No. 19-2058

In the United States Court of Appeals for the Third Circuit

CHRISTINA WILLIAMS, ET AL.
Appellants,

v.

MEDLEY OPPORTUNITY FUND II, LP, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 2:18-CV-02747 (GOLDBERG, J.)

BRIEF FOR APPELLANT RED STONE, INC.

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CORPORATE DISCLOSURE STATEMENT

Red Stone, Inc. has no parent corporation or stock. It is fully owned by the Otoe-Missouria Tribe of Indians.

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INTRODUCTION

Plaintiffs Christina Williams and Michael Stermel borrowed money from AWL, Inc., an online-lending entity wholly owned by the federally recognized Otoe-Missouria Tribe of Indians ("Tribe"). Each plaintiff's loan agreement includes an arbitration provision providing that "any dispute" arising from the agreement must be resolved through arbitration.

Instead of honoring their agreements, Williams and Stermel brought their disputes to court, alleging in this putative class action that their loans violate state and federal law. The complaint names several defendants, including appellant Red Stone, Inc., another company wholly owned by the Tribe.

When Red Stone moved the district court to compel arbitration, plaintiffs offered a single response: The arbitration provision is unenforceable because it violates the "prospective-waiver" doctrine, which prohibits arbitration provisions from unambiguously waiving a plaintiff's right to pursue in arbitration any federal statutory remedy that it would have in litigation. The court denied Red Stone's motion, finding a prospective waiver with minimal explanation.

That decision was erroneous and should be reversed, for either of two reasons. First, the district court had no power to resolve plaintiffs' enforceability challenge, because in borrowing money from AWL, plaintiffs expressly agreed that any enforceability challenge would be resolved by the arbitrator and not a

court. Second, the prospective-waiver argument fails because plaintiffs' loan agreement does not disclaim federal law and thereby prevent plaintiffs from pursuing in arbitration any federal remedy that they could pursue in litigation. In fact, the arbitration provision's governing-law clause expressly adopts the same body of federal law that would apply in litigation. That by definition is not a prospective-waiver violation.

This Court should reverse and remand with instructions that arbitration of plaintiffs' claims against Red Stone be compelled.[1]

JURISDICTION

When plaintiffs filed their complaint, the district court had subject-matter jurisdiction over their federal claims under 28 U.S.C. §1331 and 18 U.S.C. §1965, and over their state-law claims under 28 U.S.C. §1367. As explained below, Red Stone moved the court to dismiss the complaint for lack of subject-matter jurisdiction, on the ground that Red Stone is an arm of the Otoe-Missouria Tribe and therefore immune from unconsented suit. The district court did not resolve the immunity motion, choosing to address Red Stone's motion to compel arbitration first.[2]

[1] By filing this brief, Red Stone does not waive any defense, including that it is immune from suit as an arm of the Otoe-Missouria Tribe.

[2] The court had jurisdiction under Article III to make that choice notwithstanding Red Stone's pending immunity motion. *See Sinochem International Company v.*

This Court has jurisdiction over Red Stone's appeal. On May 7, 2019, the district court denied Red Stone's motion to compel arbitration. JA6. Red Stone filed its notice of appeal the next day, JA8, within the time allowed by Federal Rule of Appellate Procedure 4(a)(1)(A). And the Federal Arbitration Act authorizes interlocutory appeals of orders denying motions to compel arbitration. 9 U.S.C. §16(a)(1).

ISSUES PRESENTED

1. Whether the district court erred in resolving the enforceability of plaintiffs' arbitration provision. (This issue was raised below at JA259-260, and implicitly ruled on at JA5-6.)

2. Whether the district court erred in refusing to compel arbitration on the ground that the arbitration provision prospectively waives borrowers' federal statutory rights. (This issue was raised below at JA256-264, and ruled on at JA6.)

STATEMENT OF RELATED CASES

This case has not been before this Court previously. Other pending cases that involve the enforceability of (1) the same arbitration agreement at issue here or (2) a materially identical one are:

Malaysia International Shipping Corporation, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying an audience to a case on the merits.'" (quoting *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 585 (1999)))

- *Solomon v. American Web Loan, Inc.*, No. 19-1258 (4th Cir.) (consolidated with *Solomon v. Curry*, No. 19-1267)
- *Gibbs v. Great Plains Lending, LLC*, No. 18-1907 (4th Cir.)
- *Gibbs v. Haynes Investments, LLC*, No. 19-1434 (4th Cir.)
- *Brice v. Plain Green, LLC*, No. 19-15707 (9th Cir.)
- *Brice v. Stinson*, No. 3:19-cv-1481 (N.D. Cal.)
- *Banks v. Rees*, No. 8:17-cv-02201 (M.D. Fla.)
- *Burney v. Curry*, No. 8:18-cv-03083 (M.D. Fla.)
- *Granger v. Great Plains Lending, LLC*, No. 1:18-cv-00112 (M.D.N.C.)
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- *Gibbs v. Rees*, No. 3:17-cv-00386 (E.D. Va.)
- *Gibbs v. Stinson*, No. 3:18-cv-00676 (E.D. Va.)
- *Gingras v. Victory Park Capital Advisors, LLC*, No. 5:17-cv-00233 (D. Vt.)

STATEMENT

A. Factual Background

Red Stone is wholly owned by the Otoe-Missouria Tribe. JA399. It was created to facilitate the merger of AWL's predecessor company, American Web Loan, Inc., with MacFarlane Group, Inc., a company that provided services to American Web Loan. JA358-359. Having facilitated that merger, Red Stone is now "a holding company [without any] operations or business of its own." JA359.

Christina Williams and Michael Stermel (who do not allege that they ever had any direct connection or interaction with Red Stone) entered into three short-term lending contracts with AWL. JA35-38. Two of those loan agreements were between AWL and Williams, JA301-325; JA327-351, while the third was between AWL and Stermel, JA275-299. The three agreements' relevant terms are materially indistinguishable, so this brief hereafter cites only Stermel's agreement.

The first page of the loan agreement informs borrowers, in prominent typeface, that by agreeing to borrow money from AWL, their "**RIGHT TO SUBMIT COMPLAINTS IS LIMITED TO THE DISPUTE RESOLUTION PROCESS SET FORTH IN THIS AGREEMENT**." JA280. The agreement further explains that "any dispute … related to this agreement will be resolved by binding arbitration." JA289. "Dispute" is defined as "any claim or controversy of any kind between [the borrower] and [AWL] or otherwise involving this agreement or the loan." *Id.* The agreement elaborates that "Dispute is to be given its broadest possible meaning and includes … any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." JA289-290.

The loan agreement also contains a choice-of-law clause stating that "[t]he arbitrator shall apply [Otoe-Missouria] Tribal Law and the terms of this Agreement." JA291. Those "terms," in turn, include the agreement's "Governing Law" clause, which states 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." JA292.

Under the loan agreement, a borrower who pursues arbitration can choose one of two prominent nationwide organizations to conduct the arbitration: the American Arbitration Association ("AAA") or JAMS, The Resolution Experts ("JAMS"). JA290. Borrowers may also choose to have any arbitration conducted

within 30 miles of their home. JA291. And AWL must "advance or reimburse filing fees and other costs or fees of arbitration for all non-frivolous claims," as well as pay attorneys' fees of borrowers who prevail in arbitration, JA290.

Any borrower who does not want to arbitrate disputes under the loan agreement may opt out of the arbitration provision in writing within 60 days of loan origination. JA289. In that event, any disputes arising under the loan agreement are resolved in the Tribe's court system. *Id.* Neither plaintiff here opted out.

The loan agreement prominently discloses the foregoing information in straightforward language, often with bolding, underlining, and/or capitalization. It does the same with other important information. For example, the first page of the agreement contains an "**IMPORTANT DISCLOSURE**" informing borrowers that "**THIS LOAN … IS SUBJECT TO AND GOVERNED BY TRIBAL LAW AND NOT THE LAW OF YOUR RESIDENT STATE.**" JA280. The agreement then advises that:

> **YOUR RESIDENT STATE LAW MAY HAVE INTEREST RATE LIMITS AND OTHER CONSUMER PROTECTION PROVISIONS THAT ARE MORE FAVORABLE. IF YOU WISH TO HAVE YOUR RESIDENT STATE LAW APPLY … YOU SHOULD CONSIDER TAKING A LOAN FROM A LICENSED LENDER IN YOUR STATE.**

Id.

B. District Court Proceedings

Instead of abiding by the dispute-resolution mechanism they agreed to, plaintiffs filed this putative class action, alleging that their loans with AWL violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c) and (d), and various Pennsylvania consumer-protection statutes. JA42-57. Although they borrowed from AWL—and, as noted, do not allege that they ever had any contact with Red Stone—plaintiffs did not name AWL as a defendant, instead suing Red Stone and several individuals associated with AWL. JA26-27.

Red Stone moved to compel arbitration, to dismiss the complaint for lack of jurisdiction because Red Stone is immune from unconsented suit as an arm of the Tribe, and/or to dismiss the complaint for failure to state a claim. JA238. Plaintiffs responded by moving for jurisdictional and arbitration-related discovery. JA505. The district court denied plaintiffs' motion, instead ordering plaintiffs to respond to Red Stone's arbitration motion. JA514. Plaintiffs offered a single response: The arbitration provision is unenforceable because it violates the "prospective-waiver" doctrine. Dist. Ct. Dkt. 100 at 15.

After the arbitration issue was fully briefed, the district court issued a short opinion and order denying the motion to compel. JA1. The entirety of the court's analysis (other than its summary of the parties' arguments) was as follows:

13. The broad reach of the Federal Arbitration Act cannot be invoked to avoid federal law: "while the [Supreme] Court has affirmed that the FAA gives parties the freedom to structure arbitration in the way they choose, it has repeatedly cautioned that this freedom does not extend to a 'substantive waiver of federally protected civil rights' in an arbitration agreement." *Hayes v. Delbert Serv. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016) (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009)).

14. The Third Circuit Court of Appeals has held that a "[c]hoice of arbitrator" provision permitting the parties to select the AAA or JAMS does not provide an available arbitral forum where it contains a clause stating that the policies and procedures of either organization cannot contradict the agreement or "[T]ribal law." *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 229–30 (3d Cir. 2018). Where the arbitrator is unable to consider any of the plaintiff's claims because the arbitrator "would be prohibited from applying the relevant [federal and state] law," the arbitration clause is unenforceable. *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016) ("Putting to one side the fact that substantively, the Agreement is meant to gut the federal laws that would otherwise control, procedurally, just how would JAMS determine whether any hearing it convened complied with the apparently non-existent rules of the tribe? … [A] close reading of the arbitration clause compels the conclusion that it is unenforceable.").

15. Here, the arbitration agreements explicitly require any arbitrator to "apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein." (Def.'s Mot, Ex. A at 18, ECF No. 79-1.) As in *MacDonald*, the agreements impermissibly contain a clause stating that the policies and procedures of AAA or JAMS cannot contradict the agreement or Tribal law. (*Id.* at 19.)

16. In light of the clear Third Circuit rule, I find that the arbitration agreements are unenforceable.

JA5-6 (alteration and omission in original).[3]

STANDARD OF REVIEW

"On appeal, a question concerning the applicability and scope of an arbitration agreement"—including any question as to "arbitrability"—"is subject to de novo review." *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 620, 621 (3d Cir. 2009) (quotation marks omitted).

SUMMARY OF ARGUMENT

The district court erred in denying Red Stone's motion to compel arbitration on the ground that plaintiffs' arbitration provision is unenforceable.

I. As a threshold matter, the court had no authority to resolve plaintiffs' enforceability challenge, because the parties agreed that the arbitrator rather than a court would resolve all such challenges. The Supreme Court has repeatedly emphasized—including in a unanimous decision this year—that courts must respect such agreements. Yet the district court in denying arbitration never even *mentioned* the parties' delegation clause, let alone gave a valid reason for disregarding it. The reasons that plaintiffs advanced for disregarding it, meanwhile, all fail.

[3] Mark Curry, Brian McGowan, and Vincent Ney—three named defendants who are associated with AWL in various capacities—also moved the district court to compel arbitration. JA440; JA475. The court denied those motions in the same order in which it denied Red Stone's, JA6, and those defendants likewise noticed an appeal, JA11, docketed as No. 19-2082. This Court subsequently consolidated the two appeals.

II. Even if the court properly reached the enforceability issue, there is no merit to its finding that the arbitration provision is unenforceable because it violates the "prospective-waiver" doctrine by forcing plaintiffs to give up in arbitration federal statutory rights that they would have in litigation. The Supreme Court has repeatedly made clear that the prospective-waiver doctrine allows a court not to enforce an arbitration provision only if the provision *unambiguously* disclaims federal statutory remedies. Far from meeting this high standard, plaintiffs' arbitration provision expressly adopts all federal laws that are "applicable under the Indian Commerce Clause." That phrase is equivalent to "applicable federal law," a phrase commonly upheld in arbitration provisions. The Indian Commerce Clause language also means that plaintiffs' arbitration provision adopts the same federal law for arbitration that would apply in litigation. That by definition is not a prospective-waiver violation—certainly not an unambiguous one.

ARGUMENT

The Federal Arbitration Act, or FAA, 9 U.S.C. §1 *et seq.*, was enacted to combat widespread "judicial hostility to arbitration." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). The FAA therefore adopted "a liberal federal policy favoring arbitration agreements." *Epic Systems Corporation v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Under the FAA, arbitration agreements 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. And any party "aggrieved" by another party's failure "to arbitrate under a written agreement for arbitration" may petition a district court "for an order directing that such arbitration proceed." *Id.* §4.

This is a straightforward case for compelling arbitration under the FAA. Plaintiffs have never disputed that they agreed to arbitrate all disputes arising from their loan agreements with AWL. Nor have they denied that their claims fall within the scope of that agreement. Plaintiffs likewise have lodged no challenge to Red Stone's ability as a non-signatory to enforce the agreement. *See Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 631 (2009). Accordingly, this appeal turns solely on whether the arbitration provision is enforceable. For the reasons explained below, it is.

I. ARBITRATION SHOULD BE COMPELLED BECAUSE THE PARTIES DELEGATED RESOLUTION OF ALL ARBITRABILITY CHALLENGES TO THE ARBITRATOR

The district court denied Red Stone's motion to compel arbitration on the ground that the arbitration provision is unenforceable because it violates the "prospective-waiver" doctrine. JA6. That doctrine provides that "a prospective waiver of a party's right to pursue statutory remedies" under federal law is unenforceable "as against public policy." *Mitsubishi Motors Corporation v. Soler*

Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985). This "judge-made exception to the FAA … serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the 'effective vindication' of a federal statutory right." *American Express Company v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013).[4]

As explained in Part II, the district court was wrong to conclude that the arbitration provision violates the prospective-waiver doctrine. But enforceability was not a determination the court was even empowered to make, because the parties expressly delegated all arbitrability challenges, including enforceability, to the arbitrator. And as the Supreme Court unanimously reaffirmed this year, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts *must* respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (emphasis added).

[4] The district court's ruling is admittedly somewhat unclear, in that the court repeatedly cited this Court's decision in *MacDonald*, even though that case did not address prospective waiver. *MacDonald* invalidated an arbitration provision for impermissibly designating an illusory arbitral forum; as explained below, even plaintiffs have not argued that there is any illusory-forum issue here, *see* p.18. This brief thus assumes that the district court's ruling rested on the prospective-waiver doctrine, which the court referred to twice (in citing *Hayes v. Delbert Services Corporation* and *Smith v. Western Sky Financial, LLC*), and which was the only enforceability argument plaintiffs raised.

Red Stone's motion to compel arbitration argued at length that the arbitration provision required the court to allow the arbitrator to resolve plaintiffs' enforceability challenges. JA259-260. Yet in denying the motion, the district court never even mentioned that argument, let alone offered a reason for overriding the parties' agreement. Plaintiffs did offer such reasons, but all of them lack merit.

A. The Arbitration Provision Clearly And Unmistakably Delegates All Enforceability Issues To The Arbitrator

As the Supreme Court recently reiterated, "arbitration is a matter of contract," and hence "parties to [an arbitration] contract may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability." *Henry Schein*, 139 S. Ct. at 526 (quotation marks omitted). "[A]n agreement to arbitrate threshold issues concerning the arbitration agreement" is commonly called a "delegation provision." *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). The only requirement the Supreme Court has imposed for parties to employ a delegation provision is that they express their intent to delegate "gateway questions" in "clear and unmistakable" terms. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), *quoted in Henry Schein*, 139 S. Ct. at 530. When this requirement is met, "a court *may not* decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 530 (emphasis added).

The delegation clause in plaintiffs' arbitration provision clearly and unmistakably delegates arbitrability challenges to the arbitrator. The clause states

that "*any* dispute … related to this agreement will be resolved by binding arbitration." JA289 (emphasis added). And "dispute" encompasses "any issue concerning the validity, enforceability, or scope of … this Agreement to Arbitrate." JA290. Even plaintiffs have never denied that this language constitutes a clear and unmistakable delegation—rightly so, given that the Supreme Court has held that nearly identical language satisfies the clear-and-unmistakable standard. *See Rent-A-Center*, 561 U.S. at 68-69. So has the Eleventh Circuit. *See Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015). This Court should likewise hold that standard met here.[5]

B. The Delegation Clause Is Enforceable

1. Because the parties clearly and unmistakably delegated arbitrability challenges to the arbitrator, the decision below—which resolved an arbitrability challenge—must be reversed unless the delegation clause is itself unenforceable. *See Rent-A-Center*, 561 U.S. at 71-72. The district court offered no reason why the clause cannot be enforced; indeed, its decision, as noted, never even mentioned the clause.

[5] The Eleventh Circuit subsequently held that the delegation provision in that case was unenforceable because it delegated arbitrability determinations to an illusory forum. *See Parnell v. Western Sky Financial, LLC*, 664 F. App'x 841, 844 (11th Cir. 2016) (per curiam). As discussed below, *see* p.18, these illusory-forum concerns are not present here.

2. Plaintiffs presumably will defend the district court's decision on the ground they raised below: that the arbitration provision's purported prospective waiver of federal remedies renders the delegation clause unenforceable because the prospective-waiver doctrine is a creature of federal law and hence the arbitrator would be unable to apply it in addressing the clause's enforceability. Dist. Ct. Dkt. 100 at 20. As an initial matter, plaintiffs' premise is false; the delegation clause (like the overall arbitration provision) adopts rather than precludes the application of federal law in arbitration. *See infra* pp.25-26. But even if there *were* a choice-of-law clause in the arbitration provision that barred the application of federal law, that would not prevent the arbitrator from resolving a prospective-waiver challenge, for two reasons.

First, although a choice-of-law clause ordinarily determines what law applies when resolving "the validity, enforceability, or revocability of the arbitration agreement," *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 n.7 (4th Cir. 2012), such a clause does not displace federal arbitration law if, as here, the contract involves interstate commerce, *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 43 & n.8 (3d Cir. 1978); *see also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (state-law contract principles can be displaced by substantive federal arbitration law). Indeed, "[a] number of courts from wide-ranging jurisdictions have … concluded that federal

law governs the question of arbitrability regardless of choice-of-law and arbitration clauses referencing foreign law." *Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd.*, 432 F. Supp. 2d 1305, 1312 (S.D. Fla. 2006); *accord Rota-McLarty*, 700 F.3d at 697 n.7. And the prospective-waiver doctrine is as noted a component of federal arbitration law. *See American Express*, 570 U.S. at 235. Given that, the loan agreement's choice-of-law clause would not preclude an arbitrator from applying that doctrine in resolving plaintiffs' prospective-waiver challenge.

Second, any infirmity in the choice-of-law provision (which is part of the overall arbitration provision rather than the delegation clause) would not flow to the delegation clause. That is because under the FAA's "severability rule"—which is "a matter of substantive federal arbitration law"—"an arbitration provision is severable from the remainder of the contract." *Rent-A-Center*, 561 U.S. at 70-71 (citing 9 U.S.C. §2). And because "[a]n agreement to arbitrate a gateway issue," i.e., a delegation clause, "is simply an additional, antecedent agreement," the FAA "operates on th[at] additional agreement just as it does on any other." *Id.* at 70. Hence, a delegation clause is severable from the rest of the arbitration provision. *See id.* at 71-72.

Severability means that any potential invalidity in a broader agreement does not necessarily taint the subsidiary provision. For example, the Supreme Court has explained that when a contract is alleged to be wholly unenforceable because it

was fraudulently induced, that alleged fraud does not extend to an arbitration provision within the contract—and so that provision remains enforceable—even "where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract." *Rent-A-Center*, 561 U.S. at 71. The same logic dictates that the alleged flaw in the arbitration provision here (a choice-of-law provision waiving federal statutory rights) is severed from the delegation clause contained within the arbitration provision. For this additional reason, the arbitrator could apply federal law to determine the arbitration provision's enforceability.

A few district courts have accepted plaintiffs' argument that when a delegation clause is challenged as a prospective-waiver violation, the court must resolve that challenge. *See, e.g.*, *Smith*, 168 F. Supp. 3d at 786; *Ryan v. Delbert Services Corporation*, 2016 WL 4702352, at *5-6 (E.D. Pa. Sept. 8, 2016); *MacDonald v. CashCall, Inc.*, 2017 WL 1536427, at *4 (D.N.J. Apr. 28, 2017), *aff'd on other grounds*, 883 F.3d 220 (3d Cir. 2018). These courts reason that "enforcing the delegation provision" in a contract that allegedly contains a prospective waiver "would place the arbitrator in the impossible position of deciding the enforceability of the agreement *without* authority to apply any applicable federal … law." *Smith*, 168 F. Supp. 3d at 786. That reasoning fails for

the two reasons just discussed—neither of which any of the district courts confronted.

2. Plaintiffs may try to invoke this Court's decision in *MacDonald*, which the district court cited and which held a similarly worded delegation clause unenforceable, 883 F.3d at 224, 232. Any such effort would be unavailing.

a. *MacDonald* held a delegation clause unenforceable on the ground that "the arbitral forum provided for in the Loan Agreement is nonexistent." 883 F.3d at 227. That is entirely sensible: Given the illusory nature of the prescribed forum, there was simply no mechanism by "which an arbitrator could evaluate whether the arbitration provision is enforceable," as there was no arbitrator to resolve arbitrability questions. *Id.*; *accord, e.g.*, *Parm v. National Bank of California, N.A.*, 835 F.3d 1331, 1338 (11th Cir. 2016).

But this case does not present any illusory-forum concerns. Under AWL's loan agreement, arbitrations are conducted by one of two established arbitration organizations, AAA and JAMS. JA290. Indeed, several arbitrations have taken place under this agreement, confirming that plaintiffs have an actual forum available to them. *See* Exhibits A-E to Reply to Motion to Compel Arbitration, *Solomon v. American Web Loan, Inc.*, No. 4:17-cv-00145-HCM-RJK (E.D. Va. July 9, 2018) (filings from multiple arbitrations under the AWL arbitration provision). And as explained, these arbitrators appointed by these established

organizations can apply federal law, including the prospective-waiver doctrine, in determining arbitrability.

b. The district court, however, suggested that *MacDonald* established a "clear … rule" that an arbitration agreement is unenforceable if (as here) it contains language "stating that the policies and procedures of AAA or JAMS cannot contradict the agreement or Tribal Law." JA6. That is not correct.

In *MacDonald*, this Court first held, as noted, that the arbitration forum designated in the arbitration provision (namely, a tribal arbitral forum) was "nonexistent." 883 F.3d at 227, 228. The Court then addressed the defendants' argument "that an arbitral forum is [nonetheless] available because the [arbitration] provision permits arbitration before AAA or JAMS." *Id.* at 228. The Court rejected that on the ground that the parties' arbitration provision authorized AAA or JAMS to "administer" the arbitration but not to conduct it. *Id.* at 229. In doing so, the Court observed that the administrative role for AAA or JAMS that the parties' agreement authorized was limited, in that either organization could administer an arbitration using its own rules only to the extent those rules did not contradict the terms of the parties' agreement. *Id.*; *see also id.* at 231 n.11. That in no way establishes a "clear … rule" that arbitration provisions are unenforceable if they "stat[e] that the policies and procedures of AAA or JAMS cannot contradict the agreement or Tribal Law." JA6. Such a "rule" would be odd indeed,

conferring sacred status on the policies of two private organizations that have no special place in arbitration law (or federal law generally). Indeed, the rule the district court perceived would conflict with Supreme Court precedent, which makes clear both that arbitration is a matter of contract, *see supra* p.13, and that parties have enormous flexibility (subject of course to the prospective-waiver doctrine) in deciding what will govern their agreements, *see infra* p.24; *see also* Brief of Curry, McGowan, and Ney at 17-22 (discussing the validity of the language the district court thought universally impermissible).

c. Finally, plaintiffs may attempt to rely on *MacDonald*'s severability analysis, but such reliance would likewise be misplaced. *MacDonald* held that the flaw in the arbitration provision there—specifying an illusory forum—was "an integral, non-severable part of the arbitration agreement," rendering "the entire arbitration agreement, including the delegation clause," unenforceable. 883 F.3d at 232. That holding involves a different severability doctrine from the one addressed in *Rent-A-Center* (and above, *see* pp.16-17). *McDonald* dealt with a question of state contract law, namely whether an invalid part of an agreement can be severed from the rest, such that the rest can be enforced. *Id.* By contrast, the severability rule discussed in *Rent-A-Center*—the one that explains why an arbitrator could apply federal law here to resolve plaintiffs' enforceability challenge even if there were a prospective-waiver—is "a matter of substantive federal arbitration law."

561 U.S. at 70-71. The Supreme Court itself has made this distinction clear, expressly "reject[ing] the view that the question of 'severability'" (the version discussed in *Rent-A-Center*) "was one of state law." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). The "severability" issue addressed in *MacDonald* is thus not relevant to the severability argument made earlier (nor is it otherwise relevant here, as Red Stone has never argued that any state-law severability doctrine would allow the arbitration provision to be enforced even if there were a prospective waiver).

3. In the district court, plaintiffs cited four other cases to support their argument that the delegation clause is unenforceable because of the supposed prospective-waiver issue: *Solomon v. American Web Loan*, 375 F. Supp. 3d 638 (E.D. Va. 2019), *appeal pending*, Nos. 19-1258, 19-1267; the Eleventh Circuit's second *Parnell* opinion; *Parm*; and *Hayes*. None of these cases actually supports that argument.

Solomon never even mentioned the delegation issue; its refusal to honor a delegation clause therefore has no persuasive value. *Hayes*, meanwhile, addressed delegation in a footnote, stating that the court would not honor a delegation clause because the plaintiffs there had "challenged the validity of that delegation with sufficient force and specificity to occasion [judicial] review." 811 F.3d at 671 n.1. *Hayes* is not binding here, and to the extent it held that a prospective-waiver

challenge allows a court to ignore a delegation clause, it should not be followed because that holding contravenes the Supreme Court precedent already discussed, *see supra* pp.13-14. In fact, it has specifically been abrogated by the more recent *Henry Schein* decision, where the Court held that an otherwise-valid delegation clause must be enforced even if the purported basis for arbitrability is "wholly groundless," 139 S. Ct. at 528. This holding—that courts must enforce delegation clauses even when the purported basis for arbitrability is essentially frivolous, *see id.* at 529-531—means that *Hayes* was wrong to conclude that the "force" of an arbitrability challenge, 811 F.3d at 671 n.1, permits a court to disregard a delegation clause.

Finally, *Parnell* and *Parm* were, as discussed, illusory-forum cases, and so they are inapposite for the same reason as *MacDonald*. *See* pp.14 & n.5, 18. Plaintiffs' argument is similarly not supported by *Gingras v. Think Finance, Inc.*, 922 F.3d 122 (2d Cir. 2019), which refused to enforce a similar delegation clause in a tribal-lending agreement, *see id.* at 118, 126. *Gingras* reasoned that the plaintiffs there had specifically challenged the clause by alleging "corruption in tribal government," which purportedly denied borrowers an unbiased arbitral forum. *Id.* at 128. A biased arbitral forum is obviously a valid basis not to enforce a delegation clause because without an impartial arbitrator, a borrower's arbitrability challenges are not assured a fair hearing. But no allegations of

partiality are present here—undoubtedly because JAMS and AAA cannot remotely be characterized as biased forums.

Henry Schein and other Supreme Court precedent require that plaintiffs' delegation clause be respected. The district court erred in failing (without explanation) to do so.

II. THE ARBITRATION PROVISION DOES NOT CONTAIN AN UNAMBIGUOUS PROSPECTIVE WAIVER OF FEDERAL LAW

Reversal would be required even if this Court concluded that plaintiffs' prospective-waiver challenge need not be delegated to the arbitrator, because plaintiffs' arbitration provision does not violate the prospective-waiver doctrine.

In arguing otherwise below, plaintiffs relied on *Hayes* and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), two Fourth Circuit cases striking down arbitration agreements under the prospective-waiver doctrine. Dist. Ct. Dkt. 100 at 1-2, 11-20. The district court, in turn, cited *Hayes* for the proposition that the FAA "cannot be invoked to avoid federal law." JA5-6. That is incorrect; the arbitration provision here differs materially from those in *Hayes* and *Dillon*. In particular, whereas the agreements in those cases expressly stated that no federal law applied, AWL's provision expressly states that it *is* governed by applicable federal law. In fact, it adopts for arbitration the same body of federal law that would apply in litigation. That, by definition, is not a prospective waiver.

A. The Arbitration Provision Is Expressly Governed By The Same Federal Law Applicable In Litigation

1. The FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Indeed, parties may "choose to have portions of their contract governed by the law of Tibet [or] the law of pre-revolutionary Russia." *Id.* Although the prospective-waiver doctrine creates a limitation on this flexibility, that doctrine applies only when an arbitration agreement *unambiguously* prohibits parties from vindicating their federal statutory rights. If the agreement is "ambiguous," then a prospective-waiver challenge is not ripe until the arbitrator decides whether the choice-of-law provision does in fact disclaim federal law. *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003). As the Supreme Court put it, a prospective-waiver challenge is "premature" when it has "not [been] established what law the arbitrators will apply to [a party's] claims or that [a party] will receive diminished protection as a result." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995). That approach is consistent with the broader principle that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24-25 (1983); *accord Lamps Plus*, 139 S. Ct. at 1418. Therefore, plaintiffs' prospective-waiver challenge (as they recognized below, *see*

Dist. Ct. Dkt. 100 at 18 n.5) is viable only if the arbitration provision unambiguously precludes them from enforcing their federal statutory rights.

2. Plaintiffs' arbitration provision does not waive the application of federal law, let alone do so unambiguously. In fact, the provision expressly *requires* the application of federal law in arbitration: It provides that "[t]he arbitrator shall apply Tribal law and the terms of this Agreement." JA291. And those terms include the "Governing Law" provision, which adopts tribal law and "such federal law as is applicable under the Indian Commerce Clause." JA292.

The fact that the agreement, including the arbitration provision, is governed by all federal law applicable under the Indian Commerce Clause defeats plaintiffs' prospective-waiver argument. As discussed, the prospective-waiver doctrine bars an arbitration provision from waiving in arbitration any federal statutory right that a party to the arbitration would have in litigation. But in litigation, the only federal laws applicable to a tribal entity like Red Stone are those applicable under the Indian Commerce Clause. That is because Congress's authority for applying federal law to Native Americans is the Indian Commerce Clause, which "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004). Hence, if a federal law does not apply to a tribal entity like Red Stone under the Indian Commerce Clause, it does not apply at all. The only federal laws that the arbitration provision disclaims for

arbitration, therefore, are those that also would not apply in litigation. By definition, there cannot be a prospective-waiver violation when a party has the same federal statutory rights in arbitration that it would have in litigation.

Put another way, saying "such federal law as is applicable under the Indian Commerce Clause" is equivalent to saying "applicable federal law." And arbitration agreements adopting "applicable federal law" are regularly enforced. *See, e.g.*, *In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, 835 F.3d 1195, 1201 (10th Cir. 2016); *Collins v. Discover Financial Services*, 2018 WL 2087392, at *1 (D. Md. May 4, 2018); *Keena v. Groupon, Inc.*, 192 F. Supp. 3d 630, 635 (W.D.N.C. 2016); *Dwyer v. Discover Financial Services*, 2015 WL 7754369, at *2 (D. Md. Dec. 2, 2015); *Lee v. Deng*, 72 F. Supp. 3d 806, 808 & n.1 (N.D. Ohio 2014). Plaintiffs' provision should likewise be enforced.

3. The arbitration provision's adoption of applicable federal law distinguishes this case from *Hayes* and *Dillon*, because the agreements in those cases expressly *waived* the application of any federal law. The *Hayes* agreement stated that "no … federal law applie[d] to" it. 811 F.3d at 670. And the governing-law provision of the agreement in each case stated that the agreement was "subject solely to the exclusive laws and jurisdiction of the" relevant tribe. *Dillon*, 856 F.3d at 332; *Hayes*, 811 F.3d at 669; *accord Gingras*, 922 F.3d at 118 (quoting the materially identical language in the agreement there). Plaintiffs'

agreement lacks any remotely similar language—and as discussed, its governing-law provision explicitly adopts "applicable" federal law. Those differences preclude any reasonable argument that *Hayes* and *Dillon* govern here.

In the district court, plaintiffs tried to obscure these differences by quoting language from the arbitration agreements in *Hayes* and *Dillon* that also appears in plaintiffs' agreement. Specifically, plaintiffs highlighted the language in plaintiffs' arbitration provision directing arbitrators to "apply Tribal Law and the terms of this Agreement," JA291; stating that the agreement "shall be governed by tribal law," *id.*; and providing that the ability of borrowers to choose to conduct arbitration near their homes "shall not be construed … to allow for the application of any law other than Tribal Law," *id.* *See* Dist. Ct. Dkt. 100 at 13 (quoting materially-indistinguishable language from *Hayes* and *Dillon*). This overlap does not render plaintiffs' arbitration provision unenforceable.

To begin with, plaintiffs' reliance on the fact that all three agreements require the arbitrator to apply "Tribal Law and the terms of this Agreement" borders on ridiculous, because the "terms" of plaintiffs' agreements are materially different from those in *Hayes* and *Dillon*. In particular, plaintiffs' agreement, as explained, expressly adopts applicable federal law, whereas the agreements in *Hayes* and *Dillon* expressly disclaimed it. Plaintiffs' argument is no different than asserting that *Hayes* and *Dillon* control here because the agreements both here and

in those cases contained a "Table of Contents." That is obviously wrong; it is the actual "contents" (or "terms") of each agreement that matter.

Similarly, although all three agreements state that they "shall be governed by" the law of the relevant tribe, that language could not have underlay the Fourth Circuit's prospective-waiver holdings. Indeed, *Hayes* and *Dillon* both emphasized that there is nothing unlawful about "us[ing] a choice of law clause in an arbitration agreement to select which local law will govern the arbitration." *Hayes*, 811 F.3d at 675; *accord Dillon*, 856 F.3d at 334 ("A foreign choice of law provision, of itself, will not trigger application of the prospective waiver doctrine."). What matters is "whether the foreign choice of law would preclude otherwise applicable federal substantive statutory remedies." *Dillon*, 856 F.3d at 334; *accord Hayes*, 811 F.3d at 675 (a party "may not" use an arbitration agreement to "flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject"); *see also infra* pp.31-32 (silence as to the applicability of federal law does not amount to a prospective waiver). And again, whereas other language in the *Hayes* and *Dillon* agreement did preclude statutory remedies that would be available in litigation, that other language does not appear in AWL's agreement, nor does that agreement otherwise disclaim federal law.

The last snippet of language common to the three agreements—stating that "any law other than Tribal Law" will not apply if borrowers choose to conduct the

arbitration close to their homes—is likewise unhelpful to plaintiffs. That language means exactly what it says: The simple fact of where an arbitration occurs does not *by itself* provide a basis for applying federal law. That does not change the fact that here the agreement's governing-law provision does provide such a basis, whereas in *Hayes* and *Dillon* the governing-law provision expressly precluded the application of federal law.

4. Plaintiffs also argued below (*see* Dist. Ct. Dkt. 100 at 16) that their agreement's adoption of "such federal law as is applicable under the Indian Commerce Clause" does not avoid a prospective-waiver violation because (1) the agreements in *Hayes* and *Dillon* referred to the same clause, and (2) the Seventh Circuit called that clause an "irrelevant constitutional provision." *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 769, 778 (7th Cir. 2014). Those assertions fail.

In *Hayes* and *Dillon*, the agreements stated that they were "made pursuant to a transaction involving the Indian Commerce Clause." *Hayes*, 811 F.3d at 670; *see also Dillon*, 856 F.3d at 335 (containing that same phrase). That phrase says nothing about what law *governs*, and thus it is unsurprising that the Fourth Circuit did not deem the phrase relevant to the prospective-waiver issue. The agreement here, by contrast, specifically states that a body of federal law governs any arbitration. In *Jackson*, meanwhile, "[t]he loan agreements recite[d] that they

[were] 'governed by the Indian Commerce Clause.'" 764 F.3d at 769. That language *is* meaningless, because the Indian Commerce Clause is not itself a body of law or source of rights that an arbitrator can look to or apply. It is instead a constitutional source of congressional power to legislate in the field of Indian affairs. *See supra* p.25. But "such federal law as is applicable under the Indian Commerce Clause" is a body of law that a court or an arbitrator can apply. Again, then, the language in *Hayes* and *Jackson* is materially different from the language here.[6]

B. Other Language In The Arbitration Provision Does Not Unambiguously Waive Any Federal Statutory Rights That Plaintiffs Would Have In Litigation

Perhaps recognizing that their prospective-waiver argument is defeated by the AWL agreement's choice-of-law provision, plaintiffs selectively quote various other phrases from the agreement. That effort fails.

1. Most fundamentally, plaintiffs' reliance on other language does not change the fact that their interpretation gives no meaning to the phrase "federal law applicable under the Indian Commerce Clause," the agreement's key language

[6] Plaintiffs' district-court briefing (*see* Dist. Ct. Dkt. 100 at 18) also cited *Solomon*, which held the agreement at issue here unenforceable because it was "virtually indistinguishable from those in *Hayes* and *Dillon*," 375 F. Supp. 3d at 669. But the district court in *Solomon*—despite being presented with the same arguments made in the text—never explained why *Hayes* and *Dillon* show a prospective waiver in the AWL loan agreement given the material differences between that agreement and those in *Hayes* and *Dillon*.

regarding what law governs. That is fatal to their position because a "cardinal principle of contract construction" is "that a document should be read to give effect to *all* its provisions." *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 63 (1995) (emphasis added); *accord In re Frescati Shipping Company*, 718 F.3d 184, 203 (3d Cir. 2013). Red Stone's position, by contrast, is consistent with this principle, giving effect to every term of the agreement—including, as explained in the balance of this section, all the language plaintiffs cited.

2. None of that language disclaims federal law. And certainly none of it—even standing alone, let alone when considered along with the language affirmatively adopting federal law—does so *unambiguously*. That is dispositive because as explained, courts may decline to enforce an arbitration provision only if it unambiguously effects a prospective waiver. *See supra* pp.24-25.

a. Plaintiffs first relied on the bolded and capitalized "**IMPORTANT DISCLOSURE**" at the front of the loan agreement, a disclosure that (in plaintiffs' words) "provides that any dispute shall be 'subject to and governed by tribal law.'" Dist. Ct. Dkt. 100 at 12 (quoting JA306). That sentence does not foreclose the application of federal law because it does not say the agreement is governed *only* by tribal law. This omission is critical: The Supreme Court has twice rejected similar prospective-waiver arguments where the choice-of-law provision specified that the agreement was governed by foreign law and was silent as to the

applicability of federal law. In *Vimar Seguros*, the Court found no prospective waiver even though the agreement provided that it was "governed by the Japanese law," with no mention of federal law, 515 U.S. at 531, 540. Similarly, the Court in *Mitsubishi* refused to find a prospective waiver where the agreement provided that it "will be governed by and construed in all respects according to the laws of the Swiss Confederation," again with no mention of federal law. 473 U.S. at 637 n.19. Mere silence as to the applicability of federal law therefore does not constitute a prospective-waiver violation. (Here, moreover, there is not simply silence; as explained, the agreement elsewhere expressly adopts applicable federal law.)

Moreover, in the passage plaintiffs focused on, the language immediately after the words "tribal law" is: "and not the law of your resident state." JA280. This confirms that the provision addresses not the applicability of federal law but only the relevant *local* law (i.e., adopting Otoe law rather than the law of the borrower's home state). The prospective-waiver doctrine does not bar an agreement from precluding state-law remedies. *See infra* pp.35-36.

b. Plaintiffs also quoted the sentence in the choice-of-law provision stating that "**THIS AGREEMENT SHALL BE GOVERNED BY TRIBAL LAW**." *See* Dist. Ct. Dkt. 100 at 12 (quoting JA317). That language is likewise merely silent on the application of federal law, so it does not foreclose federal law and is thus not a prospective waiver either. *See supra* pp.31-32. And the very next

sentence states that "the arbitrator shall apply Tribal Law and the terms of this Agreement," JA317—terms that include the express adoption of federal law in the governing-law provision. Again, then, plaintiffs cannot prevail by invoking isolated snippets rather than the contract as a whole.

c. Next, plaintiffs pointed to language in the "Location of Arbitration" section stating that if borrowers exercise their right to conduct arbitration within 30 miles of their homes, that "shall not be construed … to allow for the application of any law other than Tribal Law." Dist. Ct. Dkt. 100 at 12 (quoting JA317). As explained, this language means what it says: The fact of where arbitration is conducted does not provide a basis for applying federal law. The separate governing-law provision, however, does provide such a basis.

d. Finally, plaintiffs pointed to a sentence in the governing-law provision stating that "neither [AWL] nor this Agreement [is] subject to any other federal or state law or regulation, nor to the jurisdiction of any court, unless so stated in this Agreement." JA318; Dist. Ct. Dkt. 100 at 12 n.3 (quoting JA318). This language also means what it says: The agreement is not subject to any laws *beyond* those stipulated in the governing-law provision, i.e., beyond Otoe-Missouria law and federal law applicable under the Indian Commerce Clause. As explained, *see supra* pp.25-26, precluding claims under law inapplicable to AWL in litigation is not a prospective-waiver violation.

In short, plaintiffs' prospective-waiver argument fails because the loan and arbitration agreements, read as a whole and giving effect to all of their language, do not unambiguously disclaim the application of federal law.

C. Plaintiffs' Arguments Construe The Prospective-Waiver Doctrine Too Broadly

Plaintiffs raised two additional arguments in the district court to support their prospective-waiver defense. Each argument stretches the doctrine beyond its limits.

1. Citing no authority, plaintiffs contended that a prospective-waiver violation occurs if the arbitration provision "precludes the application of the *specific* statutory rights at issue in the case." Dist. Ct. Dkt. 100 at 16 (quotation marks omitted). That is wrong; what matters under the prospective-waiver doctrine is whether federal statutory rights *that a party would have in litigation* are barred in arbitration. *See* pp.25-26. Hence, if a particular plaintiff invokes a "specific" federal statutory claim that would not be available in litigation, the fact that that claim is also unavailable to that borrower in arbitration is not a prospective-waiver violation.

Even if plaintiffs were correct on this point, that would not help them. In the district court, plaintiffs summarized the prospective-waiver inquiry as "whether the contract forbids the assertion of claims under RICO" in arbitration. Dist. Ct. Dkt. 100 at 16. The answer is simple: RICO would apply if this dispute was arbitrated.

See Wilhite v. Awe Kualawaache Care Center, 2018 WL 3586539, at *2 (D. Mont. July 26, 2018). In other words, plaintiffs' prospective-waiver challenge is much ado about nothing. Their only federal claim is indisputably available in arbitration.[7]

2. Plaintiffs likewise went astray in asserting that their agreement is unenforceable because it "forbids the assertion of claims under … Pennsylvania law." Dist. Ct. Dkt. 100 at 16. The prospective-waiver doctrine pertains only to federal statutory rights. In *American Express*, for example, the Supreme Court described the doctrine as "allowing courts to invalidate agreements that prevent the 'effective vindication' of a *federal* statutory right." 570 U.S. at 235 (emphasis added). The Court likewise has explained that "a substantive waiver of *federally* protected rights will not be upheld." *14 Penn Plaza*, 556 U.S. at 273 (emphasis added). The reason for this limitation on the prospective-waiver doctrine's reach is that the doctrine "rest[s] on the principle that other federal statutes stand on equal footing with the FAA," and so is "reserved for claims brought under federal statutes." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). Any preclusion here of plaintiffs' state-law claims, therefore, provides no basis not to enforce their agreement to arbitrate.

[7] That RICO would apply in arbitration, however, does not mean that Red Stone is liable to either plaintiff under that law.

Under plaintiffs' contrary contention, in fact, *every* choice-of-law provision is unlawful, because the adoption of one or more jurisdiction's laws necessarily bars claims under every other jurisdiction's law. For example, if a contract specifies the application of the law of Delaware, it "forbids the assertion of claims under … Pennsylvania law," Dist. Ct. Dkt. 100 at 16, and under every other state's law. That cannot suffice to invalidate an arbitration agreement.

It does not matter that AWL's agreement adopts Otoe-Missouria (and federal) law rather than the law of a different state. Again, the Supreme Court has reiterated the "considerable latitude" parties have "to choose what law governs," going so far as to specifically observe that the "the law of Tibet" or "the law of pre-revolutionary Russia" could be valid selections. *DIRECTV*, 136 S. Ct. at 468. Indeed, this Court has enforced a choice-of-law clause calling for the application of Swiss law, which of course would preclude claims under the laws of all 50 states—including Pennsylvania. *Barbey v. Unisys Corporation*, 256 F. App'x 532, 533-534 (3d Cir. 2007). There is no sound basis to hold that parties can preclude state law from their arbitrations by adopting Swiss law but not Otoe-Missouria law.

3. One of plaintiffs' central themes throughout this litigation has been that "AWL is a front—the consumer-facing website of a lending scheme that is the brainchild of a long-time non-tribal payday lender—Defendant Mark Curry." Dist. Ct. Dkt. 100 at 4; *accord id.* at 4-6. Plaintiffs have also repeatedly alleged, in the

same vein, that AWL is part of a "Rent-A-Tribe Scheme," i.e., that Curry rather than the Tribe *really* owns AWL, and that he simply paid the Tribe to "rent" its sovereign immunity to AWL. JA30-34. This Court should ignore these and similar claims—which plaintiffs will surely reprise on appeal—because they are irrelevant to the enforceability of plaintiffs' arbitration provision. If AWL (or Red Stone) were in fact owned by Curry rather than the Tribe, they would still be fully entitled under Supreme Court precedent to have their arbitration provisions enforced. The question of who owns AWL or Red Stone thus has no bearing on whether plaintiffs' arbitration provisions are enforceable.

* * *

To deny Red Stone's motion to compel arbitration, the district court had to ignore some of Red Stone's key arguments and disregard binding precedent. Its decision evinces the very anti-arbitration hostility that the FAA exists to root out. That decision should not stand.

CONCLUSION

The denial of Red Stone's motion to compel arbitration should be reversed and the case remanded with instructions to order arbitration of plaintiffs' claims against Red Stone.

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Respectfully submitted,

/s/ Daniel S. Volchok

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CERTIFICATE OF BAR MEMBERSHIP

I am a member in good standing of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) in that, according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word 2016), the brief contains 8,556 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The text of the electronic brief filed with the Court is identical to the paper copies, and a virus detection program (Cylance Protect, version 2.0.1534.15) has been run on the electronic file and no virus was detected.

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CERTIFICATE OF SERVICE

On this 9th day of September, 2019, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Daniel S. Volchok
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