposite.

Lower courts, too, have expressly rejected the same arguments advanced by the defendants. In *Gingras*, the Second Circuit held that "under a theory analogous to *Ex parte Young*," tribal sovereign immunity "does not bar state" ***53** claims for "prospective, injunctive relief against tribal officials in their official capacities for conduct occurring off of the reservation." 922 F.3d at 120. In holding tribal officials liable for "violations of state law," the court explained that the "first and most obvious justification" was that the "Supreme Court has already blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law." *Id.* at 121 (citing *Bay Mills*, 572 U.S. at 785).

The Second Circuit also had little difficulty rejecting the *Bay Mills*-as-dicta argument. *See* *id.* at 122-23. Instead, it confirmed that *Bay Mills* "makes clear that the availability of *Ex parte Young*-type actions for violations of state law" was "necessary to the holding." *Id.* It also explained that *Bay Mills* authorized suits against individuals in their *official* capacity - not just their private capacity - as requiring a new lawsuit and a new injunction "each time a tribal official is replaced" would "make[] little sense" and is "impractical." *Id.* at 123.

In *Gingras*, the Second Circuit joined the First and Eleventh Circuits in squarely holding that plaintiffs can bring claims against individual tribal officials for state law violations. The First Circuit explained that, where a Tribe is "legally obligated to comply with the State's cigarette tax scheme," any "violations of that scheme by the Tribe's officers fall outside the scope of their official capacity." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006). The Eleventh Circuit, too, has explained that "tribal officials may be ***54** subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015). [11]

Ultimately, the Supreme Court and lower courts alike have unanimously affirmed that claims like those here, seeking prospective injunctive relief against tribal officials for violating state law, are readily available under *Ex parte Young*. The district court's recognition of this settled understanding should be affirmed.

B. The cases outside the tribal law context relied on by the defendants are irrelevant.

Falling back, the defendants assert that the plaintiffs' position requires overruling cases such as *Pennhurst* that bar *Ex parte Young*-style claims for state-law violations, as well as cases such as *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), that require courts to treat tribes and state officials similarly for immunity purposes. *See* App. Br. at 68. But the plaintiffs' position requires no such thing.

***55** In *Pennhurst*, the Court held that *Ex parte Young*-type claims were unavailable against state law officials for violations of their own state law. 465 U.S. at 106. But there, the Court cited federalism principles, explaining that it would be "difficult to think of a greater intrusion on state sovereignty" than having a "federal court instruct[] state officials on how to conform their conduct to state law." *Id.* Such an intrusion would be difficult to justify because the "need to reconcile competing interests" that motivated *Ex parte Young*-style claims would be "wholly absent." *Id.*

That concern is irrelevant here, where holding *tribal* officials liable for violations of *state* law avoids any equivalent "conflict[]" with the "principles of federalism." *Id.* The tribal official and the state law represent two different entities, just like the state official and federal law in *Ex parte Young*. In *Gingras*, the Second Circuit made this very point: Where a suit concerned a tribal official's violation of state law, "tribes cannot empower their officials to violate state law the way a state can interpret its own laws to permit a state official's challenged conduct." 922 F.3d at 122-23. The district court correctly adopted the Second Circuit's logic in concluding that "*Pennhurst* and the language at issue in *Bay Mills*" can "stand in harmony." JA1767.

Make no mistake: Because the defendants' conduct here took place off-reservation and was intentionally directed into Virginia, Virginia's interest in ***56** enforcing its state law is relevant. *See* *Gingras*, 922 F.3d at 124 (explaining that its holding balances the "competing interests of tribes and states as separate sovereigns" and avoids a situation where "[t]ribes and their officials would be free" to "violate state laws with impunity"). In finding that the "'off-reservation effects' clearly exist here and warrant the imposition of Virginia's generally applicable laws," the district court agreed with every other court in finding the defendants' activity to have occurred off-reservation. JA1772. *See, e.g.*, *Gingras*, 922 F.3d at 117 (describing a similar lending scheme as "off-reservation commercial activities of Indian tribes"); *Jackson,* 764 F.3d at 782 (holding that tribal courts lacked jurisdiction over off-reservation lending scheme); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008) (finding that usury statutes regulated in-state activity where lender made online loans to Kansas residents); *see also* *Bay Mills*, 572 U.S. at 825 (Thomas, J., dissenting) (describing tribal payday lenders that operate "beyond Indian lands").

The defendants' reliance on *Lewis* to argue that the tribe is the real party in interest, justifying immunity, fares no better. In *Lewis*, the Court cautioned that official-capacity suits for monetary damages may equate to suits against the state, 137 S. Ct. at 1290-91, as "a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself" ***57** to recover damages, *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). [12] But again, no similar concern exists here. While "[s]ome suits against state officers are barred" by sovereign immunity if they "are, in fact, against the State," that rule "does not bar certain actions against state officers for injunctive or declaratory relief." *Alden v. Maine*, 527 U.S. 706, 756-57 (1999) (citing *Ex Parte Young*). As a result, the Supreme Court has limited inquiries about the "real, substantial party in

interest" to situations where the "judgment sought would expend itself on the public treasury or domain, or interfere with public administration." *Va. Office for Prot. and Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). Here, because the plaintiffs' claims would not directly impact or interfere with the tribe's treasury, domain, or public administration, the district court correctly allowed them to proceed.

***58 C. The identity of the plaintiff has no bearing on the availability of relief under *Ex parte Young*.**

In a last-ditch effort at reversal, the defendants offer a novel view that *Bay Mills* permits only states, not private plaintiffs, to pursue *Ex parte Young*-style claims against tribal officials. App. Br. at 70-71. But official-capacity suits have long been available to private parties. Indeed, private parties were the very plaintiffs in *Ex parte Young* itself. *See* 209 U.S. at 129.

The defendants offer no support for such a distinction. Nor could they, as the Supreme Court itself has explicitly disavowed it in the *Ex parte Young* context, explaining that "there is no warrant in our cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff." *Stewart*, 563 U.S. at 256. It then proceeded to declare that "a *private person* hal[ing] [] officers into federal court" is "something everyone agrees is proper." *Id.* at 257-58. Courts have repeatedly embraced this principle. *See, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (holding that mothers of children receiving Medicaid benefits could bring *Ex parte Young* claim to enforce a consent decree); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 648 (2002) (holding that *Ex parte Young* permitted claim by Verizon against a state agency); *Gingras*, 922 F.3d at 124 (seeing "no reason to depart from th[e] tradition" of allowing claims by private plaintiffs).

***59** The defendants offer no reason to discard this principle in the tribal context, and courts have similarly sanctioned *Ex parte Young*-style claims by private parties against tribal defendants. *See, e.g.*, *Vann v. Dep't of Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012) (sanctioning suit by private parties against tribal official, describing *Ex parte Young* suits as the "standard approach" to obtain injunctive relief "notwithstanding sovereign immunity"); *Salt River Proj. Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012) (calling a suit by private parties against tribal official "a routine application of *Ex parte Young*"). Therefore, the defendants' generic descriptions of the differences between states and private parties as litigants are irrelevant here. *See* App Br. at 70-71.

IV. The district court erred in holding that the plaintiffs' claims for injunctive relief against tribal officials are unavailable under RICO.

The defendants also aimed to narrow the plaintiffs' claims before the district court by arguing that RICO permits neither private injunctive relief nor claims against tribal officials. But the text of the RICO statute is expansive: It begins by empowering district courts to "prevent and restrain violations" of the statute by "issuing appropriate orders, including, but not limited to" a long list of potential remedies. 18 U.S.C. § 1964. Nothing in the broadly-worded statute justifies imposing atextual limitations on its remedies or its targets. *See* ***60** *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985) (instructing that "RICO is to be read broadly," especially given Congress's "self-consciously expansive language and overall approach").

A. The text, history, and purpose of the RICO statute all support the availability of injunctive relief.

The district court held that RICO does not authorize private injunctive relief. JA17788 But its holding cannot be squared with the text of the statute, which plainly includes injunctive relief as a potential remedy. The relevant portions of the statute, 18 U.S.C. § 1964(a)-(c), read as follows:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; 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, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold ***61** the damages he sustains and the cost of the suit, including a reasonable attorney's fee ....

In interpreting statutes, courts begin with the text, and also end there, if the plain language is unambiguous. *Nat'l Ass'n of Mfrs v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Here, that basic rule establishes the availability of injunctive relief. Subsection (a) provides a non-exhaustive and extensive list of remedies that district courts are empowered to award, including injunctive relief. Specifically, courts can "prevent and restrain violations" through remedies "including, but not limited to" "reasonable restrictions on the future activities or investments of any person." 18 U.S.C. § 1964(a). After subsection (a)'s broad remedies, subsections (b) and (c) do two things: They establish twin enforcement mechanisms - one public and one private - and then provide additional remedies unique to each. Subsection (b), which authorizes the Attorney General to sue, permits the federal government to receive interim relief *in addition* to the remedies in section (a). *See, e.g.*, *United States v. Ianniello*, 824 F.2d 203, 209 (2d Cir. 1987) (affirming grant of preliminary injunctive relief to the government). Subsection (c), which authorizes private parties to sue, also provides an additional unique remedy to private plaintiffs in the form of treble damages. *See, e.g.*, *Allstate Ins. Co. v. Abramov*, 2020 WL 1166498, at *1 (E.D.N.Y. Mar. 11, 2020) (awarding treble damages to private ***62** plaintiffs). Neither subsection explicitly nor implicitly limits the broad set of remedies in subsection (a) to suits brought by the Attorney General or private plaintiffs under subsections (b) and (c).

This straightforward reading is confirmed by those courts of appeals that have meaningfully grappled with RICO's text. *See* *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016); *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (hereinafter *NOW I*). In *NOW I*, the Seventh Circuit read subsection (a) to "spell out a non-exclusive list of the remedies district courts are empowered to provide," and then read subsections (b) and (c) as articulating "additional remedies" for the Attorney General and private plaintiffs, respectively. 267 F.3d at 697-98 (explaining that this "straightforward" reading "gives the words their natural meaning and gives effect to every provision in the statute"). In *Chevron*, the Second Circuit "agree[d] with the Seventh Circuit's view" that subsection (a) details a non-exclusive list of remedies, and that subsections (b) and (c) articulate specific types of relief only available to the named plaintiffs. 833 F.3d at 138. Under this plain-text approach, the district court was wrong to read private injunctive relief out of the statute.

In holding private injunctive relief unavailable under RICO, the district court reasoned that subsection (b)'s grant of the ability to "institute proceedings under *this section*" to the Attorney General limited subsection (a)' s ***63** remedies to the Attorney General. JA1785. It read that phrase to "express[] an intent that the general grant of injunctive power to the courts in § 1964(a) not apply in cases involving only private plaintiffs." JA1785. Instead of reading subsection (c) as granting private plaintiffs an *additional* remedy, the district court concluded subsection (c) prescribed the *exclusive* remedies available to them - excluding injunctive relief. [13] In doing so, it asserted that the availability of monetary damages for private plaintiffs constituted an "adequate remedy at law that would seemingly preclude equitable relief of the sort described in § 1964(a)." JA1786. On its reading, then, the Attorney General is eligible for the remedies in subsections (a) and (b), while private plaintiffs are only entitled to the remedy of treble damages in subsection (c).

The district court's understanding cannot be squared with the statute's text. In focusing only on the phrase in subsection (b) explaining that the "Attorney General may institute proceedings under this section," the court ignored the existence of a similar grant of litigating authority to private plaintiffs in subsection (c). That subsection states that private plaintiffs who are injured by "a violation of section 1962 of this chapter may sue therefor in any ***64** appropriate United States district court." Just like the phrase the district court fixated on in subsection (a), then, subsection (b) also enables private plaintiffs to bring suit under RICO. Therefore, if subsection (b)'s grant of litigating authority renders all the remedies in subsection (a) available to the Attorney General, the similar grant in subsection (c) does the same for private plaintiffs. *See* *NOW I*, 267 F.3d at 697 (calling the phrase in subsection (b), that "[t]he Attorney General may institute proceedings under this section," to be the "equivalent of the first clause" in subsection (c), that "any person injured ... may sue therefor"). Far from specifying the exclusive type of remedies available, then, those two phrases clarify who can bring an action under the statute.

The district court also asserted that "the absence of any provision for such [interim injunctive relief] in private-plaintiff suits" confirms that only the Attorney General can seek injunctive relief, as § 1964(b) would otherwise be superfluous. JA1786. But final injunctive relief is independent and separate from interim final relief, and private plaintiffs' inability to receive the latter - a particularly unique remedy - does not in any way preclude its ability to receive the former. Nor is § 1964(b) superfluous, as Congress likely wanted to emphasize the government's ability to obtain the unusual remedy of *interim* injunctive relief.

***65** The district court finally relied on the contrast between the RICO statute and the Clayton Act (on which RICO was modeled) to hold private injunctive relief unavailable. JA1786-88. Because Section 4 of the Clayton Act lacks a private right to injunctive relief, by analogy, the district court concluded that § 1964 similarly excluded such relief. JA1786-88. But although the analogy was sound, the court's conclusion was not. Section 16 of the Clayton Act explicitly authorizes "[a]ny person, firm, corporation, or association" to "sue for and have injunctive relief." 15 U.S.C. § 26. Accordingly, the Supreme Court has "already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act." *NOW I*, 267 F.3d at 700 (citing *California v. Am. Stores Co.*, 495 U.S. 271 (1990)). And the Supreme Court "regularly treats the remedial sections of RICO and the Clayton Act identically," *id.* (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89 (1997)). The Clayton Act, then, confirms RICO's text: Both statutes authorize injunctive relief for private-party suits.

Even if the district court's reading of the statute were plausible, however, the history and purpose of the statute readily undermine it. Congress provided in RICO that "its terms are to be 'liberally construed to effectuate its remedial purposes.'" *Boyle v. United States*, 556 U.S. 938, 944 (2009) (quoting § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961). Heeding that mandate, the Supreme Court has repeatedly rejected atextual limitations of the statute. *See, e.g.*, ***66** *Nat'l Org. for Women,*

Inc. v. Scheidler, 510 U.S. 249, 261 (1994) (rejecting a requirement that the enterprise have an economic motive because the "statutory language is unambiguous"); *Sedima*, 473 U.S. at 495, 497 (rejecting a requirement of a "racketeering injury," in part because "RICO is to be read broadly"). That makes sense, given civil RICO's objective "to turn [civil litigants] into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). To achieve that goal, as one House report put it, subsection (a)'s remedies are "not meant to be exhaustive"; instead, "the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence." H.R. Rep. No. 91-1549 (1970). The district court's cramped reading would eliminate a critical enforcement mechanism. *See* *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002) (calling "extraordinary" the idea that Congress might have intended to "deprive the district courts" of the "classic remedial power [of injunctive relief] in private civil actions brought under the act").

The weakness of the district court's interpretation is further illustrated by the only court of appeals to agree with it. *See* *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). In *Wollersheim*, the Ninth Circuit discarded the first rule of statutory interpretation - read the text - and instead resorted to two pieces of suspect legislative history: a *rejected* amendment that ***67** would have expressly permitted private injunctive relief, and later congressional refusal to make a similar amendment. *Id.* Not even the district was willing to go that far. JA1784 (declining to "rely[] on legislative history"). For civil RICO to have any teeth to address illegal lending practices - one of the "very crimes that Congress specifically found to be typical of the crimes committed by persons involved in organized crime" in crafting RICO, *United States v. Turkette*, 452 U.S. 576, 590 (1981) - this Court should affirm the full range of tools that the statute provides.

B. Although the district court did not reach the question, there is also little doubt that individuals acting in their official capacity can be sued under RICO.

In dismissing the plaintiffs' RICO claims, the district court discussed, but did not decide, whether tribal officials acting in their official capacity could be sued under RICO. JA1777-78. But there is little doubt that they can be. RICO defines a "person" capable of violating the statute as "any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961(3), a definition that applies to tribal officials. And, as both the Second and Third Circuits have held, there is no "defensible explanation" for exempting "government entities, and their officers sued in their official capacity" from being sued under RICO - at least when it comes to a "suit[] for prospective, injunctive relief" like the one here. *Gingras*, 922 F.3d at 123-25 (noting that ***68** "private corporations are routinely held liable" under RICO, even for damages); *see also* *Genty v. Resol. Tr. Corp.*, 937 F.2d 899, 909 (3d Cir. 1991).[14] This Court should follow this well-reasoned approach here.

CONCLUSION

The district court's decision should be affirmed in part and reversed in part.

***69** Respectfully submitted,

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Footnotes

1 Multiple federal courts of appeals, in addition to this Court, have roundly rejected similar arguments regarding the necessity of an express waiver. *See, e.g.*, *Gingras*, 922 F.3d at 127; *Williams*, 2020 WL 3968078, at *7.

2 Similarly, tribal law caps the Commission's authority to award relief "to the amount of the Consumer's debt plus reimbursement of payments." JA280 § 11.4(e). What's more, the Commission "may not award attorneys' fees or costs" even if a federal statute authorizes them. JA280 § 11.4(i).

3 The plaintiffs raised unconscionability as a separate basis for invalidating the arbitration agreement below. Dkt. 96 at 17-24. The district court did not reach this ground because it concluded that the prospective waiver doctrine precluded enforcement. If this Court finds otherwise, it should remand the issue to be addressed by the district court in the first instance.

4 Virginia's Code contains only a handful of anti-waiver provisions; and none of them make an exception for choice-of-law provisions. *See, e.g.*, Va. Code Ann. § 59.1-303 (prohibiting "any waiver" of "the provisions" of Virginia's Health Club Act); Va. Code Ann. § 40.1-28.01(A) (prohibiting employees from agreeing to a nondisclosure concealing the details relating claims of sexual assault); Va. Code Ann. § 59.1-214(A) (prohibiting waivers regarding invention development services); Va. Code Ann. § 59.1-335.9 (same regarding Virginia's Credit Services Business Act); Va. Code Ann. § 59.1-443.3(D) (same regarding Virginia's Personal Information Privacy Act. The General Assembly's rare use of anti-waiver provisions further reflects the strength of these statutes. *See* *Volvo Constr.*, 386 F.3d at 609 (highlighting the Louisiana legislature's use of anti-waiver provisions, but not in its dealer statute).

5 That might be different if the plaintiffs traveled outside Virginia to the Tribe's reservation, as is the case when a non-tribal member gambles at a tribal casino. But when it comes "to interstate contractual obligations [] parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (citations omitted). By admittedly engaging in "a transaction involving [] interstate commerce," JA1088, the tribal lender became subject to Virginia's regulation and laws of general applicability, just like any other lender. *See, e.g.*, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008) (holding that usury statutes regulated in-state activity where lender made loans over the internet to residents in Kansas).

6 To date, the plaintiffs have been unable to find any information regarding a court system for the Tribe. It appears that none exists, based on the defendants' own briefing. App. Br. at 57 ("The Tribe continues to develop its court system ...").

7 Numerous decisions have reached the same conclusion. *See Gibbs*, 368 3d. at n.49 (explaining that *Settlement Funding* "considered whether the trial court erred in *assuming* that no distinction existed between Utah usury laws and Virginia usury laws" and holding it did not require enforcement of the "Tribal choice-of[-]law provisions"); *NC Fin. Sols. of Utah*, 100 Va. Cir. 232, *12 (explaining that the Virginia Supreme Court "never reached the issue of whether the choice of Utah law ... would be against Virginia public policy").

8 More specifically, the defendants' reply brief stated that the "public policy" argument was not properly before the court because it did not form "the basis of the trial court's rulings" and there was "literally no trial evidence" in the record. *Id*. at *2-3.

9 The defendants cite the exceptions as proof that Virginia has no public policy against usurious lending. App. Br. at 52. These exceptions, however, "are all in some fashion regulated by a Virginia governmental body." *NC Fin. Sols.*, 100 Va. Cir. 232 at *12 (citing Va. Code § 6.2-303(B)). In addition, many of these "exceptions" do not allow for uncapped interest rates, but only a nominally higher rate. *See, e.g.,* Va. Code § 6.2-1520(A) (allowing a licensed consumer finance company to charge "a single annual rate not to exceed 36 percent"); Va. Code § 6.2-1817(A) (allowing a licensed payday lender to charge 36%); Va. Code § 6.2-2216(A) (allowing a motor vehicle title lender to charge between 15-22%). And one of the exceptions reduces the 12% cap for pawnbrokers. Va. Code § 54.1-4008(A).

10 The defendants' citation to the informal letter from the Virginia Bureau of Financial Institutions does not change this. As the district court explained: This letter is "unavailing, because the letter lacks any explanation and has no binding effect on this Court." JA1756, n.10. Further, the CFA authorizes "the Attorney General," not the Virginia Bureau of Financial Institutions, to bring enforcement actions for violations of its provisions, including against "any person, not licensed under th[e] chapter." Va. Code § 6.2-1537(A). The Virginia Attorney General has taken the position that online lenders must be licensed to make consumer finance loans in the Commonwealth of Virginia. *NC Fin. Sols. of*

Utah, 100 Va. Cir. 232 at *1. Accordingly, any value of the informal letter is offset by the position of the Virginia Attorney General, who is charged with enforcement of the CFA.

11 The best support the defendants can muster for their side are decisions applying *legislative immunity* to officials acting in their *legislative capacity*. *See, e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Runs After v. US*, 766 F.2d 347, 354 (8th Cir. 1986). But those decisions come nowhere close to demonstrating that *Ex parte Young*-style claims are unavailable against tribal officials who violate another state's laws off the reservation - a completely different situation.

12 Although the defendants have not explicitly made the argument, any potential ancillary financial impact on the tribe has no bearing here, as the Supreme Court has explicitly rejected this concern as a basis to foreclose *Ex parte Young* relief. *See* *Edelman v. Jordan*, 415 U.S. 651, 667 (1974) (explaining that, in *Ex parte Young* itself, the sanctioned action "was not totally without effect on the State's revenues" and that the Court has frequently "authorized equitable relief" that had "greater impact on state treasuries" than in that case). Here, any effects on a defendant's finances are "a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Id*. at 668.

13 The district court correctly recognized the lack of controlling precedent on the issue. In doing so, it rejected the defendants' argument that *Johnson v. Collins Entertainment Co.*, 199 F.3d 710 (4th Cir. 1999) settled the issue, as *Johnson* did no such thing. JA1779-80.

14 The two courts of appeals that have held RICO inapplicable to municipal entities did so primarily because of concerns about the treble-damages provision. *See* *Gil Ramirez Grp., LLC v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 412 (5th Cir. 2015) (rejecting governmental RICO liability due to "reluctance to impose punitive damages on the public fisc"); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (similar). But, as the Second Circuit made clear in *Gingras*, those concerns are not present where, as here, the plaintiffs seek injunctive relief. 922 F.3d at 125.

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