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.)

REPLY BRIEF FOR APPELLANT RED STONE, INC.

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INTRODUCTION

Red Stone's opening brief explained that two independent grounds require reversal. First, the parties expressly agreed to a delegation clause that requires the arbitrator to resolve all challenges to the enforceability of the arbitration provision. Second, plaintiffs' "prospective-waiver" claim is refuted by that provision's plain language. Plaintiffs' responses to each argument lack merit.

As to the delegation clause, plaintiffs agree that its validity depends on whether the arbitrator could resolve their prospective-waiver challenge. But they do not respond to either argument Red Stone presented for why the arbitrator could do so: (1) even if the arbitration provision's choice-of-law clause disclaims federal law, that disclaimer does not foreclose the arbitrator from applying federal *arbitrability* law, including the prospective-waiver doctrine; and (2) any defect in the choice-of-law clause does not automatically flow to the delegation clause. Plaintiffs' failure to respond to either point is dispositive.

Should the Court nonetheless reach the merits of plaintiffs' prospective-waiver challenge, that challenge fails because the arbitration provision explicitly adopts applicable federal law, requiring the arbitrator to apply "such federal law as is applicable under the Indian Commerce Clause," JA292. Nothing plaintiffs argue regarding this language changes the simple fact that it provides plaintiffs with the same federal statutory rights in arbitration that they would have in litigation. At a

minimum, that language forecloses any conclusion that the arbitration provision *unambiguously* waives federal statutory rights. That, in turn, precludes a prospective-waiver finding.

ARGUMENT

Before addressing the specific flaws in plaintiffs' arguments regarding both the delegation clause and the merits of their prospective-waiver challenge, one overarching point bears mention.

Rather than defend the district court's reasoning—which they largely ignore—plaintiffs repeatedly attempt (*e.g.*, Br. 2-3, 49-50) to characterize this case as the latest in a line of cases invalidating tribal-lending arbitration agreements. But as the Supreme Court has "said on numerous occasions," the Federal Arbitration Act's "central or 'primary' purpose" is to ensure that arbitration agreements "are enforced according to *their* terms." *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. 662, 682 (2010) (emphasis added). What matters, then, is not the context of an arbitration provision (here, tribal lending), but the provision's specific terms.

Given that, most of the cases plaintiffs cite are inapposite because the provisions in those cases did not have the same language as the provision here. Indeed, in most of the cases, the court did not even address a prospective-waiver argument, instead holding the provision at issue invalid because of an illusory

arbitral forum. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220, 223 (3d Cir. 2018); *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 127-128 (2d Cir. 2019), *petition for cert. filed*, No. 19-331 (U.S. Sept. 11, 2019); *Parnell v. Western Sky Financial, LLC*, 664 F. App'x 841, 843-844 (11th Cir. 2016) (per curiam); *Parm v. National Bank of California, N.A.*, 835 F.3d 1331, 1337 (11th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014); *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 768 (7th Cir. 2014). Those case are particularly unhelpful to plaintiffs because plaintiffs do not dispute Red Stone's argument (Opening Br. 18-19) that the arbitral forum here is real.

Of the four cases plaintiffs cite that did find a prospective-waiver, three involved materially different arbitration provisions: *Hayes v. Delbert Services Corporation*, 811 F.3d 666 (4th Cir. 2016); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017); and *Gingras v. Think Finance, Inc*. Specifically, the provisions in those cases expressly disclaimed federal law, Opening Br. 26-29, whereas plaintiffs' governing-law provision states that the arbitrator must apply (along with tribal law) "such federal law as is applicable under the Indian Commerce Clause," JA292. Those cases thus do not help plaintiffs because, again, the Supreme Court has made clear that what matters is the specific terms of the provision at issue.

The lone case holding that the language of *this* agreement constitutes a prospective waiver, *Solomon v. American Web Loan*, 375 F. Supp. 3d 638 (E.D. Va. 2019), does little to help plaintiffs. That decision is on appeal, but more importantly, it contained no analysis whatsoever regarding the "Indian Commerce Clause" language, i.e., the language that defeats plaintiffs' prospective-waiver argument by adopting applicable federal law (or, at a minimum, by rendering the agreement ambiguous as to whether it waives the application of federal law).

In short, no court has actually analyzed the key language at issue here. Plaintiffs cannot distract from that crucial point with a guilt-by-association strategy that Supreme Court precedent forecloses.[1]

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

The district court concluded that plaintiffs' arbitration provision is unenforceable under the prospective-waiver doctrine. But the court was not empowered to resolve that challenge (or any other enforceability argument), because the arbitration provision clearly and unmistakably delegates all enforceability issues to the arbitrator. *See* Opening Br. 13-14. Plaintiffs do not dispute that. Nor do they deny that their prospective-waiver challenge falls within

[1] This Court need not and should not consider the argument that the FAA is inapplicable to plaintiffs' loans, because that argument was not raised below and is raised here only by plaintiffs' amicus. *See New Jersey Retail Merchants Association v. Sidamon-Eristoff*, 669 F.3d 374, 382 n.2 (3d Cir. 2012).

the scope of the delegation clause. The only question, then, is whether the delegation clause is itself enforceable. As Red Stone explained (Opening Br. 15-23), it is. Plaintiffs do not engage with that explanation; the arguments they offer instead are, as explained below, simply irrelevant.

A.1. Plaintiffs agree that the enforceability of the delegation clause depends on whether an arbitrator could apply federal arbitrability law in resolving plaintiffs' prospective-waiver challenge. *See* Opening Br. 15. Plaintiffs demonstrate this agreement by arguing (Br. 42) that the delegation clause is unenforceable because it "would place an arbitrator in the impossible position of deciding the enforceability of the agreement *without* authority to apply any applicable federal … law." But Red Stone's opening brief provided (at 15-17) two independent reasons why an arbitrator *could* apply federal arbitrability law to resolve plaintiffs' prospective-waiver challenge even if the choice-of-law clause otherwise barred the application of federal law. First, a generic choice-of-law provision does not extend to arbitrability issues, only to the merits of the underlying claims. Second, any infirmity in the choice-of-law provision is severed from and thus does not extend to the delegation clause. Red Stone further explained (Br. 17) that the district-court cases plaintiffs relied on below in challenging the delegation clause, including *Smith v. Western Sky Financial, LLC*,

168 F. Supp. 3d 778, 786 (E.D. Pa. 2016), were not persuasive because they had not confronted those two arguments.

Plaintiffs offer *no response* to any of this. They do not acknowledge, let alone answer, either of the reasons why an arbitrator could apply federal arbitrability law in resolving their prospective-waiver challenge. And while plaintiffs quote *Smith* (Br. 42), they do not address Red Stone's arguments about why that (non-binding) decision should not be followed. Finally, plaintiffs cite four other cases (*id.*), but again never respond to Red Stone's arguments that those cases are inapposite. *See* Opening Br. 18-19, 21-23.[2]

Plaintiffs' failure to respond to Red Stone's arguments is tantamount to a waiver. As this Court has recognized, when an appellee fails to respond to arguments in the appellant's opening brief, the appellee, though "not conced[ing] that a judgment should be reversed," does "'waive[], as a practical matter anyway, any objections not obvious to the court to specific points urged by the [appellant].'" *Beazer East, Inc. v. Mead Corporation*, 412 F.3d 429, 437 n.11 (3d Cir. 2005) (second alteration in original). There are no "obvious" objections here, *see infra* pp.7-9, so plaintiffs have "waive[d]" any objection to Red Stone's

[2] Plaintiffs cite *Dillon* (Br. 43 n.5) as a fifth case invalidating a delegation clause where the plaintiffs had brought a prospective-waiver challenge. But *Dillon* never even mentions delegation.

arguments that an arbitrator could apply federal arbitrability law and thus could resolve plaintiffs' prospective-waiver challenge.

That waiver resolves this appeal. Because an arbitrator could resolve the prospective-waiver challenge, the delegation clause is enforceable. The district court thus erred in denying Red Stone's motion to compel arbitration rather than enforcing the parties' agreement by leaving it to an arbitrator to resolve plaintiffs' prospective-waiver argument.

2. To reassure this Court that there are no "obvious" "objections" to Red Stone's opening-brief arguments, *Beazer*, 412 F.3d at 437 n.11, Red Stone briefly recapitulates those here.

First, as many courts have held, a general choice-of-law provision does not by itself displace federal arbitrability law. For example, the Ninth Circuit—citing this Court's decision in *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 43 & n.8 (3d Cir. 1978)—held "that a general choice-of-law provision does not constitute an agreement to apply non-federal arbitrability law." *Cape Flattery Limited v. Titan Maritime, LLC*, 647 F.3d 914, 921 (9th Cir. 2011). The Fourth Circuit has similarly held that the "broad, general language of [a choice-of-law] provision" does not "displac[e] federal arbitration law." *Porter Hayden Company v. Century Indemnity Company*, 136 F.3d 380, 382 (4th Cir. 1998); *accord Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697

n.7 (4th Cir. 2012), *quoted in* Opening Br. 15. Many district courts have also reached this conclusion. *See* Opening Br. 15-16. And while this Court has not squarely addressed the issue, it all but reached the same conclusion in *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), holding that "a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default regime," *id.* at 289. Here, because the choice-of-law provision is "generic," i.e., it does not specify that the chosen law governs arbitrability, it would not displace federal arbitrability law, including the prospective-waiver doctrine, even if it otherwise waived federal law.[3]

Second, even if the choice-of-law provision precluded the application of federal arbitrability law (and of other federal law), that defect would be severed from the delegation clause. Such a clause "is simply an additional, antecedent agreement" "to arbitrate a gateway issue," *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 68, 70 (2010), and therefore is severable from the broader agreement of which it is a part (here, the arbitration provision), *id.* at 71-72, *cited in* Opening Br. 16-17. That is true even when the flaw in the broader agreement is "equally"

[3] After Red Stone filed its opening brief, this Court deemed *Becker* abrogated by Supreme Court precedent. *See In re Remicade (Direct Purchaser) Antitrust Litigation*, 938 F.3d 515, 520-521 (3d Cir. 2019). But that abrogation was limited to the scope of an arbitration agreement, an issue not implicated here. *Id.* In any event, *Roadway Package System*, as explained, establishes the same proposition.

applicable to the delegation clause. *Id.* at 71. In other words, "[b]ecause the delegation clause [is] severable from the" arbitration provision, "it [is] unaffected by the [arbitration provision's] validity." *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 229 (3d Cir. 2012). And because any unlawful waiver of federal law in the arbitration provision would be severed from the delegation clause, an arbitrator could apply federal arbitrability law and thus resolve plaintiffs' prospective-waiver challenge.

This severability argument is not defeated by plaintiffs' observation (Br. 43 n.5) that a party can rely on the same arguments to challenge both a delegation clause and the broader arbitration provision. Red Stone has already recognized that point, noting (Opening Br. 18) that a claim that an arbitral forum is illusory applies to both the delegation clause and the arbitration provision overall. But that does not help plaintiffs, because severability means that a party cannot merely assert that a defect in an arbitration provision *automatically* flows to a delegation clause contained within that provision. The party must instead explain, in the Supreme Court's words, why the defect "*as applied* to the delegation provision rendered *that provision*" unenforceable. *Rent-A-Center*, 561 U.S. at 74. Plaintiffs here have failed to do so—a notable omission given Red Stone's express arguments about why an arbitrator could apply federal arbitrability law.

B. The few arguments plaintiffs make regarding the delegation clause lack merit.

1. Plaintiffs assert (Br. 44) that the delegation clause is unenforceable because in the district court, they made a "specific attack" on the delegation clause—by which they mean that in opposing Red Stone's motion to compel arbitration, they stated that the delegation clause "was unenforceable under the FAA." But even assuming that a mere reference to a delegation clause by name amounts to a specific attack, such specificity is not by itself enough to render the clause unenforceable. Such specificity is necessary, *Rent-A-Center*, 561 U.S. at 72, but not sufficient. As this Court explained in *MacDonald v. Cashcall*, a specific challenge to a delegation clause allows a court to "*assess*[] the delegation clause's enforceability." 883 F.3d at 227 (emphasis added). That assessment, of course, need not end with the conclusion that the clause is unenforceable. *See, e.g.*, *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1267 (11th Cir. 2017) ("[B]ecause we can discern no unconscionability, we are required to enforce the delegation provision according to its terms.").

The cases plaintiffs cite (Br. 42, 44) for the proposition that courts must blindly accept a plaintiff's assertion that a delegation clause is unenforceable if the clause is challenged by name—*MacDonald* and *Gingras*—reject that position. In *MacDonald*, this Court noted the paragraph in the complaint that challenged the

delegation clause as unenforceable, but sustained that challenge only after carefully analyzing whether, as the plaintiffs there alleged, "there [was] no arbitration forum in which an arbitrator could evaluate whether the arbitration provision is enforceable." 883 F.3d at 227. The same is true of *Gingras*: The court was persuaded that an arbitrator could not resolve enforceability challenges not because the plaintiffs there had merely referred to the delegation clause but because the court concluded that the prescribed forum was illusory and biased. *See* 922 F.3d at 127-128.[4]

The delegation clause is thus not unenforceable merely because plaintiffs say so. Rather, the court must actually determine whether plaintiffs' stated basis of unenforceability is correct. As discussed, *see supra* pp.5-7, here that determination turns on whether an arbitrator could apply federal arbitrability law in resolving plaintiffs' enforceability challenges—and as explained the answer is yes. The delegation clause must therefore be enforced. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue.").

[4] Of course, no such finding was made here.

2. Red Stone explained (Opening Br. 21-22) that this Court should not follow the sparse delegation analysis in *Hayes*, *see* 811 F.3d at 671 n.1, because that analysis both contravenes *Rent-A-Center* and has been abrogated by *Henry Schein*. Plaintiffs' response (Br. 43-44) is that *Henry Schein* is distinguishable because here, unlike there, the validity of the underlying arbitration provision is at issue. That impermissibly ignores the Supreme Court's reasoning. The "wholly groundless" exception at issue in *Henry Schein* conflicted with the FAA, the Court explained, because the statute "requires that we interpret the contract as written." 139 S. Ct. at 529. In other words, delegation is required regardless of the merit or "force" of an arbitrability challenge. *Hayes*, which held the "force" of an arbitrability challenge *is* relevant, 811 F.3d at 671 n.1, is thus no longer good law.

3. Finally, plaintiffs assert (Br. 43-44) that Red Stone's argument is that a delegation clause "categorically" bars federal courts from resolving prospective-waiver challenges. That is incorrect. Red Stone acknowledged (Opening Br. 14) that a court would have to resolve plaintiffs' prospective-waiver challenge if the delegation clause were unenforceable. But, as explained, that is not the case. The district court therefore erred in disregarding the clause and resolving plaintiffs' prospective-waiver challenge.[5]

[5] Plaintiffs repeatedly suggest (*e.g.*, Br. 13, 23) that the inclusion of a delegation clause is itself inappropriate or establishes a prospective-waiver violation. This argument is new on appeal and therefore waived. *See infra* p.28. It is also

II. THE ARBITRATION PROVISION DOES NOT UNAMBIGUOUSLY WAIVE FEDERAL LAW

If this Court reaches the merits of plaintiffs' prospective-waiver challenge, it should reject that challenge because the arbitration provision's "governing law" clause expressly adopts applicable federal law—the opposite of a prospective waiver. Plaintiffs attack this straightforward conclusion in three ways: (1) they assert that the governing-law language does not mean what it says; (2) they assert that that language is contradicted by *other* language in the loan agreement; and (3) they raise various arguments not preserved below. None of that justifies affirmance.[6]

A. The Governing-Law Clause Expressly Adopts The Same Body Of Federal Law Applicable In Litigation

Plaintiffs' arbitration provision states that "[t]he arbitrator shall apply Tribal Law and the terms of this Agreement." JA291. Those "terms" include the "Governing Law" clause, which requires the arbitrator to apply tribal law "and such federal law as is applicable under the Indian Commerce Clause." JA292. This language adopts in arbitration the same federal remedies available to

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meritless. The Supreme Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator"; although plaintiffs may not like delegation clauses, "that ship has sailed." *Henry Schein*, 139 S. Ct. at 530.

[6] Plaintiffs rightly disclaim (Br. 22 n.1) any argument that prospective waiver of *state* remedies is unlawful, recognizing that the prospective-waiver doctrine is limited to federal remedies, *see* Opening Br. 35-36.

borrowers in litigation. That defeats plaintiffs' prospective-waiver challenge. *See* Opening Br. 25-26.

Plaintiffs claim, however (Br. 25), that accepting Red Stone's argument would create a "split with [other] circuits." But no other circuit has ruled on plaintiffs' arbitration provision: The "Indian Commerce Clause" language in plaintiffs' arbitration provision—i.e., the language expressly adopting applicable federal law—was not present in *Hayes*, *Dillon*, or *Gingras*, the prospective-waiver decisions from other circuits on which plaintiffs rely. Other circuits' interpretation of *different* arbitration language obviously cannot give rise to a circuit conflict.

Plaintiffs also respond to Red Stone's argument by offering (Br. 25-37) various scattershot arguments regarding the "Indian Commerce Clause" language. None of those arguments, however, gives any actual meaning to that language—a fatal flaw under Supreme Court precedent, *see infra* p.21. Instead, plaintiffs assert that: (1) they are not entitled to the same remedies in arbitration as in litigation because Red Stone could invoke immunity in arbitration (Br. 27-29); (2) other courts have rejected the "Indian Commerce Clause" language (Br. 26-27, 29-34); and (3) the alleged prospective waiver is not cured by concession (Br. 31), voluntary compliance (Br. 34-35), or substantive equivalence under tribal law (Br. 35-37). Each argument lacks merit.

1. Plaintiffs say (Br. 28) that despite the arbitration provision's adoption of applicable federal law, borrowers would not be able to "pursue" most federal remedies in arbitration, because Red Stone could invoke its immunity from suit. This argument fails for the simple reason that, under Supreme Court precedent, a tribal entity that enters into an arbitration agreement consents to participate in the arbitration, including by providing a limited waiver of its sovereign immunity for purposes of the arbitration and contractually specified forum for judicial review only. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). Accordingly, by moving for arbitration, Red Stone waived its immunity in the arbitral forum, allowing plaintiffs to meaningfully pursue in arbitration any applicable federal remedy.

Plaintiffs posit, however (Br. 28-29), that footnote 7 of Red Stone's opening brief reveals Red Stone's intent to invoke immunity in arbitration. But setting aside that Red Stone (whatever its intent) could not successfully do so for the reason just stated, plaintiffs misread that footnote. It states: "That RICO would apply in arbitration, however, does not mean that Red Stone is liable to either plaintiff under that law." That means only that even if RICO applies in arbitration,

plaintiffs must still prove the merits of their RICO claim. The footnote says nothing about invoking immunity.[7]

2. Plaintiffs cite *Hayes*, *Dillon*, and *MacDonald* to argue (Br. 26) that "federal courts facing similar language in these tribal-arbitration contracts have uniformly rejected" Red Stone's argument that no prospective waiver exists because the arbitration agreement expressly adopts federal law. That too is wrong.

As Red Stone explained (Opening Br. 29), the language in plaintiffs' arbitration provision regarding the Indian Commerce Clause is materially different from the language regarding that clause in the cases plaintiffs cite. Specifically, the language here states that arbitration is "*governed* … *by* … such federal law as is applicable under the Indian Commerce Clause," JA292 (emphasis added). The language in *Hayes* and *Dillon*, by contrast, stated that the loan agreements there were "made *pursuant to* a transaction involving the Indian Commerce Clause," 811

[7] Plaintiffs (Br. 29 n.3) relatedly mischaracterize Red Stone's argument as being that the same body of law applies in litigation and arbitration because "Red Stone would be immune" in either forum. That is not what Red Stone argued. Indeed, the word "immunity" appears only once in the entire argument section of Red Stone's opening brief (at 36-37)—and that was to disclaim its relevance in this appeal. Red Stone's argument is what is presented in its opening brief (at 25-26) and summarized in the text above.

F.3d at 670; 856 F.3d at 335 (emphasis added). The agreement at issue in *MacDonald* had substantively identical language. *See* 883 F.3d at 224-225.[8]

These different phrases regarding the Indian Commerce Clause cannot possibly be read to have the same meaning. The "pursuant to" language merely says that the transactions involve Indian commerce. But it says nothing about whether federal laws apply in arbitration. Other parts of the agreements in *Hayes* and *Dillon*, moreover, expressly disclaimed federal law, stating that the arbitration agreement was "subject solely to the exclusive laws and jurisdiction" of the tribe. *See* Opening Br. 26-27. Here, by contrast, the "Indian Commerce Clause" language expressly states that applicable federal law is available in arbitration.

Plaintiffs' response (Br. 26-27) is that notwithstanding the different language in the various agreements, "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." That is simply a bald plea for this Court to close its eyes to unmistakable differences in the wording of the various agreements.

[8] *MacDonald* quotes two references to the "Indian Commerce Clause" in the arbitration provision at issue, 883 F.3d at 224-225, whereas *Hayes* quotes only one, 811 F.3d at 670. But the actual arbitration provision in *Hayes* includes the same "Indian Commerce Clause" language quoted in *MacDonald*. *See* Joint Appendix 154, *Hayes*.

Plaintiffs also deny (Br. 31) that the Fourth Circuit's finding of a prospective waiver in *Hayes* and *Dillon* was based on language stating that the arbitration agreements there were "subject solely to the exclusive laws and jurisdiction" of the tribe. According to plaintiffs (Br. 32-33), the prospective waivers were found based on two other clauses, both of which are also in the agreement here. That argument fails.

To begin with, the court in *Hayes*, in explaining why the agreement there prospectively waived federal law, described the "subject solely to" language as the first "notable provision[]." 811 F.3d at 669. That belies plaintiffs' claim that that language was not crucial to the court's ruling. Moreover, one of the two clauses plaintiffs invoke is the statement that the "arbitrator will apply the laws of the Otoe-Missouria Tribe of Indians and the terms of this Agreement." JA291. The fact that that phrase is also in the agreement here proves nothing, because the "terms" are different. *See* Opening Br. 27-28 ("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."). And the other clause that plaintiffs invoke states only that the agreement is "governed by tribal law." JA291. Under Supreme Court precedent, such language does nothing to show a prospective waiver, because it is silent on the availability of federal law.

See Opening Br. 31-32; *see also infra* pp.23-26. In short, plaintiffs' reading of *Hayes* and *Dillon* as depending on language that is also present here, rather than on language that is not, is implausible.

Even if those cases had rested on the two clauses that are also present here, that would not establish prospective waiver. That is because, as discussed, the agreement in *Hayes* and *Dillon* indisputably did not have the language here expressly adopting federal law. At a minimum, that language renders the contract ambiguous regarding whether federal law applies. But plaintiffs can prevail only if the arbitration provision unambiguously disclaims federal law, Opening Br. 24-25, as they conceded in the district court, Dist. Ct. Dkt. 100 at 18 n.5.[9]

Finally, plaintiffs relatedly rely (Br. 30-31) on footnote 4 in *Gingras*. But that footnote rejected an argument Red Stone has not made: the choice-of-law clause in *Gingras* only allowed for the application of tribal law, so the defendant sought to avoid a prospective-waiver finding by pointing to the arbitration agreement's inclusion of "claims based on a 'federal or state constitution, statute, ordinance, regulation, or common law'" in the agreement's definition of "dispute." 922 F.3d at 127 n.4. Again, Red Stone makes no such argument; rather, Red Stone

[9] Although plaintiffs apparently no longer concede the point, their responses (which are addressed below, *see* pp.28-30) lack merit.

relies on the "Indian Commerce Clause" language, which, as explained, adopts applicable federal law.

3. Plaintiffs briefly present various other arguments for why the arbitration provision's adoption of federal law does not avoid a prospective-waiver finding. Each of these arguments is irrelevant because it attacks a position that Red Stone has never advanced.

Plaintiffs assert (Br. 31) that "defendants offer [a] concession" that plaintiffs may bring federal claims in arbitration "notwithstanding [the] choice of tribal law in the contract." That is wrong. Red Stone argues that the choice-of-law provision adopts federal law in addition to tribal law, and thereby allows plaintiffs to bring the same federal claims in arbitration as they could in litigation. In other words, Red Stone argues not that it should prevail here despite a prospective waiver, but rather because there is no such waiver.

Plaintiffs relatedly contend (Br. 34) that "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." But Red Stone has never argued that its voluntary use of federal laws precludes a prospective-waiver finding. Again, Red Stone argues that such a finding is precluded by the arbitration provision's adoption of applicable federal law.

Finally, plaintiffs posit (Br. 20-21, 35-37) that their ability to vindicate their RICO claims under tribal law would not avoid a prospective waiver. This addresses an argument made by the other appellants, as Red Stone has never argued that the substance (or availability) of tribal law is relevant to the prospective-waiver analysis.

* * *

Under *Stolt-Nielsen* and other Supreme Court precedent, this Court's assessment of plaintiffs' prospective-waiver challenge turns on the terms of *their* arbitration provision, not any other. Yet, plaintiffs have no interpretation that gives meaning to all of that provision's language—principally, of course, the language in the governing-law provision that adopts in arbitration all federal remedies available to plaintiffs in litigation. That contradicts what the Supreme Court has called a "cardinal principle" of contract interpretation, that every provision in a contract must be given meaning, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). Red Stone explained this (Opening Br. 30-31), and plaintiffs offer no response. That failure, together with plaintiffs' reliance on cases with materially different arbitration provisions, leaves no doubt that plaintiffs' prospective-waiver challenge should be rejected.

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

Lacking a coherent reading of the key language of their arbitration provision, plaintiffs rest their prospective-waiver claim on other passages that (in their view) collectively waive federal remedies. Red Stone explained (Opening Br. 30-34) why none of those passages supports plaintiffs' position. Once again, plaintiffs offer no response.

1. Plaintiffs rely (Br. 9-10, 13, 21, 25, 33, 38, 39) on the following phrases of the arbitration provision:

- the statement that any dispute over the loan shall be "subject to and governed by tribal law," JA280;
- the statement that the contract itself "shall be governed by tribal law," JA291;
- the directive that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal Law," JA291;
- the statement that "neither [AWL] nor this Agreement [is] subject to any other federal … law or regulation … unless so stated in this Agreement," JA292; and
- the statement that the "arbitrator shall apply Tribal Law and the terms of this Agreement," JA291.

Red Stone addressed (Opening Br. 27-28, 31-34) why none of these phrases, individually or collectively, amounts to a prospective waiver. Plaintiffs simply ignore those arguments.

2. Plaintiffs' brief points (at 9-10, 21, 39) to two additional phrases: (1) the prohibition on the arbitrator "applying any rules or law that would 'contradict this Agreement to Arbitrate or Tribal Law,'" JA290; and (2) the directive to the arbitrator to award those "remedies available under Tribal law," JA291. Neither phrase shows an unambiguous prospective waiver (even in isolation, let alone when read, as each phrase must be, together with all the other language in the contract).

The first provision simply specifies that the terms of the arbitration provision must be followed. Because those terms, as explained, include an express adoption of applicable federal law, that mandate does not help plaintiffs.

The second provision, meanwhile, does not say the arbitrator may "only" award remedies available under tribal law. In other words, it is silent about whether remedies under federal law can *also* be awarded. And Red Stone's opening brief explained (Br. 31-32) that under cases like *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), silence regarding the applicability of federal law cannot constitute a prospective waiver.

Plaintiffs assert, however (Br. 40-41), that Red Stone's reliance on *Vimar Seguros* and similar cases is "misplaced" because those cases involve *international* arbitration agreements. And, plaintiffs say, under *Aggarao v. MOL Ship Management Company, Ltd.*, 675 F.3d 355 (4th Cir. 2012), and *Lipcon v.*

Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998), the prospective-waiver doctrine applies differently to such agreements. That argument lacks merit.

To begin with, Supreme Court cases addressing the prospective-waiver doctrine have cited to both domestic and international-arbitration precedent, with no suggestion that the doctrine differs materially between the two contexts. *See, e.g.*, *American Express Company v. Italian Colors Restaurant*, 570 U.S. 228, 235-236 (2013). Indeed, the Court has extended prospective-waiver principles that it first announced in international arbitration cases to domestic ones. *See, e.g.*, *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003). Moreover, Chapter 2 of the FAA—which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that governs international arbitration agreements, *see Sandvik AB v. Advent International Corporation*, 220 F.3d 99, 105 (3d Cir. 2000)—states that Chapter 1, which governs domestic arbitration agreements, "applies to actions and proceedings brought under [Chapter 2] to the extent [Chapter 1] is not in conflict with [Chapter 2] or the Convention." 9 U.S.C. §208.

There is no such conflict here. Nothing in Chapter 1 (or 2), or in the Convention, contradicts the principle—specifically recognized by the Supreme Court in international arbitration cases—that silence regarding the applicability of

federal law does not prove prospective waiver. The principle is thus fully applicable in both international and domestic arbitration cases.

That conclusion is underscored by *PacifiCare Health Systems*. In that case, which involved domestic arbitration, the Court recognized that an arbitration provision is unenforceable under the prospective-waiver doctrine only if the disclaimer of federal law is unambiguous. 538 U.S. at 406-407. And it drew that principle from *Vimar Seguros*—a case involving international arbitration. *Id.* at 407 (citing 515 U.S. at 541). The rule that ambiguous language does not prove a prospective waiver is closely related to the rule that silence is ambiguous and hence silence as to the applicability of federal law does not prove a prospective waiver. Particularly given that similarity, there is no principled reason why the latter rule (regarding silence) should not apply equally in the context of domestic arbitration.

The (non-Supreme-Court) cases on which plaintiffs rely are not to the contrary. In *Aggarao*, there *was* a specific conflict: Prospective-waiver case law holds that the doctrine can be invoked in opposing a motion to compel, whereas the Convention dictates that "public policy defense[s]," including prospective waiver, "may only be asserted at" the arbitral-award stage. 675 F.3d at 372. But again, plaintiffs have pointed to no conflict here. *Lipcon*, meanwhile, did not involve the prospective-waiver doctrine. It involved a distinct doctrine, about when an

international choice-of-forum and choice-of-law clause is enforceable under *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 9-10 (1972). *Lipcon*, 148 F.3d at 1292. More specifically, the issue was whether *Bremen* applied to securities claims. The Eleventh Circuit answered affirmatively. *Id.* at 1295. The language on which plaintiffs rely—about international agreements being "sui generis"—was therefore limited to the securities context. *Id.* at 1294.

In sum, plaintiffs seek to support their prospective-waiver argument by pointing to language that is merely *silent* regarding the applicability of federal law. The principle Red Stone invoked to refute that reliance—namely, that an agreement's silence regarding the applicability of federal law does not prove a prospective waiver—is fully applicable in this domestic arbitration case.

That conclusion also accords with common sense. Arbitration clauses often provide that they are governed by the law of a particular state, without mentioning federal law. *See, e.g.*, *Gay v. CreditInform*, 511 F.3d 369, 387 (3d Cir. 2007). Under plaintiffs' view, doing so effects a prospective waiver because the provision is silent regarding the applicability of federal law. Such a view would invalidate many thousands of arbitration agreements. That cannot be right.

3. Plaintiffs contend (Br. 37-40) that their arbitration provision's "choice-of-law clause cannot be read in isolation" and thus "does not save the contract." This section is difficult to follow, but plaintiffs appear to be responding

(Br. 37-38) to an argument that the choice-of-law provision's adoption of tribal law is no different than one adopting state law. And their response (Br. 38-39) is that an arbitrator must look to the loan agreement and arbitration provision as a whole, and that upon doing so, the arbitrator would conclude that the agreement disclaims federal law.

Plaintiffs attack a strawman (although it is certainly true, as explained above and in Red Stone's opening brief, that the contract must be read as a whole rather than isolating particular provisions—as plaintiffs do). The choice-of-law provision does not just say "tribal law applies," nor has Red Stone defended it on that basis. Rather, the provision adopts tribal law and applicable federal law. *That* is why Red Stone has argued that the choice-of-law provision defeats prospective waiver. Plaintiffs' response does not answer that argument.

C. Plaintiffs' Argument Regarding Tribal-Court Review Is Waived And Meritless

Red Stone's opening brief argued (at 24-25) that arbitration is required if there is ambiguity regarding prospective waiver because the arbitrator must first decide whether the arbitration provision does in fact disclaim federal law. Plaintiffs respond (Br. 45-48) that ambiguity does not require arbitration here because the arbitration provision does not provide for *federal*-court review of an arbitral decision, only tribal-court review.

1. As a threshold matter, this argument was not raised below and thus is waived. In opposing Red Stone's motion to compel arbitration, plaintiffs responded to Red Stone's ambiguity argument only by contending that "there is no uncertainty" because "[t]he contract here 'effects an unambiguous and categorical waiver.'" Dist. Ct. Dkt. 100 at 18 n.5. They made no mention about the unavailability of federal-court review. Indeed, plaintiffs' briefing below scarcely referred at all to the fact of tribal-court review. They assuredly never suggested that such review fundamentally changed the standard by which their prospective-waiver challenges should be assessed.

"[A]n appellee is entitled to rely on alternative arguments *which had been raised in the district court* supporting the judgment." *Deisler v. McCormack Aggregates, Company*, 54 F.3d 1074, 1081 n.12 (3d Cir. 1995) (emphasis added); *accord Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) ("[A]n appellee may rely upon any matter appearing in the record in support of the judgment below."). But plaintiffs' argument was not raised in the district court. This Court therefore cannot affirm based on that argument.

2. Plaintiffs' argument would lack merit even if it were properly presented. Plaintiffs contend (Br. 46) that the ambiguity principle (i.e., allowing an arbitrator to first resolve if an ambiguous arbitration provision disclaims federal

law) assumes that a court can later review an arbitral award. Here, plaintiffs contend that assumption is not satisfied because "that review is impossible." *Id.*

This argument fails because the arbitration provision *does* provide for judicial review of arbitral awards: in the Court of Indian Offenses (CIO), a court that serves as the Otoe-Missouria's court but that was created by federal law, 25 C.F.R. §§11.100, 11.102, 11.104, and whose members are federally appointed officials, *id.* §11.201.

Plaintiffs suggest (Br. 46) that tribal-court review is insufficient because it allows for vacatur of an arbitral award "only if 'the conclusions of law are erroneous under Tribal law.'" (quoting JA291). But as this quote shows, plaintiffs added the word "only." The arbitration provision does not say that, and thus it would not preclude the CIO from applying the prospective-waiver doctrine to invalidate an arbitral award if the arbitrator concluded that the provision disclaims federal law.

Nor does plaintiffs' citation to *Gingras* (Br. 46-47) help them. The Second Circuit held there that tribal-court review was insufficient because that court would insulate the tribe from any adverse decision. 922 F.3d at 127-128. But the tribal court there was not the federally administered CIO (staffed by federally appointed judges)—and that court was in fact corrupt. *Id.* at 128. Plaintiffs have submitted no evidence suggesting that the CIO would be biased against borrowers and

accordingly refuse to apply the prospective-waiver doctrine even if doing so were warranted. Nor did the district court embrace that suggestion. This Court should reject it.

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,

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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 6,486 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 4th day of December, 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.

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