No. 23-2097

In the United States Court of Appeals for the Fourth Circuit

LULA WILLIAMS, GLORIA TURNAGE, GEORGE HENGLE, DOWIN COFFY, MARCELLA P. SINGH, Administrator of the Estate of Felix M. Gillison, Jr., on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees

v.

MATT MARTORELLO,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia at Richmond
Case No. 3:17-cv-00461-REP (The Honorable Robert E. Payne)

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Lula Williams, Gloria Turnage, George Hengle, Dowin Coffy, and Marcella P. Singh, Administrator of The Estate of Felix M. Gillison, Jr., are all individuals that have no corporate parent and do not issue stock.

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INTRODUCTION

This is the second appeal by the head of a predatory high-interest online lending scheme who has tried to evade liability for years by cloaking his operation in tribal law and then lying about his role. This scheme, orchestrated by a midwestern businessman named Matt Martorello with no claim to tribal affiliation, made loans online to Virginia consumers with annual percentage rates above 700%—nearly 60 times Virginia's legal limit. Despite his lack of tribal affiliation, Martorello has repeatedly sought to evade state and federal law through a contract purporting to limit borrowers to claims under tribal law and by arguing that principles of tribal sovereign immunity foreclose borrowers' claims against him.

Last year, this Court dismissed Martorello's effort to shield himself from liability through these contracts and rejected his attacks on the district court's factual findings regarding his role in the scheme, including that Martorello had "lied" about his involvement in, and profit from, the lending enterprise.[1] *Williams v. Martorello*, 59 F.4th 68, 89 (4th Cir. 2023). And this Court cleared the path for the plaintiffs in this case—Virginia consumers who were victims of Martorello's scheme—to prove that "Martorello's significant and relatively unchanging role" in the lending scheme "establish[ed] RICO liability" because he "participated in and controlled the

[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

direction of the lending operations" and therefore "proximately caused the [plaintiffs'] harm under RICO." *Id.* at 90.

The plaintiffs did just that. At summary judgment, Martorello ultimately conceded that the record established most of the elements of their RICO claims. After rejecting his other arguments, the district court awarded judgment against Martorello—more than five years after the Virginia plaintiffs sued him.

Martorello raises three arguments on appeal, none of which have merit. *First*, he argues that tribal law, not Virginia law, applies. But that view is foreclosed by this Court's decision in *Hengle v. Treppa*, which held that because online tribal lending activity "clearly constitutes off-reservation conduct," "substantive state law"—and not tribal law—applies. 19 F.4th 324, 348–49 (4th Cir. 2021).

Second, Martorello asserts that the claims against him should have been dismissed because the tribal entities—who were originally parties but later settled with the plaintiffs—were indispensable parties under Rule 19. But Rule 19 dismissal is a drastic remedy and Martorello comes nowhere close to demonstrating that the district court abused its discretion here.

Finally, Martorello raises a "mistake-of-law defense," arguing that he can't be held liable under RICO because he thought tribal law applied—in other words, because he allegedly didn't know he was breaking the law. Even putting aside the profound implausibility of that assertion given the facts of this case, the age-old

principle is that ignorance of the law is no defense. And nothing in RICO's text or context offers this remarkable protection to the operators of sophisticated illegal enterprises. In response, Martorello tries invoking the criminal law presumption of *mens rea*, but that just doesn't apply to this civil lawsuit. Moreover, even under that presumption, his request for this exceptional defense fails as a matter of law and fact.

The district court carefully considered and correctly rejected all of Martorello's last-ditch attempts to escape liability for his years-long illegal lending scheme. It is time for this case to end. This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court err in holding that Virginia law, not tribal law, applies in this case about the marketing, targeting, and collection of predatory loans with respect to Virginia residents who never set foot on a tribal reservation?

2. Did the district court abuse its discretion when it concluded that the tribal entities previously in this case were neither necessary nor indispensable parties under Rule 19?

3. Did the district court err in holding that, based on standard civil law principles and RICO's text and structure, a defendant may not avoid liability by raising a mistake-of-law defense to civil claims under 18 U.S.C. §§ 1962(c), (d), and 1964(c)?

STATEMENT OF THE CASE

A. Factual background

1. Martorello's tribal-lending scheme. This case involves an illegal tribal-lending enterprise created and operated by Martorello—a midwestern entrepreneur with no claim to any tribal affiliation. JA167. Although Virginia caps interest on loans at 12% APR, *see* Va. Code § 6.2-303(A), Martorello's loans carried triple-digit rates of more than 700%, JA1478. As in other tribal-lending schemes, Martorello relied on a "byzantine corporate structure" of more than a dozen interrelated entities to evade liability. SA174; *see* SA22–33.

Martorello first "became involved in payday lending" in 2008. SA43. This endeavor offered loans with interest rates that "would be usurious under state laws," and, in an effort to circumvent such laws, used a choice-of-law provision selecting "the laws of Costa Rica." JA454; SA44. Three years later, "Martorello became interested in the tribal lending concept"—a "new device to evade state usury laws" that "used Native American tribal entities" as "the nominal lender in an effort" to "preclude enforcement of the interest rap caps in state usury laws." SA43.

At an online lending conference, Martorello met with Robert Rosette, a well-known actor in the tribal-lending space, and was subsequently connected with the Lac Vieux Desert Band of Lake Superior Chippewa Indians (LVD), a federally recognized tribe, to offer loans over the internet to consumers across the country.

SA127. Rosette and his partner explained that, under the proposed operation, there would be two entities—one, called Bellicose VI LLC, owned by Martorello, and one, called Red Rock Tribal Lending LLC, owned by the tribe. Martorello's entity "would be the servicer for the lending operation," while the company owned by the tribe would not be "involved in the business." SA131–132. They told him that, although "representatives from the tribe" would be considered "managers" of the tribe-owned entity, it was Martorello's company, Bellicose, that would "operate[] the business completely." SA132.

In accordance with this framework, Bellicose entered into a "servicing" agreement with Red Rock, the newly created tribal entity, in October 2011. JA1845. The contract gave Martorello nearly complete control over Red Rock. In exchange for running virtually all aspects of the business, Bellicose received 98% of the net income collected on the loans. JA1854. Red Rock received 2% of the net revenue from the loans, less charge offs. JA1852. Through this initial arrangement, Martorello and his companies received over [redacted] SA243–244.

Soon after Red Rock began issuing loans, Martorello grew concerned over his risk of liability from increasing enforcement actions against tribal-lending schemes across the country. SA62–69; JA594. In late 2012, he posed "some urgent questions" to a business expert about how to value businesses that were "illegal, yet very profitable." JA594. Martorello explained that the "[tribal lending] industry is going

to be living in the grey area of its legality for another year or two," and that he had already "received dozens of letters from State AGs saying we need to be licensed and sending Cease and Desist orders." JA595. Martorello also revealed that the law firm Greenberg Traurig had provided him with a 20-page legal opinion—prepared at his request to enable him to "understand the risk" he had "as an equity owner" of the lending business, JA2369—that concluded that Martorello could be liable for "**aiding and abetting felony crime**" in states like Georgia. JA595 (emphasis in original).

As things grew worse for the industry, Martorello approached Rosette about restructuring the business to reduce his liability. The New York Department of Financial Services had ordered Red Rock to cease and desist its lending in New York and a court had found that Red Rock was "subject to the State's non-discriminatory anti-usury laws" because the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands." *Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 361 (S.D.N.Y. 2013). Martorello recognized that the decision created a "significant potential liability for [Bellicose]" and could, at a minimum, "precipitate [a] potential investigation and potential prosecution of us personally and our companies." JA657. He worried that if the decision were upheld, it would mean "certain death." JA669. He asked Rosette to "zero in asap on minimizing my risk for being individually liable." JA599.

Martorello began to think that the way forward was to exploit sovereign immunity. JA1097. In a 2013 email with the subject heading "LVD to take ownership of Bellicose VI," Martorello presented options for a restructure in an attempt to allow Bellicose to share in the LVD's immunity. JA1097. Martorello proposed that Bellicose would "[a]ssign today LVD 51% of Bellicose via Equity only membership interest tied to the SPVI subsidiary only." *Id.* (underline in original). Anticipating that the business would be shut down, Martorello further proposed that a separate trust entity of his, called BlueTech, would "own 49% equity, but 100% profits interests until month 49" thus guaranteeing that Martorello would retain the profits until the time when he predicted the business would be gone. *Id.* Martorello candidly asserted that the transaction must be "structured to provide all entities sovereign immunity." *Id.* In a contemporaneous email to the LVD tribal council, Martorello explained that the "Current Manager (myself) will be locked in as the decision maker for 48 months, at which point they will hire a new Manager to replace me." JA1160.

Martorello's concerns over his own liability prompted him to "stress the urgency on his end" for the parties to reach a new agreement. JA1170. He worried that "the clock is ticking before I end up in a Cash Call type of attack" and advised that he wanted to "move very quickly" on the deal so that he wouldn't be "inadvertently disadvantaged." JA675; JA712; *see also* JA1954. (noting that "time is of the essence … in getting a sale done"). "Cash Call" referred to an enforcement action

against a tribal-lending scheme for "unfair, deceptive, and abusive acts or practices by collecting and attempting to collect consumer-installment loans that were void or uncollectible because they violated either state caps on interest rates or state licensing requirements for lenders."[2]

To acquire the protection of the tribe's sovereign immunity for himself and his companies, Martorello orchestrated a transaction creating the appearance that he had sold Bellicose to the tribe. SA62–66. That transaction involved two newly created entities: Ascension Technologies, a tribal entity purportedly created to take over Bellicose's business, and Eventide Credit Acquisitions, a non-tribal entity through which Martorello planned to continue running the lending operation. JA215. Under the terms of the transaction, the tribe purported to purchase Bellicose for $300 million, while Eventide purported to loan the tribe the same amount. JA214–216. But rather than pay typical interest payments on the loan, the tribe agreed to continue paying Martorello his usual percentage of net profits. JA216–217.

No money changed hands for the sale, and Martorello continued to keep almost all the profits (now deemed loan payments) while retaining substantial control of the lending operation through Eventide. *See Williams v. Big Picture Loans, LLC*, 2019 WL 1983048, at *6 (E.D. Va. May 3, 2019) (describing the "sham transaction"). For

[2] Consumer Financial Protection Bureau, *CashCall Inc.; WS Funding, LLC; Delbert Services Corporation; and J. Paul Reddam*, https://perma.cc/8HZC-8E7B.

example, Martorello insisted that, as "the seller," he would "have to keep a final say so in business decisions." JA729; *see also* JA756 (confirming that "[a]s far as I know, the [tribal] Manager's [sic] don't really do anything"). And Martorello made clear he did not want any changes, explaining that there was "[n]o need to reinvent the wheel or shake things up, just need to keep it alive and then use the earnings from it to take risks with and do other things." JA729; *see also* JA747.

After the merger closed in 2016, the loans were originated in the name of Big Picture Loans—a name, website, brand, and set of operational materials that Martorello had developed for another tribe. *See, e.g.*, SA72. Martorello has continued to receive substantial amounts of money, including distributions that typically range between $1 and 2 million per month. *See* SA14 (showing the monthly distributions to Martorello's companies and trusts).

B. Procedural history

1. The plaintiffs in this case represent a class of Virginia residents who obtained loans originated by Red Rock or Big Picture at interest rates above the legal rate in Virginia. SA226–227. Their complaint asserts violations of RICO and Virginia's usury law against Martorello, two tribal entities (Big Picture and Ascension), and other defendants not relevant here. JA166–196.

The tribal defendants moved to dismiss, arguing that they were entitled to sovereign immunity. After abbreviated jurisdictional discovery, the parties briefed

the sovereign-immunity issue based on the record developed in that discovery. SA40–78. Martorello filed a declaration in which he characterized Red Rock and Big Picture as being almost exclusively run by the tribe. SA73–78. Among other things, he stated that the tribe had independently created Red Rock without his involvement, that it was the driving force behind the creation of Big Picture, and that it controlled all aspects of the lending operation. SA47–48, SA52, SA69–70. At the same time, Martorello minimized his own involvement in the operation and claimed to have ended his involvement entirely in 2016. SA70.

The district court denied the motion. In its factual findings, the court, "relying principally on Martorello's affidavit," largely adopted Martorello's characterizations of the lenders' operations. SA52. But the court concluded that the entities had failed to prove that they were arms of the tribe. JA277. This Court reversed. *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019). The Court found "no clear error in the district court's factual findings" but concluded, as a matter of law, that Martorello's involvement was not sufficient to deprive the tribal entities of sovereign immunity. *Id.* at 177.

2. While the appeal was pending, extensive third-party discovery revealed that Martorello's declaration included false and misleading statements on material issues, and that those statements had influenced the district court's findings on the motion to dismiss, which had in turn influenced this Court's decision. SA164–165; *see also*

SA6–7. After the plaintiffs raised this issue before the district court, the tribal entities agreed to a settlement with the plaintiffs in a related case brought against the tribal officials. *See* SA10; *see also Galloway v. Williams*, 2020 WL 7482191, at *2 (E.D. Va. Dec. 18, 2020) (discussing the terms of the settlement). Once this settlement was "reached… in principle," SA10, the district court dismissed the tribal entities from the case, *see* SA13. As the plaintiffs no longer sought declaratory relief against the tribal entities, all that remained were damages claims against Martorello. SA147–148, SA157.

As to Martorello, the court treated the plaintiffs' allegations of his misrepresentations as "a most serious matter," ordered the plaintiffs to submit proof, accepted evidentiary briefing, and held a two-day hearing that included Martorello's live testimony. SA44–45; SA165.

The court then issued more than thirty pages of factual findings in which it found "substantial (and largely unrebutted) evidence" that Martorello had significantly misled the court on many relevant aspects of the lending scheme. SA196. The court based that conclusion on documentary and deposition evidence and on its first-hand observations of "Martorello's demeanor and conduct when answering questions" at the evidentiary hearing, which it found "compel[led] the conclusion that Martorello was not telling the truth." SA55. For example, Martorello claimed in his declaration that he "was not involved in the creation of Red Rock." SA47. But the evidence showed that Martorello's lawyer had drafted the papers establishing the

entity, that Martorello had approved those papers before they were filed, and that he had even chosen the name "Red Rock." SA49–51. Martorello also claimed that the tribe was the driving force behind the creation of Big Picture. SA69–70. In reality, Martorello had created the company for use with a different tribe. SA31–74.

"[H]ad the facts not been misrepresented," the court wrote, some of its findings on the motion to dismiss "simply could not have been made." SA75. The court did not overrule any of its prior orders, but wrote that it would "take into account the record about the misrepresentations" in resolving future motions against Martorello, who could not invoke the tribe's immunity. SA78.

3. Faced with this opinion, Martorello sought once again to dismiss the claims against him. This time, he argued that Rule 19 required dismissal because the tribal entities were "necessary and indispensable parties." SA141. The district court had little difficulty rejecting this argument. For one thing, settled joinder law made it clear that "joint tortfeasors are not necessary parties." JA414. For another, Martorello's attempt to require joinder of the tribal entities as necessary parties failed to recognize that these entities had *already* been "parties in this litigation" but then settled the claims against them. *Id.* That meant that Rule 19 did "not apply by its very terms." *Id.*

4. The court then turned to the plaintiffs' motion for class certification. The court rejected Martorello's argument that the loan contract's class-waiver provision

precluded certification, as Martorello had not shown that he was a "related [] party" under the contract's terms. SA175–182. The district court also performed the required "rigorous" analysis of the prerequisites for class certification under Rule 23. SA197–198. In this analysis, the Court found that Martorello did not "play[] only a minor, supporting role" in the scheme, because "Martorello was the de facto head of the LVD's lending operations at all relevant times." SA221. The court granted the plaintiffs' motion. SA226–229.

5. This Court affirmed. It rejected all of Martorello's arguments against class certification and his attacks on the district court's factual findings regarding his role in the lending scheme. On the latter, after carefully reviewing the evidence, this Court confirmed that the record "support[ed]" the conclusion that Martorello "operated as the de facto head of the Tribe's lending operation." *Williams*, 59 F.4th at 87. It also agreed that Martorello had "lied when he said that he was never involved in receiving or demanding payments on Red Rock loans" and that, contrary to Martorello's testimony, he had "received consumer payments on Red Rock loans such that he was functionally in charge of Red Rock's lending operations." *Id.* at 89. And it likewise confirmed that the record established that Martorello "was still largely in charge of lending operations after the restructuring and that Big Picture operated as Red Rock had." *Id.* at 90.

6. On remand the parties cross-moved for summary judgment. Up first was a disagreement over "what law applies to the loans" that were taken out by the Virginia class members. JA2703. Even though all of the class members "resided in Virginia when they took out the loans," Martorello claimed that tribal law, not Virginia law, should apply. *Id.*

The district court rejected Martorello's argument. The court noted that the "undisputed record in this case" established both that key lending activity—including marketing and loan collection—took place off the reservation and directly targeted consumers who lived in Virginia, and that the "effects" of the illegal lending activities "were felt by the Plaintiffs in Virginia," not on tribal land. JA2703. "[B]inding Fourth Circuit precedent"—this Court's recent decision in *Hengle*—thus foreclosed Martorello's argument that this type of lending "occur[s] on the reservation." *Hengle*, 19 F.4th at 348. As the district court explained, *Hengle* squarely rejected an identical argument and recognized that analogous lending activity "is considered 'off-reservation' conduct" and therefore governed by substantive state law—not tribal law. JA2706 (quoting and discussing *Hengle*).

The district court next considered an argument made by Martorello that he could avoid civil liability under sections 1962(c) and (d) of RICO by asserting a "mistake of law defense." JA2712. Martorello claimed that he had set up the tribal lending enterprise on the "mistaken belief of law that (1) the loans made by the alleged

RICO enterprise were governed by tribal law and that, therefore, (2) those loans were legal under tribal law." *Id.* He also asserted that, to be liable under section 1962(d), the plaintiffs must specifically prove that he "knew that the loans were unlawful and, with that knowledge, intentionally conspired with co-conspirators to collect them." *Id.*

The district court rejected both of these arguments as well. The court began by detailing how Martorello's theory was—once again—at war with his own admissions and "the record as a whole" in the case. JA2719. Although Martorello now claimed that "he believed that Tribal law governed the loans at issue," starting in at least 2012 he repeatedly said that he "knew tribal lending was under legal and regulatory attack" and admitted that he had "received dozens of letters from State AGs" ordering him to cease and desist his companies' lending. JA2719–2720. In fact, he was "so concerned about his own liability that he asked two attorneys to put together an opinion letter detailing his potential for personal criminal liability for the online lending" enterprise. JA2720 (underline in original). And that advice warned him that it was "possible" that he "could be held liable for criminal violations" and that "'it will be an uphill battle' to persuade a court that the loans were legal in a civil proceeding." JA2720–2721 (underline in original). Despite all of this, Martorello "deliberately took the risk that his guess about what law would apply might well be wrong." JA2721.

The district court, however, ultimately rejected Martorello's argument for its flawed legal premises. The court explained that "mistake of law defenses are heavily disfavored in civil cases" and "when Congress has intended to provide a mistake of law defense to civil liability," it has done so explicitly. JA2726 (quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010)). Congress "did not do so when it enacted RICO" and Martorello did "not contend otherwise." JA2726. Further, even courts in the criminal context that had described violations of section 1962 as knowing and willful did not impose the unusual requirement that a defendant must have actual "knowledge" that they were violating state or federal law. JA2725, 2730–2732, 2735–2737. As the district court recognized, courts that have addressed this and similar statutory provisions have held that "neither the statutory language nor the policies underlying RICO and the predicate state law" compel the conclusion that knowledge of illegality is required. JA2740–2745 (citing cases).

7. After resolving these (along with several other) issues, the district court entered judgment in favor of the plaintiffs on their claims that Martorello violated section 1962(c) and section 1962(d) of RICO. Martorello had conceded that the record evidence established each of the remaining elements of the claims. *See, e.g.*, JA2679 (informing the court that Martorello "did not contest Plaintiffs' assertion that [he] had high-level involvement in the facilitation of the enterprise"); JA2679 (telling the court that, beyond the question of which law applied and whether a mistake-of-law

defense was available under RICO, Martorello "concedes there are no remaining triable issues of fact"); *see also* JA2681. So the district court awarded damages—based on the loan data and a stipulation between the parties—on behalf of the class against Martorello in the amount of $43,401,817.47. SA231.

SUMMARY OF THE ARGUMENT

I. The district court correctly held that Virginia law applies in this case about the marketing, targeting, and collection of predatory loans with respect to Virginia residents who never set foot on a tribal reservation. As this Court has held, this online lending activity "clearly constitutes off-reservation conduct" and so "substantive state law applies." *Hengle*, 19 F.4th at 348–49. There is no principle of tribal sovereignty that mandates a different result, as this Court and every other court to have considered this issue has concluded. *Id.* (citing cases). Such principles apply "to activity undertaken on the reservation," not this plainly off-reservation conduct. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

And even if principles of tribal sovereignty were at play, the result would be no different. The *Bracker* test calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. Here, the only party who would be subject to Virginia's law is Martorello, a midwestern entrepreneur with no claim to tribal membership. The subject of the regulation is a predatory lending enterprise that targeted Virginia residents off-reservation and was specifically designed to evade

state law. Applying state law would thus not interfere with any federal interests or infringe upon the right of tribal members to "make their own laws and be ruled by them." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 156 (1980).

II. The district court, in its discretion, reasonably concluded that the tribal entities previously in this case were neither necessary nor indispensable parties under Rule 19. Either of these grounds is sufficient to affirm. *First*, the tribal entities are not necessary parties under Rule 19(a) because complete relief can be afforded by a judgment against Martorello. And "joint tortfeasors or co-conspirators"—like the tribal entities here—are "not necessary parties under Rule 19." *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 615 (M.D.N.C. 2014). Further, as courts have uniformly held, a party's decision to settle makes it "inappropriate" for a remaining party "to attempt to champion [the] absent party's interests" in service of a Rule 19 motion. *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir 1994). This includes cases involving Martorello's illegal lending scheme. "By entering into the Settlement Agreement and stipulating to their dismissal, the Tribal Entities cannot be said to 'claim an interest in the subject' of this action, as Rule 19(a)(1)(B) requires." *Duggan v. Martorello*, 596 F. Supp. 3d 195, 204 (D. Mass. 2022); *see also Smith v. Martorello*, 2021 WL 5910652, at *2 (D. Or. Dec. 14, 2021) (same).

Second, even assuming the tribal entities are somehow necessary parties, the district court reasonably concluded that they are not indispensable under Rule 19(b).

A Rule 19(b) "dismissal of a case is a drastic remedy that should be employed only sparingly." *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 952 (4th Cir. 2020). This judgment is "addressed to the sound discretion of the trial court" and reviewed deferentially only for abuse of discretion. *Id.* at 950. The tribal entities face little risk of prejudice, as they have already settled the plaintiffs' claims against them and the remaining claims are against Martorello. In contrast, the prejudice to the plaintiffs would be severe. They were the victims of Martorello's predatory lending scheme, their credit ratings and lives suffered, and they are entitled to damages under state and federal law. It would be highly prejudicial to dismiss their case based on the nonjoinder of entities that Martorello intentionally created to thwart liability.

III. Martorello's final plea is that he can't be held liable under RICO because he did not know that the loans were governed by Virginia law. But the Supreme Court has "long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman*, 559 U.S. at 581. A mistake-of-law defense therefore only exists for a civil action when the statute makes it expressly clear, and there is nothing of the kind in the relevant RICO provisions. *See* 18 U.S.C. §§ 1962(c), (d), 1964(c). Martorello tries to avoid this conclusion by invoking the presumption that criminal punishment requires a guilty mind. But that presumption simply doesn't apply to a lawsuit brought under RICO's civil cause of action.

Even if criminal law principles applied, Martorello would fare no better. That's because he's not just asking for this Court to read a *mens rea* requirement into RICO, but asking for the most exceptional *mens rea* requirement: proof that a defendant knew he was breaking the law. This Court and others have repeatedly refused to engraft this unusual defense on racketeering offenses when it's not in the statute's "plain language." *United States v. Lawson*, 677 F.3d 629, 651 (4th Cir. 2012). The statutory context further forecloses such a defense, as does Congress' express directive that RICO's statutory "terms are to be liberally construed to effectuate its remedial purposes." *Boyle v. United States*, 556 U.S. 938, 944 (2009). And while Martorello tries to argue that a mistake-of-law defense is necessary to avoid punishing "innocent mistakes," Opening Br. 49, RICO reserves its penalties for only the most flagrant violators of state usury laws.

Finally, even if some *mens rea* were required with respect to the legality of the loans, Martorello's reckless disregard for the law is sufficient. "[R]ecklessness is morally culpable conduct" that "involve[es] a deliberate decision." *Counterman v. Colorado*, 600 U.S. 66, 79 (2023). Martorello's choice to operate in an area of dubious legality despite cease-and-desist letters by state authorities along with warnings by his attorneys, JA2719–2722, illustrates why his conduct is far from "innocent."

STANDARD OF REVIEW

This Court reviews an award of summary judgment *de novo*. *Noonan v. Consolidated Shoe Co.*, 84 F.4th 566, 572 (4th Cir. 2023). It reviews a district court's exercise of discretion to deny a Rule 19 motion to dismiss for abuse of discretion. *McKiver*, 980 F.3d at 950. Generally, "the inquiry contemplated by Rule 19 is a practical one," properly "addressed to the sound discretion of the trial court." *Id.*

ARGUMENT

I. The district court correctly held that Virginia law, not tribal law, governs the loans and conduct at issue here.

Martorello's lead argument is that the district court was wrong to apply Virginia law, instead of tribal law, to the challenged loans at issue in this case. He claims that the loans were "made on the reservation by an arm of the Tribe" and therefore must be "governed by tribal, not state law." That is wrong. As this Court—along with every other court to have considered this question—has made clear, "substantive state law applies" to tribal lending operations where lending activity occurs outside the reservation. *Hengle*, 19 F.4th at 349.

A. No understanding of tribal sovereignty precludes a state from applying its law to claims seeking to regulate off-reservation conduct.

1. Tribal sovereignty—and the corresponding ability of tribes to be free from certain state laws or regulation—derives from the fact that tribes are "unique aggregations possessing attributes of sovereignty over both their members and their

territory." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). But tribes are only "semi-independent"; their sovereign authority is "an anomalous one and of a complex character," *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 173 (1973), because tribes remain "ultimately dependent on and subject to the broad power of Congress," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). That power authorizes Congress, under the Indian Commerce Clause, Art. 1, § 8, cl. 3., "to regulate tribal affairs." *Id.* at 142. In the absence of congressional regulation, however, tribes retain the right to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The balance between tribal sovereignty and congressional regulation has "given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. The first is that a state's exercise of regulatory authority over tribal affairs "may be pre-empted by federal law." *Id.* And the second is that a state may not "unlawfully infringe" on the right of tribal members "to make their own laws and be ruled by them." *Id.* Determining whether either barrier applies is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty," but instead requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145.

The Supreme Court has been clear, however, that these principles of tribal sovereignty apply *only* "to activity undertaken on the reservation." *Id.* at 143; *see also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 97 (2005) (noting that *Bracker*'s interest-balancing test "applies only where a State asserts authority" over a party "engaging in activity on the reservation"). Where state law regulates a party's conduct "that occurs off the reservation," *Bracker*'s approach to balancing a tribe's sovereign interests against a state's simply "does not apply." *Wagnon*, 546 U.S. at 99. That is because "going beyond the reservation boundaries" makes tribe members categorically "subject to any generally applicable state law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014); *see also Wagnon*, 546 U.S. at 114 (holding that "an expansion of the … *Bracker* test" to off-reservation conduct "is not supported by our cases").

2. One activity that courts have uniformly held involves conduct outside reservation borders is the extension of loans over the internet to consumers in their home state. As this Court explained in *Hengle*, online lending activity "clearly constitute[s] off-reservation conduct" because it involves marketing and collection efforts that are intentionally directed into states, allows consumers to apply for loans online from their home states without stepping foot on a reservation, and directly impacts consumers where they live. 19 F.4th at 348–49. As a result, "substantive state law applies." *Id.* at 349.

Every other court to have considered a similar online tribal lending enterprise has reached the same conclusion. *See id.* (citing cases and noting that there does not appear to be "any court," anywhere, that has ever disagreed). Just like *Hengle*, these courts have recognized that parties "engage[] in conduct outside Indian lands when they extend[] loans" online to state residents. *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019); *see also Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 (2014) (noting that a tribal online lending scheme did not require consumers to "enter the reservation to apply for the loans, negotiate the loans, or execute the loan documents" and that consumers "made payments on the loans and paid the financing charges" from their home state); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008) (finding that substantive Kansas law applied to lending activity where loans were made online to Kansas residents). When it comes to online tribal lending, the *Bracker* test simply "does not apply." JA2706.

B. Because the relevant conduct here occurred outside the reservation, state law applies.

1. These fundamental limitations on tribal sovereignty easily dispose of Martorello's argument that the district court should have refused to apply Virginia law to the illegal loans Martorello peddled to consumers in Virginia. Martorello, of course, resists this conclusion. He claims (at 18) that the district court should have treated the lending activity here as "on reservation," and therefore applied the *Bracker*

interest-balancing test, because "the loans [were] made on the reservation by an arm of the Tribe."

Hengle squarely forecloses this argument. There, the defendants made precisely the same claim—they "assert[ed]" that their online payday lending scheme should be considered on-reservation activity because the loans were "made and accepted in the sovereign territory" of the tribe. *Hengle*, 19 F.4th at 348. This Court rejected that theory. A defendant cannot "limit[]" the scope of the relevant conduct for this analysis to where a loan might technically be considered to have been "made and accepted." *Id.* Instead, online tribal lending enterprises constitute "off-reservation" activity when (1) defendants "marketed their lending business throughout the country," (2) the consumers "resided on non-Indian lands when they applied for their loans online," (3) the defendants "collected loan payments" from consumers "while they resided" in their state and "from bank accounts maintained there," and (4) the "effects of Defendants' allegedly illegal activities were felt" by consumers in their home state. *Id.*

Martorello does not argue that any of these criteria are somehow missing here. Nor could he. As the district court explained, the "undisputed record" "establishes" that the lending activity in this case occurred "off-reservation." JA2707. Although the "office of the entities that (at least nominally) issued the loans, Red Rock and Big Picture Loans, were located on tribal land," it is "not disputed" that the Virginia

consumers in this case were "the targets of the lending activity" and "resided on non-Indian lands when they applied for their loans online." JA2706. Nor is it disputed that "the effects of [Martorello's] allegedly illegal activities were felt by the Plaintiffs in Virginia," not on tribal land. *Id.* As the district court correctly concluded, because "the loan activities in this case are directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct," the *Bracker* test is "inapplicable" and Virginia law applies. JA2707.

2. Instead of challenging the record or any of these findings here, Martorello makes several halfhearted attempts to distinguish *Hengle*. They all fail.

He first claims (at 26) that *Hengle* is "inapposite" because the defendants there were tribal officials and argued that "tribal sovereign immunity covers tribal officials sued for alleged violations of state law." That is irrelevant. Regardless of the identity of the parties or the contours of the particular defense, the defendants in *Hengle* made the precise argument Martorello makes here, and this Court squarely rejected it. The defendants "assert[ed] that the conduct at issue … occurred on the reservation, unlike the off-reservation gaming in *Bay Mills*," because the loans were "made and accepted" on tribal land. *Hengle*, 19 F.4th at 348. But this Court rejected that argument and held that the lending activity "clearly constitute[s] off-reservation conduct" and that, as a result, "substantive state law applies." *Id.* at 349.

That Martorello is not a tribal official and has no claim to sovereign immunity does not alter *Hengle*'s conclusive statement regarding the application of substantive state law to online lending activity that occurs in Virginia. If anything, applying Virginia law to a non-tribe member would seem to implicate tribal immunity even less than applying state law to tribal officials. And were it otherwise, substantive state law would only apply to tribal officials' off-reservation conduct but not to the off-reservation conduct of their non-tribal counterparts—a result that directly contradicts the Supreme Court's holding that if a state "may apply a nondiscriminatory" state law to tribal members, "then it follows" that it may apply that law to non-tribal members as well. *Wagnon*, 546 U.S. at 113.

It is also immaterial that, according to Martorello (at 26), *Hengle* "did not discuss the Indian Commerce Clause or federal preemption." Those principles are relevant only insofar as they explain why the Supreme Court established the interest-balancing test in *Bracker* in cases "where a State asserts authority" over a party "engaging in activity on the reservation." *Wagnon*, 546 U.S. at 97. Where the challenged activity is off-reservation—as it was in *Hengle* and as it is here—neither the *Bracker* balancing test nor Indian Commerce Clause or federal preemption principles are implicated. *See Bay Mills*, 572 U.S. at 795 (holding that "going beyond [the] reservation boundaries" makes parties "subject to any generally applicable state law").

C. Even under *Bracker*'s interest-balancing test, Virginia law would still apply.

Even assuming the lending activity in this case could be considered "on reservation" such that *Bracker*'s interest-balancing test would apply, that still would not help Martorello.

Recall that, under *Bracker*, to determine whether the exercise of state authority applies to certain on-reservation activity, a court must perform "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." 448 U.S. at 145. As part of this inquiry, a court must consider several relevant factors. One is the status of the relevant parties. As the Supreme Court explained in *Bracker*, "[w]hen on-reservation conduct involving only Indians is at issue," state law is likely to be inapplicable because a state's "regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Id.* at 144. But a state's interest increases if "the conduct of non-Indians" is in question. *Id.*

A similar understanding applies to the subject of the state's attempt to regulate. A tribe's interest "peaks" when a state regulation "threatens a venture in which the tribe has invested significant resources"—like a "concerted and sustained undertaking to develop and manage [a] reservation's wildlife and land resources." *Otoe-Missouria*, 769 F.3d at 113. But a tribe "has no legitimate interest in selling an opportunity to evade state law." *Id.* at 114. So tribal efforts to "market an exemption"

from state law "to persons who would normally do their business elsewhere" will tip the balance against tribal sovereignty. *Id.*

Against these factors, Martorello simply argues (at 27–28) that the tribe's economic interest in the lending enterprise is dispositive. But this argument has been soundly rejected by the Supreme Court. *See Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134 (1980). In *Colville*—a case which, unlike this one, actually involved tribal members running a business on tribal land—certain tribes operated "tribal smokeshops" that marketed and sold cigarettes to nonmembers at "bargain prices" that did not include state taxes. 447 U.S. at 154. The tribes argued that, because the smokeshops' cigarette sales "generate[d] substantial revenues" for them, the "economic impact" of requiring state-law compliance tipped the balance in favor of tribal sovereignty. *Id.* The Court disagreed. It held that, if the "primary argument" in favor of tribal law is "economic," and all the business offers is "solely an exemption from" state regulation, the "principles of federal Indian law" do not justify an exemption from state law. *Id.* at 154–55; *see also id.* at 156 (noting that a state "does not infringe" the right of a tribe to "make their own laws and be ruled by them" simply because applying state law will "deprive" the tribes of "revenues they currently are receiving").

Apply these factors here and it's easy to see why, even under *Bracker*'s test, Virginia law still applies. First, the only party who would be subject to Virginia's

substantive state law in this case is Martorello—a former KPMG consultant who has no claim to tribal membership or sovereignty. Second, the subject of Virginia's regulation is a lending enterprise that is marketed to Virginia residents who would normally do their business elsewhere, and that is intentionally designed to circumvent state lending and usury laws like Virginia's. Applying state law to Martorello and his operation—even indulging the fiction that the lending activities occurred "on reservation"—would therefore neither substantially interfere with any federal interest in, nor unduly infringe on, the right of tribal members to "make their own laws and be ruled by them." *Colville*, 447 U.S. at 156.

II. The district court reasonably held that Rule 19 does not require dismissal and that the tribal entities are neither necessary nor indispensable parties.

In his next attempt to avoid liability for his illegal lending scheme, Martorello argues that the district court abused its discretion in denying his Rule 19 motion to dismiss because certain tribal entities are "indispensable parties in whose absence this case cannot be adjudicated." Opening Br. 29. The district court, in its discretion, reasonably denied this further attempt to escape liability.

A. The tribal entities are not necessary parties under Rule 19.

Martorello's argument that the absence of the tribal entities—Ascension, Big Picture, and the tribe itself—requires the dismissal of this lawsuit against him under Rule 19 stumbles right out of the gate. Rule 19 "sets up a two-part inquiry." *McKiver*,

980 F.3d at 950. To start, any party seeking dismissal must first demonstrate that a "nonjoined party is necessary under Rule 19(a)." *Id.* Under this rule, a party is necessary, or required, in only two circumstances. *First*, if, in that party's absence, "the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). *Second*, if the party "claims an interest relating to the subject of an action and is so situated that disposing of the action in the person's absence may":

> (i) as a practical matter impair or impede the [party's] ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(B)(i), (ii).

1. Martorello offers scant argument to meet his burden of demonstrating that the tribal entities are necessary parties. *See* Opening Br. 29. On Rule 19(a)'s first ground—that the court cannot afford complete relief in the party's absence—Martorello says (at 34) only that complete relief would be impossible because the plaintiffs sought "declaratory relief" that the tribal entities' "loan agreements are void and unenforceable under Virginia law." But at the time Martorello filed his Rule 19 motion, the plaintiffs were no longer seeking any declaratory or injunctive relief against either the tribal entities or Martorello himself. *See* SA147–148, SA157. Instead, the only relief the plaintiffs were seeking was monetary damages under RICO and state law against Martorello—and Martorello alone—for his role in the illegal

lending enterprise. *Id.* There can be little doubt, therefore, that—regardless of the tribal entities' participation—complete relief is available between the plaintiffs and Martorello. *See United States v. Arlington County*, 669 F.2d 925, 929 (4th Cir. 1982) (noting that a judgment and award of monetary damages will provide complete relief "among those already parties"); *see also Dillon*, 16 F. Supp. 3d at 615 (noting that such relief would not prevent tribal entities from "lending money or from relying on other mechanisms to collect on their loans").

In this way, the relief sought here resembles that of a party seeking monetary damages from a joint tortfeasor. As the Supreme Court has explained, "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990). Rule 19 is therefore inapplicable in such situations. *See Dillon*, 16 F. Supp. 3d at 612–13 (noting that similar damages claims arose "under statutory schemes analogous to tort law" that made the tribal lenders "at most joint tortfeasors or co-conspirators" and therefore "not necessary parties under Rule 19"); *Pennsylvania v. Think Fin.*, 2016 WL 183289, at *7 (E.D. Pa. Jan. 14, 2016) (noting that tribal lenders are "akin to joint tortfeasors, and therefore not necessary to be joined"); *S. Co. Energy Mktg. v. Va. Elec. & Power Co.*, 190 F.R.D. 182, 186 (E.D. Va. 1999) (similar). Martorello, for his part, ultimately concedes the point, acknowledging (at 36) that the "rule of joint and several liability often

satisfies Rule 19(a)(1)(A) by enabling a court to provide complete relief where only money damages are being sought."

2. Given this, Martorello ultimately pivots to Rule 19(a)'s second ground. He argues (at 36) that, just because the district court might be able to provide complete relief here given that "only money damages are being sought," that is "not the end" of the inquiry. Instead, he argues (at 35) that the tribal entities all have "contractual and sovereignty interests" that he can't adequately protect and that might be affected by a judgment here. That is wrong.

Courts have consistently recognized that, where a party has previously been involved in the litigation, a decision to settle means that it is "inappropriate" for a remaining party "to attempt to champion an absent party's interests" in service of a Rule 19 motion. *Rose*, 34 F.3d at 908; *see also Shropshire v. Canning*, 2012 WL 13658, at *5–6 (N.D. Cal. Jan. 4, 2012); *Hill v. Mallinckrodt LLC*, 2020 WL 956589, at *3 (M.D.N.C. Feb. 27, 2020); *Thompson v. United Transp. Union*, 2000 WL 382033, at *2 (D. Kan. Mar. 30, 2000). A party's choice to settle demonstrates that "[the party] did not feel that it was necessarily in his interest to remain a party in th[e] action" and renders Rule 19(a)'s second ground inapplicable. *Rose*, 34 F.3d at 908. Indeed, this rule has been applied not just in similar cases, but in cases involving these very tribal entities. In other proceedings around the country, Martorello sought to dismiss the claims against him by filing similar Rule 19 motions. Those efforts, like this one, were

unsuccessful because, as courts recognized, "[b]y entering into the Settlement Agreement and stipulating to their dismissal, the Tribal Entities cannot be said to 'claim an interest in the subject' of this action, as Rule 19(a)(1)(B) requires." *Duggan*, 596 F. Supp. 3d at 204; *Smith*, 2021 WL 5910652, at *2 (same).

This rule applies here. Martorello briefly suggests (at 38) that "Rule 19 applies regardless of whether the absent parties were once joined in the litigation," but the only two cases he cites involved parties who were dismissed without settling their claims. Opening Br. at 38 (citing *Republic of Philippines v. Pimentel*, 553 U.S. 851, 855 (2008) and *Hartog v. Jots, Inc.*, 2004 WL 2600280 (N.D. Cal. Nov. 12, 2004)). In this case, the "best evidence" that the tribal entities no longer claim an interest in the litigation, let alone believe their absence would impair or impede anything, is their decision to settle. *Rose*, 34 F.3d at 908. That conclusion also accords with the purpose of the joinder rule, which is "to preserve the right of parties to make known their interests and legal theories." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The tribal entities have done that here. By foregoing any remaining interest in the litigation, Martorello cannot show that the tribal entities somehow have a claimed interest sufficient to meet the requirements under Rule 19(a)(2).

Were there any lingering doubt, the actual record evidence in the case confirms the point. Martorello asserts (at 39) that the tribal entities "nowhere in the settlement agreement … disclaim their interests in the case." But "the Tribal Entities

were aware at the time of the settlement that [the plaintiffs] would continue to pursue this action against Martorello." *Duggan*, 596 F. Supp. 3d at 204. The agreement unequivocally shows the tribal officials knew and understood that the claims against Martorello would move forward without them. *See* JA304 (recognizing that Martorello was a "Non-Settling Defendant" and that the claims against him would proceed immediately). The settlement also details the tribal entities' agreement to provide data for the purpose of identifying and distributing funds to class members in the event that a class action is certified and a monetary judgment is reached against Martorello. *Id.* ¶ 6.3. This "agree[ment] to assist in that effort" further undermines Martorello's assertion. *Duggan*, 596 F. Supp. 3d at 202. And the signatories to the settlement agreement include not only the tribe's companies—Big Picture and Ascension—but also the Tribal Chairman and other tribal officials responsible for representing the tribe's interests. JA346–352.

B. The district court reasonably held that the tribal entities are not indispensable.

Even assuming that the tribal entities are somehow necessary under Rule 19(a), the district court reasonably concluded that they are not indispensable under Rule 19(b). To overturn the district court's conclusion on this point, Martorello faces a daunting task. A Rule 19(b) "dismissal of a case is a drastic remedy that should be employed only sparingly." *McKiver*, 980 F.3d at 952. To that end, this decision "must be made pragmatically, in the context of the substance of each case," and "must take

into account the possible prejudice to all parties," including the victims. *Id.* at 951. That judgment is "left to the sound [] discretion of the trial court" and reviewed deferentially only for abuse of discretion. *Id.* at 957. Martorello doesn't come close to showing that "the action of the district court was so unreasonable or so arbitrary as to be beyond the range of its discretion." *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 314 (4th Cir. 1984).

Rule 19(b) provides a set of nonexclusive factors to consider. These include (1) the extent to which a judgment rendered in a party's absence might prejudice that party or the existing parties; (2) the extent to which any prejudice could be lessened or avoided; (3) whether a judgment rendered in the party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *See* Fed. R. Civ. P. 19(b). Courts should be "loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *McKiver*, 980 F.3d at 951.

Briefly considering these factors readily demonstrates why the district court got it right. As already discussed, the tribal entities face no risk of prejudice—they have already settled the plaintiffs' claims against them and the judgment here lies only against Martorello. The lawsuit in this case seeks monetary damages only from Martorello and only for his violations of federal and state statutory laws; any award

of damages for Martorello's statutory violations would therefore not prejudice the tribal entities. *See* Fed. R. Civ. P. 19 advisory committee's note to the 1966 amendment (explaining that awarding of monetary damages against a remaining party in the case avoids any prejudice against absent parties). It is for this reason, moreover, why the absence of the tribal entities would also not render any judgment inadequate.

By contrast, the prejudice to the plaintiffs of dismissal would be severe. The plaintiffs suffered serious harm from Martorello's illegal predatory lending scheme. Martorello's conduct violated federal law and "unquestionably shocks one's sense of right in view of Virginia law." *Hengle*, 19 F.4th at 352. It would be highly prejudicial to leave his victims without remedy if this action were dismissed for nonjoinder of entities that Martorello intentionally created to avoid liability as part of this very scheme.

Martorello, for his part, appears to claim (at 31) only that the tribal entities should be considered indispensable because "any judgment would prejudice [their] economic interests." He identifies nothing in the record to support this claim, but even if it were true, "a financial stake in the outcome of the litigation is not a legally protected interest" that warrants dismissal under Rule 19. *Disabled Rts. Action Comm. v. Las Vegas Events*, 375 F.3d 861, 883 (9th Cir. 2004); *see also Pettus v. Servicing Co.*, 2015 WL 9255331, at *3 (E.D. Va. Dec. 17, 2015) (rejecting the claim that "[c]omplicating or

tangentially affecting one's business" is sufficient to justify dismissal under Rule 19). That is all that's necessary to affirm.

III. Martorello's mistake-of-law defense to the plaintiffs' civil lawsuit has no basis in law or fact.

Martorello's last resort is to argue that he isn't liable for his central role in his own illegal lending business because he did not know that the loans were governed by Virginia law. But the Supreme Court has "long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman*, 559 U.S. at 581. Courts will not allow this exceptional defense to civil liability absent express indication from Congress—which is entirely lacking here. Martorello instead asks this Court to treat the plaintiffs' civil lawsuit like a criminal prosecution, which it isn't. And even under criminal law principles, Martorello's request for an exceptional mistake-of-law defense still fails on the law and the facts. There's just no basis to conclude that Congress, in enacting RICO to combat sophisticated illegal enterprises, silently allowed them the exceptional protection of immunity "by simply claiming that [they] had not brushed up on the law." *Hamling v. United States*, 418 U.S. 87, 123 (1974).

A. The plain language of the statute forecloses Martorello's attempt to engraft a mistake-of-law defense on the plaintiffs' civil cause of action.

There is no express language in any of the relevant statutory provisions granting Martorello a mistake-of-law defense. Martorello does not dispute that he

would lose under civil law principles, so he instead invokes criminal law principles. But the question of what *mens rea* is needed for criminal prosecution under a distinct statutory provision is simply not implicated here.

1. "[W]hen Congress [] intend[s] to provide a mistake-of-law defense to civil liability," it does so "explicitly." *Jerman*, 559 U.S. at 583. This is a high bar. It is not enough for a statute to include an exception for when "the violation was not intentional and resulted from a bona fide error." *Id.* at 576–77. Instead, Congress must use language like "with 'actual knowledge or knowledge fairly implied on the basis of objective circumstances' that [the defendant's] action was 'prohibited by [the statute].'" *Id.* at 583–84 (quoting 15 U.S.C. § 45(m)(1)(A), (C)). There is nothing remotely close to that here.

a. Start with 18 U.S.C. § 1964(c). A plaintiff has a cause of action so long as he was "injured in his business or property by reason of a violation of section 1962." § 1964(c); *see also Yegiazaryan v. Smagin*, 599 U.S. 533, 545 (2023) ("§ 1964(c)'s focus is on the injury … as the product of racketeering activity.")

b. As to section 1962(c), it only says that it "shall be unlawful for any person employed by or associated with" a RICO enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Nowhere does it say that a defendant must know the debt was unlawful. Instead, "[t]he elements predominant

in a subsection (c) violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity" or collection of an unlawful debt. *Salinas v. United States*, 522 U.S. 52, 62 (1997). That's why all that is needed is "that Defendants (1) conducted the affairs of an enterprise (2) through the collection of unlawful debt (3) while employed by or associated with (4) the enterprise engaged in, or the activities of which affect, interstate or foreign commerce." *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 312 (E.D. Va. 2019), *aff'd sub nom. Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286 (4th Cir. 2020). No wonder courts have consistently reached the same conclusion that no showing of actual knowledge of illegality is required. *See, e.g.*, JA2733–2734 (citing cases); *see also Mao v. Glob. Tr. Mgmt., LLC*, 2022 WL 989012, at *9 (E.D. Va. Mar. 31, 2022).

c. Finally, as to section 1962(d), it just says that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Such "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Salinas*, 522 U.S. at 63. Thus, a plaintiff "need not establish that each conspirator had knowledge of all of the details of the conspiracy but, rather, only that the defendant participated in the conspiracy with knowledge of the essential nature of the plan." *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985). It is sufficient "(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and

agreed to the overall objective of the RICO offense." *United States v. Abed*, 203 F.3d 822 (4th Cir. 2000) (unpub.). No mistake-of-law defense here either.

2. Martorello understandably ignores *Jerman* and spends little time on the statutory text. Instead, he invokes the principle (at 42) that "[g]enerally, wrongdoing must be conscious to be criminal." But that just doesn't apply to this civil suit.

a. The plaintiffs have a civil RICO claim because under section 1964(c) they were "injured in [their] business or property by reason of" Martorello's violation of section 1962's "[p]rohibited acts" of "conduct[ing] or participat[ing]" in a RICO enterprise's "collection of unlawful debt," and "conspir[ing] to" do the same. The Supreme Court has held that when a court is interpreting section 1964(c)'s cause of action and section 1962's prohibitions "in conjunction," the "obvious source … for the combined meaning of these provisions" is civil law. *Beck v. Prupis*, 529 U.S. 494, 499–501, 501 n.6 (2000). The Court expressly rejected the argument that it should "look to criminal, rather than civil, common-law principles to interpret the statute." *Id.* at 501 n.6. Accordingly, civil law principles apply here.

Criminal prosecutions arise under a separate provision elsewhere in the statute and would involve a separate analysis. If the government were prosecuting Martorello, it could rely on section 1963(a), under which a person who "violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years." Martorello could then argue that criminal law principles

require reading in a *mens rea* requirement such that section 1963(a) only applies when a person "*knowingly* violates any provision of § 1962," and then further argue that this creates a mistake-of-law defense.[3] But that would not justify engrafting a mistake-of-law defense on civil suits under section 1964(c).

That distinguishes the cases on which Martorello relies. In a case where the same statutory term "crime of violence" triggered criminal and immigration consequences, the Supreme Court stated in a footnote that if there had been any ambiguity, it would have applied lenity to interpret the same term "consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (citing this same principle in an opinion joined by only four Justices). But here there is no risk of inconsistent interpretations of an identical statutory term across different contexts. This Court can "interpret the statute consistently" by holding that plaintiffs suing under section 1964(c) because they were "injured … by reason of a violation of section 1962" need not prove that the defendant actually knew his conduct was illegal, regardless of whether someone can be prosecuted under section 1963(a) only if they *knowingly* "violate[d]" section 1962.

[3] Though as explained below, even in the criminal context, such an argument is similarly unavailing. *See infra* 43–51.

Martorello's appeal to dicta in out-of-circuit criminal cases is similarly irrelevant. The law in the Second Circuit is that "RICO imposes no additional *mens rea* requirement beyond that found in the predicate crimes." *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986). Two panels of that court, however, have expressed some concerns about the possibility that "a criminal RICO violation may carry no scienter requirement at all" if it is based on a predicate violation of a state usury laws without a scienter requirement. *United States v. Moseley*, 980 F.3d 9, 19 (2d Cir. 2020); *see also United States v. Grote*, 961 F.3d 105, 120 (2d Cir. 2020). But that concern is simply not presented in a civil case under section 1964(c).

B. Even if criminal law principles applied to the plaintiffs' civil suit, Martorello cannot rely on his implausible mistake-of-law defense.

Even if this Court were to determine that the plaintiffs' civil claims are governed by criminal law principles—they are not—Martorello fares no better. At the outset, it is important to clarify what Martorello is requesting. He's not just asking for this Court to read a *mens rea* requirement into the statute. As the district court explained in detail, such a requirement would still leave him high and dry. JA2725, 2730–2732, 2735–2737. Instead, he needs this Court to read in the most unusual and demanding *mens rea* requirement: a showing that a defendant actually knew he was breaking the law. That is flatly inconsistent with RICO's text and context, and certainly does not follow from the general presumption that Congress includes some

mens rea requirement in criminal statutes. And even if some *mens rea* were needed specifically with respect to the illegality of the predatory loans, Martorello's reckless disregard for the law would amply satisfy it.

1. RICO's text and structure foreclose Martorello's attempts to create a mistake-of-law defense.

Martorello's unusual mistake-of-law defense can't be squared with the statutory text and structure. That's why courts have repeatedly rejected reading a mistake-of-law defense into racketeering prosecutions and into section 1962 in particular, and Martorello does not identify a single court to have held otherwise.

a. This Court has refused to impose a mistake-of-law defense on a racketeering prosecution when it was not in the statute's "plain language." *Lawson*, 677 F.3d at 652. *Lawson* involved a neighboring racketeering offense, section 1955, which prohibits "conduct[ing] … an illegal gambling business" in "violation of the law of a State … in which it is conducted." 18 U.S.C. §§ 1955(a), (b)(1)(i). Just like section 1962(c), this provision predicates a racketeering violation on "conduct[ing]" a business in violation of state law. And just like in this case, the defendant in *Lawson* protested that she could not be convicted unless she knew the gambling violated state law. *Lawson*, 677 F.3d at 652.

This Court didn't buy it: "[T]he plain language of 18 U.S.C. § 1955 does not require that a defendant know that her conduct constitutes illegal gambling under state law." *Id.* In declining to read in this unusual requirement, the Court joined the

"numerous courts" that had "rejected [this] precise argument." *Id.* (citing cases). Instead, section 1955 is "a general intent crime, which does not require the government to establish that the defendants knew that their conduct violated state law." *Id.* at 653. Under that standard, a defendant "must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Elonis v. United States*, 575 U.S. 723, 735 (2015).

Lawson is the beginning and end of the analysis here. The "plain language" of section 1962(c) provides no more basis to read in a mistake-of-law defense than section 1955 did. *Lawson*, 677 F.3d at 652. Nothing in the text of section 1962(c)'s prohibition on "conduct[ing]" a RICO enterprise in the collection of an unlawful debt "require[s] the government to establish that the defendants knew that their conduct violated state law." *Id.* at 653. Court after court has reached this same conclusion based on "[a] plain reading of the statute." *United States v. Pepe*, 747 F.2d 632, 675–76 (11th Cir. 1984); *United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993); *Biasucci*, 786 F.2d at 512. Martorello fails to identify a single case holding the contrary.[4] And the prosecutorial guidance manual Martorello cites relies on *Biasucci*, 786 F.2d at 512,

[4] *United States. v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992), recited jury instructions that described a violation of section 1962(c) as knowing and willful. *Id.* at 1498. But as the district court explained, even under a knowing-and-willful standard, "[t]he defendant need not have known that he was breaking any particular law." JA2736; *see also Lawson*, 677 F.3d at 653 & n.32 (making the same point).

which rejected his argument. *See* U.S. Dep't of Just., *Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors*, at 136 (6th rev. ed. 2016).

The same thing goes for a conspiracy under subsection (d). The government need only prove "that the defendant participated in the conspiracy with knowledge of the essential nature of the plan." *Tillett*, 763 F.2d at 632; *see also Abed*, 203 F.3d 822. Indeed, "[t]he RICO conspiracy provision … is even more comprehensive than the general conspiracy offense." *Salinas*, 522 U.S. at 63. Martorello again fails to identify a single case to the contrary.[5]

Finally, Martorello's mistake-of-law defense can't be squared with Congress's express directive that RICO's statutory "terms are to be liberally construed to effectuate its remedial purposes." *Boyle*, 556 U.S. at 944. Congress enacted RICO because it understood that stronger measures were urgently needed to combat sophisticated criminal enterprises. And Congress was "especially concerned with loansharking." JA2748 (citing *United States v. Turkette*, 452 U.S. 576, 591–92 & n.14 (1981)). It just isn't plausible that, at the same time, Congress silently granted these sophisticated criminal enterprises the unusual shield of being able "to avoid prosecution by simply claiming that [they] had not brushed up on the law." *Hamling*, 418 U.S. at 123. "The background presumption must be that every citizen knows the

[5] *United States v. Battle*, 473 F. Supp. 2d 1185 (S.D. Fla. 2006), nowhere says that a defendant must be aware he is violating state law. *See id.* at 1212.

law," *United States v. Fuller*, 162 F.3d 256, 262 (4th Cir. 1998), and there's no reason to think that Congress made an exception to this rule for higher-ups in interstate conspiracies who can simply claim they didn't know the precise terms of any particular state's law.

b. If anything more were needed, the statutory context clinches it. When a neighboring provision includes a specific intent requirement, a defendant's attempt to engraft such a requirement where none exists is "untenable." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16–17 (2010). And right next door to subsection 1962(c), subsection (a) contains an exception for individuals who purchase securities "without the *intention* of controlling or participating in the control of the issuer." § 1962(a) (emphasis added). Congress thus knew how to limit section 1962 liability based on mental state and did so where it wanted to: in subsection (a), under certain narrow circumstances—not in subsection (c). "In the context of [this] narrow, specifically articulated exception," creating an unwritten exception "would not be to interpret Congress' words but to add terms on Congress' behalf, an exercise exceeding the authority of this court." *In re Wood*, 993 F.3d 245, 252 (4th Cir. 2021).

Further, neighboring racketeering offenses expressly require knowledge of illegality or specific intent. One such offense requires that defendants "know[] that the property involved … represents the proceeds of some form of unlawful activity" and act "with the intent to promote the carrying on of specified unlawful activity."

18 U.S.C. §§ 1956(a)(1), (a)(1)(A)(i); *see also* § 1957(a) ("knowingly engages or attempts to engage in a monetary transaction in criminally derived property"). So do many of section 1962(c)'s predicate offenses, which are expressly cross-referenced through the definition of "racketeering activity." § 1961(1). There are countless examples. *See, e.g.*, § 1028(a)(2) ("knowingly transfers … a false identification document knowing that such document … was stolen or produced without lawful authority"); § 2312 (similar for stolen vehicles); § 2313(a) (same); § 2314 (similar for stolen money or goods); § 2315 (same). And compare section 1962(c)'s broad application to anyone who "conduct[s] or participate[s], directly or indirectly, in the conduct of [a RICO enterprise's] affairs," with neighboring section 1960(a)'s application only to someone who "*knowingly* conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business." (emphasis added).

c. Martorello's final plea (at 49) is that a mistake-of-law defense is necessary to distinguish between "innocent mistakes" and criminal conduct. Yet this again runs into *Lawson*, where the defendant similarly argued that operating a gambling business without knowing it violated state law was acting in "good faith." 677 F.3d at 652. More fundamentally, charging predatory rates of interest as part of a RICO enterprise is hardly an "innocent mistake." RICO requires that "the usurious rate is at least twice the enforceable rate" under state law, 18 U.S.C. § 1961(6) "'to limit the effect of this definition to cases of clear loan-sharking,' and to 'eliminate the possibility of

'inadvertent' usury." *Durante Bros. & Sons, Inc. v. Flushing Nat. Bank*, 755 F.2d 239, 250 (2d Cir. 1985) (quoting S. Rep. No. 91–617, at 158–59 (1969)). And loans must be incurred in connection with "the business of lending money … at a rate usurious under State or Federal law," § 1691(6), which was "aimed at the same goal, *i.e.*, the exclusion from the scope of the statute of occasional usurious transactions by one not in the business of loan sharking," *Durante Bros.*, 755 F.2d at 249–50.

This case illustrates why Congress made the choice to punish the most flagrant violators of state laws protecting their residents against predatory lending. "Since as early as 1734, the Virginia legislature has regulated usurious loans." *Hengle*, 19 F.4th at 351. Its current laws reflect "the public policy of the state that usury is not to be tolerated." *Radford v. Cmty. Mortg. & Inv. Corp.*, 312 S.E. 2d 282, 285 (1984). And this Court held in another tribal lending case "that unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrowers … unquestionably shocks one's sense of right in view of Virginia law." *Hengle*, 19 F.4th at 352. There's nothing innocent about this.

Martorello cites two Supreme Court cases for his innocent mistake argument, but these merely reinforce the importance of a statute's text, context, and purpose. These cases both addressed whether an express statutory knowledge requirement extended to certain elements of the offense. *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019); *Liparota v. United States*, 471 U.S. 419, 420–21, 424–26 (1985). For example, *Rehaif*

examined a statute that applied to "[w]hoever knowingly violates" a provision making it "unlawful for any person … illegally or unlawfully in the United States, to possess in or affecting commerce, any firearm or ammunition." 139 S. Ct. at 2195. In holding that "knowingly violates" included knowing the element of being unlawfully in the country, the Court relied on "ordinary English grammar," along with the statute's "purposes" and context. *Rehaif,* 139 S. Ct. at 2196, 2198; *see also Liparota*, 471 U.S. at 424–26 (same). The Court distinguished between a mistake about this "collateral question of law" and a defendant's claim that he was "unaware of the existence of a statute proscribing his conduct." *Rehaif*, 139 S. Ct. at 2198–99. The Court found further support in the fact that a noncitizen brought to the country as a child and unaware of her immigration status could innocently possess a firearm. *Id.* at 2198. Similarly, in *Liparota*, the Court looked to the fact that punishing the use or possession of food stamps in a manner that inadvertently violated certain regulations would "criminalize a broad range of apparently innocent conduct." 471 U.S. at 426.

None of this applies here. There's no express knowledge requirement in these statutory provisions. The statutory language and context foreclose a mistake-of-law defense. Reading in such a requirement would be inconsistent with RICO's express mandate to interpret the statute broadly, not to mention its purpose. And punishing RICO enterprises in the business of lending at well above the rate a state has

determined usurious is hardly "criminaliz[ing] a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426.

2. Even if the statute required scienter as to the illegality of the predatory loans, the facts of this case amply satisfy that standard.

Finally, even if some awareness of the loans' illegality were required to distinguish between innocent and criminal conduct, the facts of this case are more than sufficient. Defendants act recklessly when they "consciously disregard a substantial risk." *Voisine v. United States*, 579 U.S. 686, 691 (2016). While Martorello protests that "assumption of the risk" does not distinguish "between innocent and criminal conduct," Opening Br. 49–50, "recklessness is morally culpable conduct" that "involve[es] a deliberate decision," *Counterman*, 600 U.S. at 79. For that reason, "the Model Penal Code ha[s] taken the position that a *mens rea* of recklessness should generally suffice to establish criminal liability." *Voisine*, 579 U.S. at 695.

There is ample undisputed evidence that Martorello "consciously disregard[ed] a substantial risk" that the loans were unlawful. *Id.* at 691. This standard "requires a consciousness of something far less than certainty or even probability." Wayne R. LaFave, *1 Substantive Criminal Law* § 5.4(f) (3d ed. 2023). Reviewing the repeated warnings Martorello had received about the dubious legality of his scheme, *see* supra at 5–8, the district court concluded that "Martorello deliberately took the risk that his guess about what law would apply might well be

wrong." JA2721. And the district court noted that this Court "held that Martorello previously has lied under oath about topics that are pertinent to the mistake of law defense." JA2722. Martorello's deliberate choice to operate in a "grey area" of legality despite cease-and-desist letters by state authorities and warnings by his attorneys and then lie about it, JA2719–2722, illustrates why his conduct is far from "innocent."

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,856 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

February 5, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system.

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