Nos. 19-2058 (L), 19-2082

In the United States Court of Appeals for the Third Circuit

CHRISTINA WILLIAMS and MICHAEL STERMEL,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

MEDLEY OPPORTUNITY FUND II, LP,
Defendant,

MARK CURRY, BRIAN MCGOWAN, VINCENT NEY,
Defendants-Appellants,

RED STONE INC., as successor in interest to MacFarlane, Group Inc.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

CONSOLIDATED BRIEF FOR PLAINTIFFS-APPELLEES

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INTRODUCTION

The plaintiffs in this payday lending case are Pennsylvania residents who were lured into obtaining payday loans from AWL—an online lending website created and run by the defendants. Even though Pennsylvania caps interest on loans at 6% APR, the plaintiffs' loans carried triple-digit interest rates that ranged from 230% to over 700% APR. All told, under the defendants' lending scheme, $3,000 in loans put one of the consumers in this case on the hook for over $15,000—more than five times what they borrowed. For others, it was much the same. Although regulators have informed the defendants that their lending violates state law, they continue to market and sell illegal loans to Pennsylvania residents.

This appeal concerns the defendants' effort to contract their way out of legal accountability. To evade courts and regulators, they did their lending over the Internet and sought to cloak themselves in immunity from all federal and state law through a tribal-arbitration contract. By its terms, the contract (1) expressly disavows the application of federal and state law to any dispute, (2) specifically forbids an arbitrator from applying any of the federal or state laws governing a consumer's claims, and (3) strips a federal court of any ability to review either the arbitration or the contract. This type of contract has been called an "integrated scheme to contravene public policy" and a "brazen" attempt to avoid federal and state lending and consumer-protection laws. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666,

676 (4th Cir. 2016). And it is invalid under the Federal Arbitration Act: Arbitration contracts that force borrowers "to disclaim the application of federal and state law in favor of tribal law . . . are both unenforceable and unconscionable." *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 126–27 (2d Cir. 2019).

The defendants nevertheless insist that the arbitration clause must be enforced. They claim that the clause is entirely "commonplace" and reflects "unobjectionable" language that parties "routinely include" in their contracts. Curry Br. 13, 19. But "every Court of Appeals that has considered" a tribal-arbitration contract has found it unenforceable and refused to enforce it. *Smith v. Western Sky Fin., LLC*, 168 F. Supp. 3d 778, 781 (E.D. Pa. 2016). The Fourth Circuit has twice labeled these sorts of tribal-arbitration contracts a "farce," designed specifically "to avoid state and federal law," and deployed by lenders "to game the entire system." *Hayes*, 811 F.3d at 674, 676; *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017). And several circuits (including this one) have likewise refused to enforce them multiple times. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018); *Parnell v. Western Sky Fin., LLC*, 664 Fed. App'x 841 (11th Cir. 2016); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331 (11th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014); *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014). Earlier this year, the Second Circuit firmly rejected yet another similar attempt. *Gingras*, 922 F.3d at 127.

There is more. Since the Fourth Circuit's path-marking decision in *Hayes*, the federal district courts have (with one cursory exception) *unanimously* invalidated these contracts under the FAA because they purport to strip a consumer's federal and state statutory rights. And the only other court to confront *this* tribal-arbitration contract held that it is "virtually indistinguishable from those in *Hayes* and *Dillon*." *Solomon v. American Web Loan*, 375 F. Supp. 3d 638, 669 (E.D. Va. 2019).

The defendants once again now seek a federal court's aid in salvaging their contract. But doing so would require holding that a contract forcing consumers to prospectively waive their rights must be enforced. That would seriously jeopardize, rather than promote, the FAA's policy favoring legitimate efforts to negotiate alternative dispute resolution mechanisms. Although the FAA permits parties to forego the legal process and submit disputes to private dispute resolution, often with an eye toward enhancing the simplicity and informality of the matter, it does not allow the terms of a contract to employ arbitration as a means to sacrifice substantive claims. Here, the defendants drafted an arbitration contract in a calculated attempt to avoid the application of state and federal law, and so the "entire arbitration agreement is unenforceable"—it takes a step "forbidden" by the FAA. *Dillon*, 856 F.3d at 337, 334. The district court's decision refusing to enforce the defendants' contract should be affirmed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1332(d), and 1367. Holding the defendants' contract unenforceable, the court issued a final judgment denying the defendants' motion to dismiss and to compel arbitration on May 7, 2019. JA1–7. The appellants timely appealed on May 8 and 10, 2019. JA8–13 (Notices of Appeal). This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B).

STATEMENT OF THE ISSUE

Consistent with every federal court of appeal to have considered the question, the district court refused to enforce the defendants' tribal-arbitration contract because it expressly forbids an arbitrator from applying any relevant state or federal law. Should this Court depart from the unanimous view of the circuits and hold that an arbitration contract requiring consumers to prospectively waive all relevant state and federal rights must be enforced?

STATEMENT OF RELATED CASES

This case has not been before this Court previously. Appellees are not aware of any related cases beyond those identified in appellants' briefs.

STATEMENT OF THE CASE

1. The AWL tribal lending scheme. AWL is a nominal online lender that sells low-dollar, high-interest loans over the internet to consumers across the country. *See* JA31 (Amended Class Action Complaint). Typically, a consumer

borrows several hundred dollars but has to repay at triple-digit interest rates that can easily end up tripling or more the total dollar amount owed within just a few months. *See, e.g.*, *Hayes*, 811 F.3d at 668–69 (describing the basic tribal lending strategy). AWL holds itself out as a tribal entity associated with the Otoe-Missouria Tribe of Indians.

But AWL is a front—the consumer-facing website of a lending scheme that is the brainchild and profit center of Defendant Mark Curry, a long-time non-tribal payday lender. JA30–34; *see generally Solomon*, 375 F. Supp. 3d at 648–52; *see also* Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326 (2012).

Curry's first foray into online payday lending was an entity based in Kansas called Geneva-Roth Ventures, Inc. JA29–30. Geneva-Roth operated on the fringe of consumer lending. To avoid complying with state usury and consumer-protection laws, it made extremely high-interest payday loans remotely through a website. JA29.

But Curry had a problem: Because payday loans often trap consumers in a cycle of debt, most states require lenders making small-dollar short-term loans to be licensed. Curry could not, however, obtain a license in Pennsylvania, or anywhere else, to make this type of loan. *See* 7 Pa. Stat. § 6214(B). That was unsurprising: the loans carried staggeringly high interest rates. Some of Curry's loans assessed rates

of over 1,300%—that vastly exceeded state usury laws, which typically cap interest rates at somewhere between 6% and 24%. *See* Guide to State Usury Laws, https://perma.cc/BB62-3TGR. By 2010, Alaska, Arkansas, California, Connecticut, Maine, Oregon, and Washington had barred Geneva-Roth from lending in their states. JA30.

In response, Curry turned to the burgeoning world of ostensibly tribal payday lending. In this now-familiar scheme, a non-tribal lender creates an "intentionally complicated and sham" lending structure that purports to offer loans through a tribal entity. *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016). But in reality, it is "nothing more than a front" to enable the non-tribal lender "to evade licensure by state agencies and to . . . shield its deceptive business practices from prosecution by state and federal regulators." *In re CashCall, Inc.*, No. 12-308, 2013 WL 3465250, at *3 (N.H. Banking Dept. June 4, 2013).

In 2010, Curry replaced his original lending model with a tribal lending one. Through a new company he founded—the MacFarlane Group—Curry forged a relationship with the Otoe-Missouria Tribe to circumvent state payday lending and usury laws and "insulate [him] from the consequences of his otherwise illegal actions." *Solomon*, 375 F. Supp. 3d at 657.

2. The plaintiffs' loans. In 2017, Ms. Williams obtained several payday loans from AWL over the internet from her home in Philadelphia. The first was for $1,400, which required that she pay a total of $6,005.94—four times the amount she received—at an interest rate of 520.09% APR. JA35. She made three bi-weekly payments and then paid off the remaining balance. JA35–36. She had the loan open for just 46 days, during which she paid over $800 in interest for a $1,400 loan. JA36. Ms. Williams' second loan carried an even higher cost. Although the loan was for $1,600, AWL required that she ultimately pay $9,388.03, almost six times the amount she borrowed, at an interest rate of 714.88% APR. JA36.

Plaintiff Michael Stermel's loan with AWL was similar. The loan was for $1,000 but required him to pay a total of $4,260.96, over four times the amount he borrowed with an interest rate of 496.55% APR. JA37. He made two bi-weekly payments of $213.08, which were credited entirely to interest. *Id.* He had the loan open for at least 34 days, during which he paid $426.16 in interest for a $1,000 loan, representing annual interest over 457%. JA38.

3. Financial regulators crack down on the lending scheme. In the years since its inception, financial regulators have attempted to crack down on the defendants' illegal lending scheme. In 2013, New York issued a cease-and-desist order to AWL "for offering illegal payday loans to New Yorkers." N.Y. State, *Cuomo Administration Demands 35 Companies Cease and Desist Offering Illegal Online Payday*

Loans That Harm New York Consumers (Aug. 6, 2013), https://perma.cc/PD3U-X9BE. Although the state never authorized the company to lend to New York consumers, regulators found that it was charging interest rates "in excess of 400, 600, 700, or even 1,000 percent" and attempting to "skirt New York[']s prohibition on payday lending by offering loans over the Internet." *Id*. Soon after, the Otoe-Missouria tribe was hit with additional cease-and-desist orders for similar efforts to circumvent state lending laws. *See*, *e.g.*, *In re Great Plains Lending, LLC*, Order to Cease and Desist (Ct. Dept. of Banking Jan. 6, 2015), https://perma.cc/NN2C-4LF2.

4. Ms. Williams and Mr. Stermel sue the defendants. In an effort to curtail the defendants' unlawful conduct in Pennsylvania, Ms. Williams and Mr. Stermel brought a putative class action against the defendants. *See* JA26–27. They asserted violations of various Pennsylvania and federal laws related to the illegal loans offered by the defendants. *See* JA42–56. They seek damages, reimbursement, and injunctive relief on behalf of themselves and several classes of consumers who received similar loans. *See id*.

5. The defendants' attempt to shield their scheme from scrutiny. Like other tribal lending schemes, the defendants' scheme is predicated on a contractual web of liability shields—an integrated (and sometimes inconsistent) set of choice-of-law provisions, forum-selection clauses, and arbitration

requirements—deployed, as the Fourth Circuit recently put it, to "game the entire system." *Hayes*, 811 F.3d at 676. And although there is no "serious[] dispute" that these sorts of loans "violate[] a host of state and federal lending laws," *Hayes*, 811 F.3d 669, the defendants (like other tribal lending enterprises) premise their scheme on the theory that they can avoid liability by cloaking their activity in tribal immunity, *see, e.g.*, *Gingras*, 922 F.3d at 126–28 (explaining the framework of a tribal payday lending entity as designed to enable lenders "to skirt state and federal consumer protection laws" under the cloak of tribal sovereign immunity).

To begin, the defendants' contract expressly requires borrowers to relinquish their rights under state and federal law. The contract contains several clauses purporting to establish complete tribal jurisdiction for, and require the application of tribal law over, any claims arising out of an American Web Loan transaction. It states that "THIS AGREEMENT SHALL BE GOVERNED BY TRIBAL LAW" and that any loan is "SUBJECT TO AND GOVERNED BY TRIBAL LAW AND NOT THE LAW OF YOUR RESIDENT STATE." *See, e.g.*, JA280, 291 (Stermel Loan Agreement). It also states that, "for purposes of this Agreement," a consumer "irrevocably consent[s] to the exclusive jurisdiction of the Tribal courts." JA291. And another clause likewise provides:

> **GOVERNING LAW:** You understand and agree that this Agreement is governed only by Tribal Law and such federal law as is applicable under the Indian Commerce Clause of the United States Constitution. We operate solely in the Indian

> country of the Otoe-Missouria Tribe of Indians and have no operations in any state. As such, neither we nor this Agreement are subject to any other federal or state law or regulation, nor to the jurisdiction of any court, unless so stated in this Agreement.

JA292.

These exclusive tribal-law and tribal-forum requirements are coupled with a demand that any dispute over the legality of the loans be resolved in arbitration, not court. And the terms of the relevant arbitration clause provide that, although a party may "choose" either the American Arbitration Association (AAA) or JAMS, any arbitrator (regardless of provider) is forbidden from applying any rules or law that would "contradict this Agreement to Arbitrate or Tribal Law." JA290 (stating that, "[t]o the extent the arbitration firm's rules or procedures are different than the terms of this Agreement to Arbitrate, the terms of this Agreement to Arbitrate will apply"); *see also* JA291 (explaining that any "arbitration under this Agreement" "shall be governed by tribal law" and may not "allow for the application of any law other than Tribal law"); *see also id.* (instructing that the "arbitrator shall apply Tribal law and the terms of this Agreement" and "has the ability to award all remedies available under Tribal law").

The defendants' contract also purports to completely insulate it from any review by a federal court whatsoever. It does that in three steps. *First*, the contract contains a front-end "delegation clause," requiring arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this

Agreement to Arbitrate." JA290. *Second*, the contract eliminates any ability of a federal court to review what happens in arbitration. It mandates that any challenge to the arbitration must "be filed with a Tribal court," thus barring a party's right to appeal in federal court. JA291 (stating that the arbitration "may be set aside by a Tribal court upon judicial review"). And it restricts "judicial review in a Tribal court" to only "(a) whether the findings of fact rendered by the arbitrator are supported by substantial evidence, (b) whether the conclusions of law are erroneous under Tribal law," or (c) whether the decision was "consistent with this Agreement and Tribal law." JA291. *Third*, the contract purports to cover a wide range of related third parties and affiliated entities—meaning that even non-tribal defendants can avail themselves of the exclusive tribal-law and arbitration process devised under the contract. JA290 (stating that the contract will cover and apply to, among others, the "Lender, our agents, servicers, assigns, vendors or any third party, Lender's affiliated companies, the Tribe, Lender's servicing and collection companies, representative and agents, . . .").

Based on these provisions, the defendants moved to force this case into arbitration. *See* JA238–39 (Red Stone); JA440–44 (Curry); and JA475 (McGowan and Ney).

6. The district court denies the defendants' motion to compel the claims into tribal arbitration. The district court refused to allow the

defendants to enforce the contract's tribal forum-selection, choice-of-law, and arbitration clauses. JA1–7 (Opinion and Order Denying Motions to Compel). Following the unanimous view of the federal circuits, it held that, because the defendants' contract operates to strip consumers of their federal statutory rights, it was unenforceable. JA5. Focusing on the contract's "explicit[]" requirement that any arbitrator must "apply Tribal Law" and the related clause forbidding the application of any rules that would conflict with the contract or tribal law, the court concluded that the contract operated as a prospective waiver of a consumer's statutory rights and was invalid under the FAA. JA6. Although the FAA has "broad reach," the court explained, it "cannot be invoked to avoid federal law." JA5. Because this contract took that forbidden step, it was unenforceable. JA5–6.

SUMMARY OF ARGUMENT

The district court correctly concluded that the defendants' tribal-arbitration contract is unenforceable. The contract strips consumers of their right to pursue statutory claims and expressly prohibits an arbitrator from applying any of the relevant law or awarding any of the relevant remedies while insulating that scheme from any federal-court review whatsoever. Those circuits that have confronted similar tribal-arbitration contracts have unanimously refused to enforce them. *See, e.g.*, *Gingras*, 922 F.3d at 127 (holding that tribal-arbitrations contracts "are unenforceable because they are designed to avoid federal and state consumer

protection laws"); *Dillon*, 856 F.3d at 336 (same); *Hayes*, 811 F.3d at 675–76 (same). None of the defendants' arguments here justify departing from this settled conclusion.

I. The defendants wrongly claim that their tribal-arbitration contract does not constitute an impermissible prospective waiver. No less than any of the others, it unambiguously forbids a consumer from pursuing any federal or state statutory claims against the defendants and bars an arbitrator from applying any of the relevant federal or state law to a consumer's claims. It states that the "THIS AGREEMENT SHALL BE GOVERNED BY TRIBAL LAW," JA291, and that "neither we nor this Agreement are subject to any other federal or state law or regulation, nor to the jurisdiction of any court, unless so stated in this Agreement." JA292. These exclusive tribal-law requirements are then coupled with a requirement that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal law"; that the "arbitrator shall apply Tribal law and the terms of this Agreement"; and that the arbitrator has the authority to "award all remedies available under Tribal law." JA291. The contract then explicitly attempts to deprive any federal or state court from reviewing this scheme, either on the front-end (through its delegation clause) or on the back-end (by requiring that any review occur in Tribal court and only for whether the arbitration complied with tribal law). *See* JA290–91. That operates as an

unenforceable prospective waiver of a consumer's right to pursue statutory claims. By crafting a contract in this way, the defendants have "wholly . . . foreclose[d]" consumers "from vindicating rights granted by federal and state law." *Gingras*, 922 F.3d at 127.

None of the defendants' efforts to distinguish their contract from the others can prevail. The same contractual language employed by the defendants here was held to violate the FAA in *Hayes* and *Dillon*. And it makes no difference that the contract purports to comply with some federal laws pursuant to the "Indian Commerce Clause," or that it permits a defendant to voluntary comply with others. Federal courts facing similar language in these tribal-arbitration contracts have uniformly rejected these arguments. *See, e.g.*, *Dillon*, 856 F.3d at 335–36 (invalidating contract notwithstanding that it was "made pursuant to a transaction involving the Indian Commerce Clause" or that the lender conceded "to the application of federal substantive law in arbitration").

Nor must a contract affirmatively disclaim each and every specific federal law at issue in the case to run afoul of the FAA. A tribal-arbitration contract that couples a tribal choice-of-law provision with an arbitration clause mandating the application of tribal law and remedies operates as a prospective waiver because "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause," it operates "to waive all of a potential

claimant's federal rights." *Hayes*, 811 F.3d at 675. That is because an arbitrator, unlike a court, derives his or her powers *only* from the parties' contract, so coupling such a choice-of-law clause with a requirement that an arbitrator must apply tribal law and enforce the contract as written binds an arbitrator's hands even as this wouldn't bind a court.

The defendants' attempt to completely insulate this scheme from any federal- or state-court review whatsoever further reinforces their intent. On the front end, the contract purports to allow only an arbitrator to determine whether the contract is invalid. *See* JA290. And on the back end, consumers are stripped of any ability to appeal to federal or state court. Instead, any challenge must, under the contract, be filed in Tribal court and may be "set aside" if "the conclusions of law are erroneous under Tribal law" or if the arbitration was not "consistent" with tribal law. *Id.* Standing alone, neither clause is enforceable; taken together, they lay bare the purpose of this contract: to effectively insulate the defendants from any adverse award and leave prospective litigants without a fair chance of prevailing in arbitration. The process, in other words, is a "sham from stem to stern." *Jackson*, 764 F.3d at 779.

II. Splitting with the unanimous view of the circuits and embracing the defendants' effort to game the system here would invite a race to the bottom. Artful drafting would make it trivially easy for lenders to slip the FAA's prohibition on

contracts that seek to avoid otherwise applicable federal and state laws, even as these contracts could be deployed to have the same effect. And lenders could engage in ongoing lending and collection practices free from the strictures of any federal law safe in the knowledge that, if ever challenged, they could just walk back the clear import of their contract and concede that a single consumer could potentially pursue their claims in arbitration. *See, e.g.*, Curry Br. 32 But an arbitration contract "does not, in the context of litigation, become [an] opening bid in a negotiation . . . over the agreement's unconscionable terms." *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 205 (3d Cir. 2010). Instead, where a company drafts the contract, it is "saddled with the consequences . . . as drafted." *Id.* This Court should affirm.

STANDARD OF REVIEW

This Court's review of a district court's order denying a motion to compel arbitration is plenary. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 159 (3d Cir. 2009).

ARGUMENT

I. The arbitration agreement is unenforceable because, by its terms, it forbids the application of state and federal law.

The defendants' effort to compel arbitration fails for one simple reason: By its terms, their contract ensures that, no matter who the arbitrator is or where the arbitration occurs, the federal and state laws governing a consumer's claims may

not be applied. That is forbidden under the FAA. 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. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). Over the past three years, this rule has been consistently applied by federal circuit and district courts alike to invalidate similar efforts by payday lenders to enforce tribal-arbitration contracts that disavow state and federal law. These courts have delivered an unmistakable message: When a lender drafts an arbitration contract "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 for why this Court should depart from this unanimous view here are persuasive.

A. The defendants' contract is invalid under the FAA because it prospectively waives a consumer's statutory rights.

1. The rule that a contract is unenforceable when it operates as a prospective waiver of a party's right to pursue statutory remedies is grounded in both the FAA's text and its policy. Under the FAA, arbitration contracts are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By stressing the contractual nature of FAA arbitration, this statutory command "establishes an equal-treatment principle." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). A court may invalidate an arbitration contract based on "generally applicable contract

defenses" but not on legal rules that "'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). In this way, the FAA expressly preserves any contract-law doctrine that would "place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339.

One of these rules is that a contract is invalid if it forbids the assertion of statutory rights. Courts will invalidate any contract—arbitration or otherwise—that attempts to foreclose "the assertion of certain statutory rights," because such a contract would jeopardize a party's "right to pursue statutory remedies." *Am. Express*, 570 U.S. at 236. And the Supreme Court has in fact recognized this rule for as long as it has applied the FAA to statutory claims. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (holding that "a substantive waiver of federally protected civil rights will not be upheld"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (noting that arbitration must permit a party to pursue statutory claims so that "the statute will continue to serve both its remedial and deterrent function"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("condemning" a contract that would foreclose the right to pursue statutory claims as "against public policy"). Under the FAA, then, an arbitration contract (no less than any other) is invalid where it operates to "eliminat[e] . . . the right to pursue" a statutory remedy. *Am. Express*, 570 U.S. at 236.

The FAA's core policy reinforces the centrality of this rule. The FAA was enacted to overcome "widespread judicial hostility to arbitration," and its "overarching principle" that "arbitration is a matter of contract" means that courts must "rigorously enforce" arbitration agreements according to their terms. *Id.* at 232–33. But although "a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019). To the contrary, "no matter how emphatically [a contract] may express a preference for arbitration," *id.*, the FAA "may not play host" to an arbitration scheme that "[w]ith one hand . . . offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other . . . proceeds to take those very claims away." *Hayes*, 811 F.3d at 673–74. That is because although the FAA permits parties to "forgo the legal process and submit their disputes to private dispute resolution" 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 the terms of 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," in other words, "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*, 473 U.S. at 628.

This rule must be rigorously enforced. If arbitration is to have any "meaningful sense," courts must refuse to endorse schemes that "would undermine, not advance, the federal policy favoring alternative dispute resolution." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (Wilkinson, C.J.). Consistent with this understanding, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," courts may enforce the parties' contract under the FAA; but where, in contrast, a contract denies a litigant this very opportunity, courts should not. *Mitsubishi*, 473 U.S. at 637.

2. The defendants press a preliminary objection to this settled framework. They suggest that, under the FAA's prospective-waiver rule, "it is not enough" that the contract "eliminate[s] claims and defenses entirely." Curry Br. 29. In their view, even if the contract extinguishes a consumer's statutory cause of action, it cannot be invalidated if a consumer might still be able to "vindicate the *substance* of their claims." Curry Br. 29. That is wrong. As the Supreme Court itself has made clear, the prospective-waiver rule "certainly cover[s]" an arbitration contract that operates to "forbid[] the assertion of certain statutory rights." *Am. Exp.*, 570 U.S. at 236; *see also Mitsubishi*, 473 U.S. at 637. So, although "the FAA gives parties the freedom to structure arbitration in the way they choose," that freedom does not extend to an "outright prohibition" on a consumer's ability to bring statutory claims and seek statutory remedies—regardless of what relief a consumer might

ultimately obtain. *Hayes*, 811 F.3d at 674–75. As the Supreme Court has put it, the primary aim of the rule is to "prevent [a] 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Am. Exp.*, 570 U.S. at 236 (emphasis in original); *see also Gingras*, 922 F.3d at 127 (explaining that, where a tribal-arbitration contract "provides no guarantee that federal and state statutory rights could be pursued," it is unenforceable).

3. Turning to the actual application of the prospective-waiver rule, the defendants' contract here straightforwardly violates the FAA's clear prohibition on contractual waivers. It provides that any dispute over the loan shall be "subject to and governed by tribal law," and that the contract itself "shall be governed by tribal law." JA280, JA291. And it requires that any arbitrator—regardless of who it is—"shall apply" this mandate as written. JA291 (instructing that the "arbitrator shall apply Tribal law and the terms of this Agreement"). It also forbids the arbitrator from applying any rules or law that would "contradict this Agreement to Arbitrate or Tribal Law," permits an arbitrator to only award those "remedies available under Tribal law," and specifically instructs that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal law." JA291, 298. Because that language renounces "the application of federal or state law" to a consumer's claims and directs that "the arbitrator shall not allow for the application of any law other than tribal law," the "entire arbitration agreement

is unenforceable." *Dillon*, 856 F.3d at 335–37; *see also Hayes*, 811 F.3d at 669–71, 675 (holding that a tribal-arbitration contract is unenforceable under the FAA where it "names a tribal forum and then purports to disavow the authority of all state or federal law").[1]

Other clauses in the defendants' contract reinforce the point. For instance, another provision provides that "neither [the lender] nor this Agreement are subject to any other federal or state law or regulation, nor to the jurisdiction of any court." JA292. The same was true in *Dillon*: the contract there contained a similar disclaimer providing that "[n]either this Agreement nor the Lender is subject to the laws of any state of the United States" and "that no other state or federal law or regulation shall apply to this Agreement." 856 F.3d at 333, 336. There is nothing

[1] Those circuits addressing the application of this rule to tribal-arbitration contracts have declined to draw a distinction between a contract's waiver of federal statutory rights and state statutory rights. *See, e.g.*, *Gingras*, 922 F.3d at 127 (holding that the tribal-arbitration contracts violate the FAA's prospective-waiver rule and are unenforceable because they "are designed to avoid federal and state consumer protection laws"); *Dillon*, 856 F.3d at 337 (holding that, because the tribal-arbitration contract reflected a "calculated attempt to avoid the application of state and federal law," it was unenforceable). Relying on a stray line from Justice Kagan's dissent in *American Express*, however, some courts have suggested that the FAA's prospective-waiver rule "does not extend to state statutes." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). This Court need not definitively resolve that question here. Because the defendants' contract waives a consumer's federal statutory claims (along with state-law ones), it trips the FAA's prohibition and may not be enforced. *See Hayes*, 811 F.3d at 1249 (holding that, where the contract "is little more than an attempt to achieve through arbitration what Congress has expressly forbidden," the entire contract is invalid).

subtle about this: Under the contract, no consumer can bring a federal or state statutory consumer-protection claim in arbitration and no arbitrator can apply the relevant law.

The "brazen nature" of the defendants' attempt to free themselves from the strictures of state and federal law is, if anything, more evident here. It not only disavows a consumer's right to seek relief under federal law, but it also attempts to block any federal court from ever reviewing that effort. It states that (1) any front-end challenge to the arbitration contract's "validity, enforceability, or scope" must be sent to an arbitrator (who is required to decide such a challenge based only on tribal law) and (2) any back-end challenge must be "filed with a Tribal court"—not a federal or state court—and that any arbitration may be "set aside by a Tribal court upon judicial review" only if "the conclusions of law are erroneous under Tribal law" or if the decision is not "consistent with this Agreement and Tribal law." JA290, JA91. By its terms, then, the defendants' contract seeks not only to eliminate a consumer's right to pursue relief under state and federal law, but also to completely insulate that effort from meaningful judicial review. Not even the contracts in *Hayes* or *Dillon* went this far.

Every court of appeals that has confronted a tribal-arbitration contract has seen this scheme for what it is: a transparent attempt "designed to avoid federal and state consumer protection laws" through a series of calculated provisions found

directly in the contract. *Gingras*, 922 F.3d at 125, 127 (noting that the FAA will not sanction enforcement of contracts that "effectively insulate Defendants from claims that they have violated federal and state law"). In *Hayes*, for instance, the tribal loan contract included a choice-of-law provision stating that the contract "shall be governed by the law of the Cheyenne River Sioux Tribe." 811 F.3d at 66–70. That language was then paired with an arbitration clause that required the arbitrator to "apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement" to any claims. *Id.* at 670; *see also id.* at 673. And in *Dillon*, a different tribal-arbitration contract stated that it "shall be governed by the law of the Otoe-Missouria Tribe of Indians" and required any arbitrator to "apply the laws of the Otoe-Missouria Tribe of Indians and the terms of this Agreement." 856 F.3d at 335. Both contracts were invalidated in their entirety.

In fact, although five circuits have considered them (some, multiple times), *not once* have they ever enforced a payday lender's tribal-arbitration contract. *Gingras*, 922 F.3d at 127 (2d Cir); *MacDonald*, 883 F.3d at 227 (3d Cir.); *Dillon*, 856 F.3d at 335 (4th Cir); *Hayes*, 811 F.3d at 676 (4th Cir.); *Jackson*, 764 F.3d at 779–80 (7th Cir.); *Parnell*, 664 Fed. App'x at 841 (11th Cir.); *Parm*, 835 F.3d at 1334 (11th Cir.); *Inetianbor*, 768 F.3d at 1354 (11th Cir.). That makes sense. The FAA does not permit a company to free itself from the application of federal and state law. As the Fourth Circuit has explained, an arbitration contract may not, "[w]ith one hand," offer "an

alternative dispute resolution procedure in which aggrieved persons may bring their claims," and "with the other, [] proceed[] to take those very claims away." *Hayes*, 811 F.3d at 673–74. Because tribal-arbitration contracts "purport[] to offer neutral dispute resolution" but actually "disallow claims brought under federal and state law," the federal courts—both circuits and district courts alike—have roundly condemned these contracts as unenforceable. *Gingras*, 922 F.3d at 127.

B. The plain meaning of the defendants' contract forecloses their claim that it does not preclude federal statutory claims.

The defendants offer one main reason why this Court should reject this consensus view and split with its sister circuits. They say that their contract "does *not*" preclude consumers from pursuing federal statutory claims in arbitration. Curry Br. 32; *see* Red Stone Br. 25 (arguing that the contract "expressly requires the application of federal law in arbitration"); *but see* Curry Br. 32 (claiming that the contract wouldn't "preclude plaintiffs from vindicating *the substance* of their RICO claim in arbitration") (emphasis added). As they see it, neither the contract's choice-of-law provisions selecting tribal law and disclaiming any other "federal or state law or regulation" nor the clause requiring that an arbitrator "shall apply Tribal law" to any dispute and forbidding any arbitrator from "allow[ing] for the application of any law other than Tribal law" can be interpreted to exclude the application of the federal law at issue here. Curry Br. 35–36. That is true, they say,

because another clause in the contract invoking "such federal law as is applicable under the Indian Commerce Clause" permits a consumer to pursue claims under "generally applicable federal law (like RICO or ERISA)." Curry Br. 33. That is wrong.

For starters, federal courts facing similar language in these tribal-arbitration contracts have uniformly rejected this argument. *See, e.g.*, *Dillon*, 856 F.3d at 335 (invalidating contract notwithstanding clause that the contract "is made pursuant to a transaction involving the Indian Commerce Clause of the Constitution of the United States of America"); *Hayes*, 811 F.3d at 675 (same); *MacDonald*, 883 F.3d at 224 (same). As these courts have held, a contract's invocation of the "Indian Commerce Clause" does nothing to change the intent or effect of the contract—which is to "use[] its 'choice-of-law' provision to waive all of a potential claimant's federal rights." *Hayes*, 811 F.3d at 675 (specifically addressing the effect of a governing law provision containing a similar clause).

The defendants attempt to distinguish these other contracts' references to the Indian Commerce Clause as simply "alluding to the existence" of it but not purporting to "apply federal laws that govern Tribes by virtue of that Clause." Curry Br. 35; Red Stone Br. 29 (arguing that these other contracts, though specifically invoking the clause, said "nothing about what law governs"). That makes no sense. By referencing the Indian Commerce Clause, all of these contracts

make the same point: that the loans are made pursuant to the Indian Commerce Clause and so carry with them all the attendant rights and obligations that flow from such a transaction. Even the defendants themselves make this point—unintentionally contradicting their own interpretive theory—by arguing (at Curry Br. 26 n.7) that their contract's "boilerplate" statement that the transaction "involves interstate commerce" "doubtless" means that the FAA applies even though that boilerplate is not explicitly followed by the phrase "and such federal law as is applicable under the Commerce Clause." *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 268, 273 (1995) (explaining that "a contract evidencing a transaction involving commerce" corresponds with the "Commerce Clause powers to the full").[2]

Turning to the actual meaning of this clause, the defendants suggest that all the circuits have gotten it wrong. In their view, "when Congress enacts a generally

[2] It is unclear whether the defendants would agree that the same rules of incorporation that apply to a contract's "Commerce Clause" reference—*i.e.*, that a clause incorporating the Commerce Clause carries with it all the law that governs under that clause—would also apply to any "Indian Commerce Clause" reference. But there is surely no logical or interpretive reason why the two should be treated differently. Both are (to use the defendants' phrase) "constitutional source[s] of congressional power to legislate," Red Stone Br. 30, and so a contract that invokes either (or both) does so for the same purpose—to indicate that the relevant body of law existing under the clause applies. Once again, the defendants' own arguments make that clear. *See* Curry Br. 33 (insisting that, "when Congress enacts a generally applicable federal law (like RICO or ERISA)," it "presumptively exercises its Indian Commerce Clause authority to subject Tribes to that law").

applicable federal law (like RICO or ERISA)," it "presumptively exercises its Indian Commerce Clause authority to subject Tribes to that law." Curry Br. 33. So, the defendants say, an arbitrator will be free to apply "all generally applicable laws in arbitration—including RICO." Curry Br. 34. But pull on this statement even a little and it comes apart. It is true, of course, that substantive laws can apply to tribes. *See, e.g.*, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) (recognizing that even states may "apply their substantive laws to tribal activities"). To say substantive laws apply, however, "is not to say that a tribe no longer enjoys immunity from suit." *Id.* To the contrary, as the Supreme Court has made clear, "the right to demand compliance" with some law is distinct from whether there exists any "means available to enforce [it]." *Id.* And it is the latter of these two issues that matters here—after all, the FAA prevents a prospective waiver "of a party's *right to pursue* statutory remedies," not of a defendant's obligation to comply with the law. *Am. Exp.*, 570 U.S. at 236 (emphasis in original).

Truth to tell, the defendants recognize this distinction but attempt to obscure it. They suggest that, although "RICO would apply in arbitration," they could not be held "liable . . . under that law." Red Stone Br. 35 n.7. That statement is carefully crafted: it implies that the plaintiffs would be able *to pursue* their claims (thus avoiding any prospective waiver problem) even if ultimately they could not hold the defendants liable for any violation. It is also wrong. Tribal sovereign

immunity is *not* a liability-only immunity; it is, instead, the "common-law immunity *from suit* traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788–89 (2014) (emphasis added). It therefore means that "any suit" must be dismissed "absent congressional authorization (or waiver)." *Id.* Some laws, like the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, contain such an explicit authorization and so permit suit against tribes. But RICO is not one of them, and the defendants do not appear to suggest otherwise. So, by the plain terms of this contract, a consumer has no right to pursue the federal claims at issue here and an arbitrator has no authority to award relief under them.[3]

Indeed, federal courts have firmly rejected similar "our contract doesn't explicitly disclaim federal law" arguments made by lenders seeking to avoid the

[3] The defendants also suggest that, even were it true that the contract forbids the pursuit a statutory claim, it should be overlooked because "in litigation," a "tribal entity like Red Stone" would be immune and so the laws "would not apply" at all. Red Stone Br. 25–26 (arguing that "[t]he only federal laws that the arbitration provision disclaims for arbitration . . . are those that also would not apply in litigation"). But that is true only for *tribes*. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (explaining that "without congressional authorization," a tribe is "exempt from suit" from federal laws). Anyone else claiming immunity has to prove it. Yet despite the fact that neither Red Stone nor any of the other defendants are tribes, the contract seeks to unilaterally confer upon them (and, basically, everyone affiliated with the lending enterprise) the same immunity from suit that a tribe would receive. *See, e.g.* JA290 (purporting to cover the "Lender, our agents, servicers, assigns, vendors or any third party . . ."). Although a court is capable of rejecting a defendant's claim to share in the immunity of the tribe, *see, e.g.*, *Gingras*, 922 F.3d at 121 (rejecting tribal immunity claims), an arbitrator is not—which is why the choice-of-law and arbitration provisions in the contract work in tandem to effect a prospective waiver. *See infra* 38–40.

obvious meaning of their tribal-arbitration contracts once they are challenged. In *Dillon*, for instance, the payday lender made an analogous argument that its arbitration contract did not expressly "deprive [a borrower] of any federal remedies" and so could not be interpreted to "implicate the prospective waiver doctrine." *Dillon*, 856 F.3d at 335.

The Fourth Circuit dismissed this cramped interpretation. A contract that "attempt[s] to apply tribal law to the exclusion of federal and state law" accomplishes a prospective waiver so long as it states that the parties' rights "shall be governed" by tribal law and requires that any arbitrator must comply with this command. *Id.* at 335, 336 (invalidating the contract because it implicitly barred an arbitrator from applying applicable federal or state law).

The Second Circuit's recent decision in *Gingras* hammers this point home. There, the lenders argued that their tribal-arbitration contract was "unlike" others because it did "not explicitly disclaim" federal law and appeared to permit certain claims based on some federal statutes or common law. 922 F.3d at 128 n.4. The Second Circuit rejected this argument. "[I]t is far from clear what import this provision provides," the court explained, given that (among other things) "the loan agreements themselves insist that the borrower 'acknowledge[s] and consent[s] to be bound to the terms of this Agreement, consent[s] to the sole subject matter and personal jurisdiction of the Chippewa Cree Tribal Court, and further agree[s] that

no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." *Id.* at 109 (emphasis in original). "At best," the court held, "the agreements intentionally obfuscate, as opposed to explicitly disclaim, the application of federal law." *Id.* at 128 n.4. But the possibility that tribal law "perhaps incorporates, or can be supplemented with, some federal law . . . does not save the agreements" and is insufficient to overcome the prospective-waiver rule. *Id.* at 127.

And that remains true even in the face of a defendant's "concession to the application of federal substantive law in arbitration" notwithstanding its choice of tribal law in the contract. *Id.* at 336. The defendants offer this same concession here. *See* Curry Br. 32. But that, as the Fourth Circuit explained, has "no merit" because it would allow a defendant to simply "rewrite the unenforceable foreign choice of law provision in order to save the remainder" of the contract. *Dillon*, 856 F.3d at 336. An arbitration contract "does not, in the context of litigation, become [an] opening bid in a negotiation . . . over the agreement's unconscionable terms." *Nino*, 609 F.3d at 205. Instead, where a company drafts the contract, it is "saddled with the consequences . . . as drafted." *Id.*

The defendants also attempt to distinguish the contracts in *Hayes* and *Dillon* by suggesting that those were only invalidated because they contained more explicit language disavowing the application of federal law. *See, e.g.*, Curry Br. 32 (arguing that "[t]he Fourth Circuit in *Hayes* and *Dillon* invalidated arbitration agreements

because they 'purported to be subject 'solely to the exclusive laws and jurisdiction of the . . . Tribe'"). That badly misconstrues these decisions. The Fourth Circuit in *Dillon* identified two specific clauses that, it held, operated as a prospective waiver. The first was a clause stating:

> THIS AGREEMENT TO ARBITRATE IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE OTOE-MISSOURIA TRIBE OF INDIANS. The arbitrator will apply the laws of the Otoe-Missouria Tribe of Indians and the terms of this Agreement....

Dillon, 856 F.3d at 335. And the second was a section titled "GOVERNING LAW" which provided that "'[t]his Agreement and the Agreement to Arbitrate are governed by [tribal law]' and '[n]either this Agreement nor the Lender is subject to the laws of any state of the United States.'" *Id.* The Fourth Circuit did not rely on—let alone discuss (other than to quote it once in the background)—the clause the defendants say matters here.[4]

[4] True, in *Dillon* the Fourth Circuit identified "other terms" in the contract that "evince[d] an explicit attempt to disavow the application of federal or state law to any part of the contract or its parties." 856 F.3d at 335–36. None involve the one the defendants assert was outcome determinative. And the court's holding did not turn on the existence of these statements. Instead, the court explained that these statements "further illustrate" that the contract was designed to disavow federal and state law. *See id.* at 337 (discussing these terms after "hold[ing]" that the contract was unenforceable). Even so, of the additional statements identified by the court in *Dillon*, similar versions of nearly all of them can be found in the defendants' contract here. *Compare id.* at 336 *with* JA292 (stating that "neither we nor this

The upshot: A tribal choice-of-law clause coupled with a mandate prohibiting an arbitrator from applying any law other than tribal law operates as an unambiguous attempt to apply tribal law to the exclusion of federal and state law.

So it is here. The relevant language in the defendants' contract is indistinguishable in substance from other tribal-arbitration contracts. It says (1) that the "THIS AGREEMENT SHALL BE GOVERNED BY TRIBAL LAW," (2) that "neither we nor this Agreement are subject to any other federal or state law or regulation, nor to the jurisdiction of any court, unless so stated in this Agreement," and (3) that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal law" and that the "arbitrator shall apply Tribal law and the terms of this Agreement." JA291–92. That accomplishes a forbidden waiver. Because the contract requires the application of tribal law and precludes an arbitrator from applying any other law, it bars a consumer from vindicating rights granted to them by federal and state law. Put another way, so long as it uses a choice-of-law provision and arbitration clause to "effectively

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Agreement are subject to any other federal or state law or regulation"); JA281 ("Our inclusion of any disclosures does not mean that Lender consents to the application of federal law to any loan or to this Agreement"); JA280 ("You agree that this loan is made within the tribe's jurisdiction and is subject to and governed by tribal law and not the law of your resident state."). The material parts of the contracts, in other words, are nearly identical across the board.

insulate Defendants from claims that they have violated federal and state law," it is invalid. *Gingras*, 922 F.3d at 125.

And make no mistake: the contract's reference to a lender's "voluntary use" of, or compliance with, "certain federal laws as guidelines" does nothing to blunt its disavowal of those laws at the heart of this case. *See* JA292 (noting that the lender "may choose to voluntarily use certain federal laws as guidelines"). The contract is very clear that the defendants' compliance with federal law "does not represent acquiescence" to "any federal law unless found expressly applicable to the operations of the Tribe." JA292. And, no surprise, among those laws that are not expressly applicable—because Congress has not unambiguously abrogated a tribe's immunity from them—are "all state law claims" as well as any "federal RICO claim." *Gingras*, 922 F.3d at 120 (noting that the tribal lenders assert that "they are entitled to immunity" from these claims); *see also* Curry Br. 4 (asserting an entitlement to immunity from the specific claims in this case); Red Stone Br. 2 (same).

That gives away the game. What matters isn't whether the contract (or tribal law) carves out a narrow exception for the defendants' voluntary compliance with *some particular* law (like the Truth In Lending Act); it is, instead, whether it precludes a plaintiff from pursuing the *specific* statutory rights at issue in the case, namely claims under RICO. *See Gingras*, 922 F.3d at 127 (holding that the incorporation of

"some federal law or Montana law does not save the agreements"). And where an arbitration contract "compels [a party] to surrender important statutorily-mandated rights afforded" under a federal law, it "contravenes the [FAA]" regardless of whether *other* statutory rights remain available. *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994) (invalidating an arbitration contract even though it authorized a party to bring a federal statutory claim because it foreclosed the right to seek certain remedies afforded under the statute). Were it otherwise, a drafter could easily slip the prohibition by voluntarily complying with a single, even irrelevant, law.

Nor does the substance of the tribe's law affect the analysis. The defendants suggest that there is no prospective waiver problem here because, "even if plaintiffs could not bring their RICO claim in arbitration," there is "no reason to think that Otoe-Missouria law would fail to vindicate the substance of that claim." Curry Br. 36. But, as both *Dillon* and *Gingras* make clear, a contract that "attempt[s] to apply tribal law to the exclusion of federal and state law" is unenforceable "as a matter of law," regardless of any alternative remedies that might be available under tribal law. *Dillon*, 856 F.3d at 336, 334; *see also Gingras*, 922 F.3d at 127.

But even if the relevant inquiry was whether the "substance" of the claims could be vindicated, the defendants' tribal code is woefully inadequate. Although the Otoe-Missouria Tribal Consumer Financial Services Ordinance references

some federal laws and instructs that lenders "shall conduct business in a manner that complies" with them, among those laws absent from this list are those that govern the claims at issue in this case. JA488–89. And, even for those laws that are listed, the code makes clear that a lender's compliance is voluntary and does not constitute "consent . . . related to the applicability of federal laws" or a waiver of the lender's "sovereign immunity from unconsented judicial or administrative process." JA489. And what about others who are not "licensed lenders" under the code? The defendants say that the code governs "licensed lenders," *see, e.g.*, Curry Br. 47, but it says nothing about other affiliated entities or individuals who (like in this case) might also have acted illegally. *See, e.g.*, JA482–83 (exempting a whole range of entities and persons "from the licensing requirements").

It is, for that matter, not even clear how a consumer would meaningfully pursue *any* claim under this code. Although it contains something called a "consumer complaint procedure," it does not appear to provide for or establish any private right of action for violations of any code provisions, let alone those federal laws with which lenders will allegedly voluntarily comply. JA500 (2018 Otoe-Missouria Tribal Consumer Financial Services Ordinance). Instead, it offers only that consumers can file a "complaint" with either the lender itself or a "Tribal Consumer Finance Services Regulatory Commission" and await a "decision with respect to the complaint," which is "final." JA500; *but see* JA503 (authorizing the

tribal commission, but not an individual, to bring a "civil complaint"). There also appears to be no guaranteed remedial mechanism allowing consumers to recover for any violations either. Instead, the code authorizes the commission to "grant or deny relief as the Commission deems appropriate." JA500. Given this setup, the defendants' insistence that consumers would have "no reason to think Otoe-Missouria law would fail to vindicate the substance of [their] claim[s]" is absurd. Curry Br. 36.

Bottom line: Because tribal law provides no guarantee that federal and state statutory rights could be pursued, much less vindicated in an arbitral forum while at the same time forbidding an arbitrator from considering *any* of the federal claims asserted by a consumer, the defendants' contract is invalid.

C. The defendants' choice-of-law clause cannot be read in isolation and does not save the contract.

The defendants next attempt to analogize their tribal choice-of-law clause to one simply selecting the law of a state. Curry Br. 36. But that reflects a basic category error. As the Fourth Circuit explained in *Hayes* when rejecting a similar analogy, "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause," a tribal-arbitration contract "uses its 'choice of law' provision to waive all of a potential claimant's federal rights." 811 F.3d at 675 (noting that a tribal choice-of-law clause "underhandedly convert[s] a choice of law clause into a choice of no law clause");

see also Mitsubishi Motors, 473 U.S. at 637 n.19 (explaining that, to be effective, a foreign choice-of-law clause cannot "wholly [] displace American law even where it otherwise would apply"). To violate the FAA, in short, a tribal-arbitration contract does not need to specifically disclaim the application of each and every federal law.

The problem with the defendants' contrary argument is that it only works if the contract's choice-of-law requirements can be divorced from the arbitration clause. Here, they cannot. As the Supreme Court explained when it first announced the prospective-waiver rule, to assess whether a contract triggers a prospective waiver, a court first must determine whether the "choice-of-forum *and* choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis added). Here, the two are inseparable—the defendants' arbitration clause itself (paragraph 22 of the loan contract) incorporates the tribal choice-of-law provisions. *See* JA291 (stating that the agreement to arbitrate "shall be governed by tribal law" and the arbitrator "shall apply Tribal Law and the terms of this Agreement").

This rule readily follows from the fundamental principle that arbitration contracts must be "enforced according to their terms." *Stolt-Nielsen*, 559 U.S. at 682. If the express terms of the arbitration clause require an arbitrator to comply with the contract as written, and the contract requires the exclusive application of tribal law, the arbitrator has no authority to apply other law—unlike a court, "an

arbitrator derives his or her powers" *only* from the parties' contract. *Id.* And unlike a court, an arbitrator "has no general charter to administer justice" but is instead restricted to what is "created by and confined to the parties." *Id.* at 683 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)). "It is only natural," therefore, to "interpret the arbitration agreement in light of the broader contract in which it is situated." *Hayes*, 811 F.3d at 676. If the language of the contract as a whole confirms that it deprives a party of an opportunity to meaningfully adjudicate their specific federal and state law claims, it may not be enforced.

The reference to AAA or JAMS does not alter this understanding. *See* Curry Br. 22 (arguing that the contract's use of either AAA or JAMS affords consumers the ability to arbitrate in one of "the most reputable arbitral forums available"). The terms of the relevant arbitration clause forbid any arbitrator—even the "most reputable"—from applying any rules or law that would "contradict this Agreement to Arbitrate or Tribal Law." JA290 (stating that, "[t]o the extent the arbitration firm's rules or procedures are different than the terms of this Agreement to Arbitrate, the terms of this Agreement to Arbitrate will apply"); *see also* JA291 (explaining that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal law"); *see also id.* (instructing that the "arbitrator shall apply Tribal law and the terms of this Agreement"). And, worse still, were a consumer to attempt to appeal the arbitrator's decision, that appeal

could not be heard by a federal court and could only be "set aside" if it was "erroneous under Tribal law." JA291 (providing that any arbitration award "must be consistent with this Agreement and Tribal law, and, if it is not, it may be set aside by a Tribal court"). By contrast, if an arbitrator *did* apply any law beyond Tribal law, that would, under this contract, constitute grounds for reversal.

This integrated set of provisions in the defendants' contract thus binds an arbitrator's hands, even as it wouldn't bind a court. Any court facing the defendants' effort to forbid consumers from pursuing their federal and state law consumer-protection claims would therefore have little difficulty rejecting it. *See, e.g.*, *Jackson*, 764 F.3d at 783 (dismissing any suggestion that a contractual tribal-forum-selection clause can confer tribal-subject-matter jurisdiction over a nonmember's consumer-protection claims); *see Pa. Dept. of Banking v. NCAS of Del., LLC*, 948 A.2d 752, 759 (Pa. 2008) (refusing to enforce a contractual choice-of-law provision where it would violate "Pennsylvania public policy"); *MacDonald v. CashCall, Inc.*, 2017 WL 1536427, at *10–14 (D.N.J. Apr. 28, 2017) (rejecting any effort to apply tribal law to a consumer's state consumer-protection and usury claims). Yet by forcing any claims out of court, the defendants' contract attempts to sidestep this possibility entirely.

And although this basic understanding applies to those contracts (like the defendants') that are governed under Chapter 1 of the FAA, it does not for those

international contracts governed by Chapter 2. That makes the defendants' focus on cases addressing the latter misplaced. *See* Curry Br. 29–31 (discussing, among others, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011), and *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012)).

Unlike contracts subject to Chapter 1 of the FAA, international contracts fall under Chapter 2 of the FAA, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and are subject to the Convention's specific framework for evaluating enforceability. *See Aggarao*, 675 F.3d 355 (explaining how international-comity concerns inform the enforceability analysis of arbitration contracts governed by the Convention); *see also Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1293–94 (11th Cir. 1998) (noting that "international agreements . . . are *sui generis*" and that the FAA's prospective-waiver rule does not apply to "truly international agreements"). Here, the defendants do not (and could not) contend that their contract is governed by Chapter 2 or the Convention, *see, e.g.*, Curry Br. 5 (premising jurisdiction on 9 U.S.C. § 16), and so this alternative framework does not control. Not surprisingly, then, none of the circuits confronting tribal-arbitration contracts saw these decisions (several of which arose within their own circuits) as compelling a different result.

D. The presence of a delegation clause does not make the tribal-arbitration contract enforceable.

The presence of a delegation clause—a provision designed to allow an arbitrator to decide certain threshold questions concerning the contract's enforceability—does not change the foregoing. The defendants suggest that the district court should have "let the arbitrator" resolve all "threshold questions about the enforceability or validity" of the contract because it contained a delegation clause. Curry Br. 13, 23. But a contract that contains an FAA-prohibited prospective waiver is unenforceable in its entirety, delegation clause included. "In practical terms, enforcing the delegation provision would place an arbitrator in the impossible position of deciding the enforceability of the agreement *without* authority to apply any applicable federal or state law." *Smith*, 168 F.Supp.3d at 786 (emphasis in original). As a result, any delegation clause in the defendants' contract is unenforceable "for virtually the same reason" that the rest of the arbitration contract is unenforceable. *MacDonald*, 2017 WL 1536427, at *4; *Parm*, 835 F.3d at 1338 (invalidating *both* the delegation clause *and* the underlying arbitration contract); *Parnell*, 664 Fed. App'x at 843–44 (same); *Hayes*, 811 F.3d at 671 n.1 (same).

Once again, the Second Circuit's recent decision in *Gingras* confirms the settled rule. There (as here), the defendant payday lenders argued that the existence of a delegation clause in the contract "unambiguously require[d] the parties' disagreement[] to be arbitrated." *Gingras*, 922 F.3d at 126. The Second Circuit firmly

rejected this claim. "'[I]f a party challenges the validity under [9 U.S.C.] § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.'" *Id.* (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)). And that is true even where a delegation clause "appears to give the arbitrator blanket authority over the parties' disputes." *Id.* Thus, where a plaintiff lodges a "specific attack on the delegation provision," that is "sufficient to make the issue of arbitrability one for a federal court." *Id.* (noting that the plaintiffs specifically challenged the validity of delegation clause). This rule applies with full force here.[5]

In response, the defendants invite this Court to adopt a radical new rule of arbitrability: that the existence of a delegation clause *categorically* deprives federal courts of the authority to "deem the arbitration agreement an unenforceable prospective waiver of federal rights." Curry Br. 24. Relying on the Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the defendants

[5] The defendants half-heartedly argue that a "prospective-waiver challenge is not a valid basis for wresting away the arbitrator's authority to resolve threshold arbitrability challenges." *See* Curry Br. 25–26 (suggesting that a plaintiff must "impugn" some other aspect of the clause). But every court to consider it has rejected this argument. *See, e.g.*, *Gingras*, 922 F.3d at 126 (invalidating delegation clause on the same basis as the entire arbitration contract); *Dillon*, 856 F.3d at 332 (same); *Parm*, 835 F.3d at 1338 (same); *Parnell*, 664 Fed. App'x at 843–44 (same); *Hayes*, 811 F.3d at 671 n.1 (same). As this Court in *MacDonald* made clear, "[i]n specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions." 883 F.3d at 226–27.

suggest that, "'[w]hen the parties' contract delegates the arbitrability question to an arbitrator . . . . a court possesses no power to decide the arbitrability issue.'" Curry Br. 24 (quoting 139 S. Ct. 524, 529 (2019)). But as with the defendants' other arguments, courts confronting this one have squarely rejected it. "*Schein* has no bearing on this case," the Second Circuit explained, because it "dealt with an exception to the threshold arbitrability question—the so-called 'wholly groundless' exception—not a challenge to the validity of an arbitration clause itself." *Gingras*, 922 F.3d at 126 n.3.

It is also wrong, as the defendants imply, that the consumers here failed to raise a "specific attack" on the delegation clause. Curry Br. 25 n.6. In their brief opposing the defendants' motion to compel arbitration, they specifically attacked the delegation clause in the defendants' contract, arguing that it, too, was unenforceable under the FAA. Opp. to Mot. to Compel, Dist. Ct. Dkt. No. 100 at 20. That is all that's required to make the issue of the tribal-arbitration contract's enforceability one for the court. *See MacDonald*, 883 F.3d at 227 (holding that a party's "explicit references to the delegation clause are sufficient to contest it"); *Hayes*, 811 F.3d at 671 n.1 (noting that a specific challenge to the delegation clause in a tribal-arbitration contract "occasion[s] our review"). The district court was correct to decide the issues here.

E. The district court's decision invalidating the contract was not premature.

Next, the defendants make a play for delay. The district court's decision to invalidate the agreement was premature, they say, because the agreement could be read to contemplate that federal law may also apply in the arbitral proceeding. *See* Curry Br. 26. In their view, rather than speculate about whether the contract forbids the application of the relevant law, the parties (and the court) should allow an arbitrator "to evaluate whether the arbitration agreement precludes plaintiffs from pursuing federal-law remedies." Curry Br. 26. As the defendants see it, a "neutral arbitrator can perform the same prospective-waiver and choice-of-law analysis just as easily as a district court can." Curry Br. 27.

This argument fails for a straightforward reason: the contract unambiguously forbids the application of any relevant federal or state law. There is, in other words, no speculation about what law the arbitrator must apply. As the Fourth Circuit has explained, a tribal-arbitration contract that states that it "shall be governed by the law of [a tribe]" and does not permit an arbitrator to "allow for the application of any law other than tribal law" must be interpreted "as an unambiguous attempt to apply tribal law *to the exclusion of federal and state law*." *Dillon*, 856 F.3d at 335–36 (emphasis in original). That is because a defendant's "concession to the application of federal substantive law in arbitration notwithstanding the unambiguous choice of tribal law" will not be effective. *Id.* at 336.

The defendants' argument here, however, is flawed for another fundamental reason: their contract—by design—affords no possibility of any meaningful back-end review because it deprives a federal court of any power to even police an arbitrator's decision on the effect of the contract's unambiguous language stripping a consumer of her federal remedies. Consider: In *Mitsubishi Motors*, the Supreme Court explained that it might be appropriate in some cases for courts to wait until the award-enforcement stage before deciding a prospective-waiver challenge. *See* 473 U.S. at 637 n.19; *see also Dillon*, 856 F.3d at 335 (discussing that approach and rejecting it for tribal-arbitration contracts). Here, that review is impossible. By its terms, the defendants' contract forecloses *any* federal court from reviewing an arbitrator's decision—it requires the arbitrator's decision to "be filed with a Tribal court" and allows only that "it may be set aside by a Tribal court" and only if "the conclusions of law are erroneous under Tribal law." JA291. There is no exception to this mandatory requirement. JA291 (stating that the consumer "irrevocably consent[s] to the exclusive jurisdiction of the Tribal courts for purposes of this Agreement").

Standing alone, that is enough to invalidate this contract. *See Vimar Seguros y Reaseguros*, 515 U.S. at 540–41 (cautioning that, where there is "no subsequent opportunity for review," a court should invalidate the contract if it operates as a prospective waiver). As the Second Circuit explained in *Gingras*, it does not matter

that a contract "provide[s] for arbitration to be conducted by an AAA or JAMS arbitrator" where "the mechanism of tribal court review hollows out those protections." 922 F.3d at 127. "Rather than the sharply limited federal court review of the arbitrators' decisions as constrained by the FAA, the review by tribal courts under these agreements hands those courts unfettered discretion to overturn an arbitrator's award." *Id.* at 127–28 (addressing an identical provisions providing that any arbitral award "may be set aside by the tribal court upon judicial review"). Ultimately, a contract directing a tribal court to interpret its own law "effectively insulates the tribe from any adverse award and leaves prospective litigants without a fair chance of prevailing in arbitration." *Id.* at 128; *see also Jackson*, 764 F.3d at 779 (refusing to defer consideration until after arbitration because the contract "provides that a decision is to be made under a process that is a sham from stem to stern").

Given this, the defendants' claim that their contract adequately "ensures the FAA's applicability" should be rejected. Curry Br. at 26 n.7. As the Supreme Court has explained, 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). The contract here unavoidably runs afoul of this basic rule.[6]

II. Enforcing this contract would invite a race to the bottom.

As we have explained (*see supra* at 6–9), the past several years have seen a dramatic rise in payday lending enterprises seeking various ways "to skirt federal and state consumer protection laws under the cloak of tribal sovereign immunity." *Gingras*, 922 F.3d 128. "Part 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." *Id.* at 126.

The defendants' contract here straightforwardly represents one of these attempts. It not only effects an unambiguous and categorical waiver of federal statutory rights, but it also attempts to insulate that waiver from any meaningful federal-court review by prohibiting any court from considering it on the front end—through a delegation clause—and then on the back end—by requiring any review to occur in tribal court and only for legal errors under tribal law.

[6] The defendants have not asked this Court to sever the offending provisions in their contract, and for good reason. As every court to consider the issue has explained, a tribal-arbitration contract's "errant provisions" are not severable because "the offending provisions go to the core of the arbitration agreement"—the "animating purpose[]" behind the contract is a "brazen" effort to ensure that the defendants "could engage in lending and collection practices free from the strictures of any federal law." *Hayes*, 811 F.3d at 675–76.

When confronted with these schemes, the federal courts have, with near unanimity, refused to endorse them. Seven times lenders have sought to enlist the aid of a federal circuit in enforcing tribal-arbitration contracts; seven times they have failed. The number of district courts that have rejected similar efforts is twice that. This consensus has delivered an unmistakable message: Tribal-arbitration contracts may not be enforced under the FAA because they are designed to "game the entire system" by deploying arbitration to avoid the state and federal law that would otherwise apply. *Hayes*, 811 F.3d at 676. In this way, they are not "on the up-and-up" and would, if enforced, turn the FAA into a vehicle for cynical attempts to opt-out of the legal rules that companies find inconvenient for their business model. *Id.* Over the last three years—since Judge Wilkinson's path-marking decision in *Hayes*—federal courts have not permitted tribal lenders to enforce these illegal tribal-arbitration contracts.

This Court should not become the first. Over the years, courts have repeatedly rejected lender efforts to draft their way around the core defect of these contracts. *See Jackson*, 764 F.3d at 769 (rejecting contract requiring arbitration before "a Tribal Elder" or "a panel of three [] members of the Tribal Council"); *Hayes*, 811 F.3d at 670 (rejecting similar contract substituting the tribal elder requirement with arbitration before AAA or JAMS but requiring arbitrator to apply tribal law and disavowing federal law); *Dillon*, 856 F.3d at 335 (rejecting new version omitting the

explicit disavowal of federal law from the governing law clause). The defendants here should not be rewarded for attempting to follow this same playbook. Accepting their invitation to become the first circuit to split from the consensus view would make it trivially easy for lenders to draft their way around the "just and efficient system of arbitration intended by Congress when it passed the FAA." *Hayes*, 811 F.3d at 674. Because the defendants' contract forecloses consumers from vindicating their statutory rights, it is not enforceable under the FAA.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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