No. 24-2056

In the United States Court of Appeals for the Seventh Circuit

JOSHUA HARRIS and DONITA OLDS, on behalf of plaintiffs and the class members described herein,

Plaintiffs-Appellees,

v.

W6LS, INC., d/b/a WithU and WithU Loans, and CALIBER FINANCIAL SERVICES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:23-cv-16429.
The Honorable Lindsay C. Jenkins, Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-2056

Short Caption: Joshua Harris, et al. v. W6LS, Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☑ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.** Counsel of Record Information

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
W6LS, Inc., d/b/a WithU and WithU Loans, and Caliber Financial Services, Inc. both of which are wholly owned and owned and operated by the Otoe-Missouria Tribe of Indians a federally recognized Indian Tribe

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Armstrong Teasdale LLP; Manatt, Phelps & Phillips, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Andrew D. Campbell Date: 10/17/2024

Attorney's Printed Name: Andrew D. Campbell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Paul Croker Date: October 16, 2024

Attorney's Printed Name: Paul Croker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Jurisdictional Statement

I. The district court's jurisdiction.

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because Plaintiffs-Appellees, Joshua Harris and Donita Olds (collectively "Plaintiffs"), allege claims arising under federal law, specifically the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964 ("RICO") and the Electronic Funds Transfer Act, 15 U.S.C. § 1693, *et seq.* ("EFTA"). The district court had supplemental jurisdiction over remaining state law claims pursuant to 28 U.S.C. § 1367. Plaintiffs also invoked 28 U.S.C. § 1337 and the Class Action Fairness Act, 28 U.S.C. § 1332, but a class has not been certified and there were no class proceedings.[1]

II. This Court's jurisdiction.

On May 22, 2024, the clerk of the district court entered the Notification of Docket Entry (A-18) and the district court entered a Memorandum and Order on the docket in this action (A-1) (the "Order") denying Defendants' Motion to Compel Individual Arbitration (Dkt. No. 26) pursuant to the *forum non conveniens* doctrine, or, alternatively, the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*.[2]

---

[1] Although not at issue on appeal, Defendants maintain they are entitled to tribal sovereign immunity and that no arguments should be construed as a waiver of the right to enforce their tribal sovereign immunity.

[2] Material in the Required Short Appendix that is bound to this brief is cited as "A-__." Other record material is cited by docket number and internal page number as "Dkt. __ at __."

On June 12, 2024, Defendants timely filed their Notice of Appeal contemporaneously with the Docketing Statement.

This Court has jurisdiction over this appeal pursuant to 9 U.S.C. § 16(a)(1)(C). *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 739 (2023) (recognizing that Section 16(a) of the Federal Arbitration Act authorizes an interlocutory appeal from the denial of a motion to compel arbitration); *Koveleskie v. SBC Cap. Markets, Inc.*, 167 F.3d 361, 363 (7th Cir. 1999) (same).

Statement of Issues Presented for Review

Each of the following issues presented for review is subject to *de novo* review.

1. Whether the district court erred in denying Defendants' Motion to Compel Individual Arbitration when it is undisputed that the parties entered loan agreements that contain arbitration provisions covering Plaintiffs' claims.

2. Whether the district court erred in refusing to enforce the delegation provisions of the loan agreements and delegate to the arbitrator Plaintiffs' challenges to arbitration.

3. Whether the district court erred in applying the prospective waiver / effective vindication doctrine to the loan agreements despite the express preservation of federal law in the governing law provisions of the loan agreements.

Statement of the Case

I. The parties' Loan Agreements.

a. The parties.

Defendants are economic arms of, and wholly owned, managed, and controlled by, the Otoe-Missouria Tribe of Indians, a federally recognized Indian Tribe (the "Tribe"). (Dkt. 27-1 at ¶¶ 2, 6.) The Tribe's trust land is geographically located within the State of Oklahoma. (Dkt. 27-1 at ¶ 4.) Defendants are entities formed under the Tribe's law and are engaged in the Tribe's online lending business authorized under Tribal law. (Dkts. 7 at ¶¶ 9-10; 27-1 at ¶ 6.) The Tribe's law includes a Tribal Contract Code. (Dkt. 36-1 at ¶ 4.)

The Tribe created W6LS, Inc. ("W6LS"), for the express purpose of economic development and betterment of the Tribe to support the Tribe's ability to self-govern and obtain economic self-sufficiency. (Dkt. 7-1 at 5, 30-31.) Because of its critical role in supporting the Tribe's sovereignty, the Tribe carefully regulates W6LS, including through licensing and oversight by the Tribe's Consumer Finance Services Regulatory Commission in accordance with the Tribe's laws. (Dkt. 7-1 at 5, 30-31.)

In light of the loan terms authorized under Tribal Law, W6LS cautions borrowers before entering into any agreement that the borrowers first evaluate their ability to repay any loan from W6LS, and expressly advises borrowers to consider alternative forms of credit that are less expensive or more suitable for the borrower's financial needs. (Dkt. 7-1 at 5, 31.)

As a wholly-owned instrumentality of the Tribe, Defendant Caliber Financial Services, Inc., provides supporting services to Defendant W6LS's business operations. (Dkt. 7 at ¶ 21.)

Plaintiffs are residents of Illinois who each entered into a loan agreement over the internet with W6LS (Dkt. 7 at ¶¶ 7-8, 25-26.) Both Plaintiffs' loan agreements are attached to the First Amended Complaint. (Dkts. 7 at ¶¶ 25-29, 7-1 at 2, 26) (the "Loan Agreements.") As set forth in the Loan Agreements, Plaintiffs each entered and obtained loans under the Loan Agreements with Defendant W6LS (Dkt. 7-1 at 5-6, 30-31.)

b. The Loan Agreements.

On December 22, 2022, Plaintiff Donita Olds entered into a Loan Agreement with W6LS, as a condition to borrow $600. (Dkt. 7-1 at 26, Dkt. 27-2 at ¶ 6.)

On May 22, 2023, Plaintiff Joshua Harris entered into a Loan Agreement with W6LS, as a condition to borrow $600. (Dkt. 7-1 at 2, Dkt. 27-2 at ¶ 5.)[3]

Both Loan Agreements are substantively the same and contain capitalized, bold-type disclosures that W6LS: (i) is an arm of the Tribe; (ii) was formed and operated pursuant to the Tribe's law; (iii) is owned and operated by the Tribe; and

[3] The Court may take judicial notice that Plaintiff Harris served as the named plaintiff in at least four other lawsuits filed by Plaintiffs' counsel against other lenders. *See generally Harris v. Eagle Valley Ventures*, Case No. 1:23-cv-01114 (N.D. Ill.); *Harris v. WLCC Lending FHC*, Case No. 1:23-cv-03149 (N.D. Ill.); *Harris, et al. v. Credit Cube*, Case No. 1:23-cv-01153 (N.D. Ill.); *Harris, et al. v. FSST Mgmt. Servs.*, Case No. 1:22-cv-01063 (N.D. Ill.). *See also Opoka v. I.N.S.*, 94 F.3d 392, 394 (7th Cir. 1996) (authorizing judicial notice of proceedings in other courts within the federal judicial system).

(iv) was formed for the express purpose of economic development and betterment of the Tribe. (Dkt. 7-1 at 5-6, 30-31.) The disclosures further caution that W6LS, and the Tribe are immune from suit in any court except to the extent the immunity is waived under the limited immunity waiver contained in the Loan Agreements (which waives tribal sovereign immunity only as to the specified processes for dispute resolution and arbitration award enforcement):

> **PLEASE READ THIS IMPORTANT DISCLOSURE AND THE TERMS OF THIS AGREEMENT CAREFULLY BEFORE SIGNING.**
>
> **LENDER IS AN ARM OF THE TRIBE. IT IS AN ENTITY FORMED AND OPERATED PURSUANT TO TRIBAL LAW, IT IS OWNED AND OPERATED BY THE TRIBE, AND IT WAS FORMED FOR THE EXPRESS PURPOSE OF ECONOMIC DEVELOPMENT AND BETTERMENT OF THE TRIBE. BOTH THE LENDER AND THE TRIBE ARE IMMUNE FROM SUIT IN ANY COURT EXCEPT TO THE EXTENT THAT THE TRIBE, THROUGH ITS TRIBAL COUNCIL, EXPRESSLY AND UNEQUIVOCALLY WAIVES THAT IMMUNITY. THE LENDER, AS AN ARM OF THE TRIBE, IS ALSO IMMUNE FROM SUIT IN ANY COURT EXCEPT AS PROVIDED IN THE LIMITED IMMUNITY WAIVER CONTAINED HEREIN. THE LENDER IS REGULATED AND LICENSED BY THE TRIBE'S CONSUMER FINANCE SERVICES REGULATORY COMMISSION (THE "COMMISSION") IN ACCORDANCE WITH TRIBAL LAW. YOUR RIGHT TO SUBMIT A DISPUTE IS LIMITED TO THE DISPUTE RESOLUTION PROCESS SET FORTH IN THIS AGREEMENT. UNLESS YOU TIMELY EXERCISE YOUR RIGHT TO REJECT ARBITRATION IN ACCORDANCE WITH THE DISPUTE RESOLUTION PROCESS IN THIS AGREEMENT, ANY DISPUTE YOU HAVE RELATED TO THIS AGREEMENT WILL BE RESOLVED BY FINAL AND BINDING ARBITRATION.**

(*Id.*) (capitalization and bold in original.)

These prefatory sections conclude with a series of prominent disclosures that (1) the loans are made within the Tribe's jurisdiction, and subject to and governed by the Loan Agreements' defined "Applicable Law" (Tribal law and applicable federal law), (2) the Loan Agreements are not governed by the law of any state, and (3) Plaintiffs agree to the terms including the interest rate and dispute resolution process:

> **BEFORE SIGNING THIS AGREEMENT, PLEASE CAREFULLY READ ITS TERMS. YOUR SIGNATURE AND ACCEPTANCE OF THIS AGREEMENT WILL BE DEEMED AS PROOF THAT YOU ACCEPT ALL OF THE TERMS OF THIS AGREEMENT AND EXPRESSLY AGREE: (I) YOUR LOAN IS MADE WITHIN THE TRIBE'S JURISDICTION, IS SUBJECT TO AND GOVERNED BY APPLICABLE LAW; (II) THE LOAN AND THIS AGREEMENT ARE NOT GOVERNED BY THE LAW OF YOUR STATE OF RESIDENCE OR ANY OTHER STATE; (III) YOUR RESIDENT STATE LAW MAY HAVE INTEREST RATE LIMITS AND OTHER CONSUMER PROTECTION PROVISIONS THAT ARE INAPPLICABLE TO THE AGREEMENT, LENDER, AND YOUR LOAN; (IV) YOU HAVE READ THIS AGREEMENT; (V) YOU HAVE HAD THE OPPORTUNITY TO CONSULT WITH AN INDEPENDENT FINANCIAL COUNSELOR BEFORE ACCEPTING THIS AGREEMENT AND ACKNOWLEDGE THAT IT IS YOUR RESPONSIBILITY, NOT LENDER'S, TO EVALUATE YOUR FINANCIAL OPTIONS; (VI) YOU CONSENT TO ALL OF THE AGREEMENT'S TERMS, INCLUDING THE INTEREST RATE AND THE DISPUTE RESOLUTION PROCESS; (VII) YOU HAVE PROVIDED LENDER WITH THE MOST CURRENT AND ACCURATE EMPLOYMENT, CREDIT, INCOME, AND ASSET HISTORY REQUIRED FOR LENDER TO ASSESS YOUR ELIGIBILITY AND CREDITWORTHINESS; AND (VIII) YOU AFFIRMATIVELY ACKNOWLEDGE THAT YOU ARE ABLE TO REPAY THE LOAN ACCORDING TO THE TERMS OF THIS AGREEMENT.**

(*Id.*) (emphasis in original.)

The Loan Agreements also provide a dispute resolution process contained in paragraph 23 (the "Arbitration Provisions") and advise that, unless the Arbitration Provisions are timely rejected, all disputes will be resolved by arbitration. (*Id.*) Plaintiffs never opted out of or rejected the Arbitration Provisions in the Loan Agreements. (Dkt. 27-2 at ¶ 7.)

The Loan Agreements emphasize that Tribal law applies. Paragraph 24 states "You understand and agree that this Agreement is governed by Applicable Law. You and we agree that the transaction represented by this Agreement involves interstate commerce for all purposes." (Dkt. 7-1 at 23, 49.) The Loan Agreements define the Applicable Law as "Tribal law and applicable federal law." (Dkt. 7-1 at 4, 30.)[4]

c. The Loan Agreements' arbitration provisions.

The Loan Agreements contain provisions (the "Delegation Provisions") that expressly delegate to an arbitrator all disputes, claims, and controversies by broadly defining the "disputes" that are subject to arbitration:

> Any claim, dispute or controversy of any kind or nature between you and us about or involving your loan, your loan account, any prior loans or accounts you held with us (collectively "**loan account**"), your current loan agreement with us (including future amendments) or any prior loan agreement with us (all of which collectively are a "**Loan Agreement**") or our relationship is referred to as a "**Dispute**". Disputes include, for example, claims or disputes arising from or relating in any way to: the interpretation, applicability, validity, arbitrability, enforceability, formation or scope of any Loan Agreement or this Arbitration Agreement; transactions between you and us; any interest, charges, or fees assessed on your loan; any service(s) or

[4] Paragraph 24 of the Loan Agreements and the defined term of "Applicable Law" are collectively referred to as the "Governing Law Provisions."

> programs related to your loan; any communications related to your loan; and any collection or credit reporting of your loan. Disputes also include claims or disputes arising from or relating in any way to advertising and solicitations, or the application for, approval, or establishment of your loan. Disputes are subject to arbitration regardless of whether they are based on contract, tort, constitutional provision, statute, regulation, common law, equity or other source, and regardless of whether they seek legal, equitable and/or other remedies. All Disputes are subject to arbitration whether they arose in the past, may currently exist or may arise in the future. Arbitration will apply even if your loan is closed, sold or assigned; you pay us in full any outstanding debt you owe; or, to the maximum extent permitted by applicable bankruptcy law, you file for bankruptcy. If your loan is sold and/or assigned, we retain our right to elect arbitration of Disputes by you and you retain your right to elect arbitration of Disputes by us.

(Dkt. 7-1 at 18-19, 43-44.)

These provisions provide that the American Arbitration Association ("AAA") will administer the arbitration pursuant to AAA's Consumer Arbitration Rules. 7-1 at 20, 23, 45, 47.) Borrowers may choose to have any arbitration conducted within thirty miles of their homes. (Dkt. 7-1 at 22, 47.) And if the borrower prevails, W6LS must reimburse filing fees, reasonable attorneys' fees, and other costs of arbitration. (*Id.* at 20, 46.)

The Arbitration Provisions require arbitration not only with W6LS, but also its "agents, servicers, assigns, vendors and any third party" as well as its "affiliated companies, the Tribe, and each of its and their respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns." (Dkt. 7-1 at 18, 43.)

The Arbitration Provisions also contain a severability clause that provides that its provisions should "be interpreted to sustain its legality and enforceability" and if any provision "is determined to be unenforceable, then the arbitrator may sever and/or reform any such provision to make it enforceable." (Dkt. 7-1 at 23, 48.)

d. The specified arbitration procedure.

The Arbitration Provisions require individual arbitration and prohibit class arbitration. (Dkt. 7-1 at 19, 45.)

The arbitrator must apply the Loan Agreements' terms, including the Arbitration Provisions, and the Applicable Law. (*Id.* at 20, 23, 45, 47.) These procedures include that "[t]his Arbitration Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and the law applicable in arbitration is Applicable Law, as that term is defined in your Loan Agreement." (*Id.* at 19, 45.)

The Governing Law Provisions are further clarified as follows:

> As separately provided, the law applicable in arbitration is Applicable Law, which includes applicable federal law. This means that in arbitration you are entitled to invoke the same body of federal law that you would have been entitled to invoke in litigation. In other words, proceeding in arbitration gives you access to the exact same body of federal remedies available in litigation.

(Dkt. 7-1 at 19, 45.)

The procedure also includes a right to appeal pursuant to the AAA's Consumer Appellate Arbitration Policy. (Dkt. 7-1 at 22, 48.) An arbitration award may be enforced in the Northern District of Oklahoma or the state courts of Kay County, Oklahoma. (Dkt. 7-1 at 23, 48.)

II. Proceedings in the district court.

Despite the agreed-upon dispute resolution procedure, Plaintiffs filed their complaint in the district court (Dkt. 1), followed by the operative First Amended Complaint – Class Action (Dkt. 7), filed on behalf of a putative class of Illinois residents. The pleadings do not contain any express allegations regarding the enforceability of the Arbitration Provisions or the Delegation Provisions. (Dkt. 7.)

The First Amended Complaint seeks a declaration and injunction to prevent Defendants from taking any action to collect any amounts due under Plaintiffs' Loan Agreements. (Dkt. 7 at 12.) The First Amended Complaint alleges that the Loan Agreements' interest rates violate the Illinois Interest Act (815 ILCS 205/0.01, *et seq*.) and the Illinois Predatory Loan Prevention Act (815 ILCS 123/15-1-1, *et seq*.). It also alleges related counts under federal law, including RICO and EFTA. (Dkt. 7.)

On March 14, 2024, Defendants moved to compel individual arbitration pursuant to the *forum non conveniens* doctrine, or, alternatively, the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. (Dkts. 26 and 27, the "Motion to Compel Arbitration".)[5] The Motion to Compel Arbitration was supported by a memorandum and two declarations attesting to Defendants' relationship with the Tribe, and authenticating the Loan Agreements that were attached to the First Amended Complaint. (Dkts. 27-1, 27-2.)

[5] The doctrine of *forum non conveniens* is the preferred procedural mechanism in the Seventh Circuit for enforcing an arbitration provision. *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 701 (7th Cir. 2022).

The district court then entered an unopposed stay of discovery pending resolution of the Motion to Compel Arbitration. (Dkt. 32.)

On April 18, 2024, Plaintiffs responded to the Motion to Compel Arbitration ("Plaintiffs' Response"). (Dkt. 33.) Plaintiffs' Response did not present any evidence, and instead, argued that the Arbitration Provisions and Delegation Provisions were unenforceable as a matter of law under the effective vindication/prospective waiver doctrine (the "Effective Vindication Doctrine.") (*Id.*)[6] Plaintiffs also argued that the Arbitration Provisions and Delegation Provisions were substantively unconscionable because the Loan Agreements disclaimed all rights under state law pursuant to the Effective Vindication Doctrine. (*Id.*) Plaintiffs, however, did not argue any procedural unconscionability, nor did they challenge the process by which they entered the Loan Agreements and agreed to the provisions therein. (*Id.*)

On May 13, 2024, Defendants filed a reply in support of their arbitration motion demonstrating that: (1) the Effective Vindication Doctrine is inapplicable because it is intended to preserve rights under federal law, which the Loan Agreements expressly do; (2) the challenges to the Loan Agreements' Governing Law Provisions and interest rate terms were not a specific challenge to the Arbitration Provisions or Delegation Provisions and are, therefore, immaterial to the Motion to Compel Arbitration; and (3) applicable law did not support the

[6] As discussed at length below, in general terms the Effective Vindication Doctrine exists to prevent the waiver of federal substantive rights through arbitration agreements.

unconscionability challenge. (Dkt. 36.) The reply also attached a declaration authenticating the Tribe's Contract Code. (Dkt. 36 at 13 n.2, 36-1.)

On May 20, 2024, Plaintiffs filed Plaintiffs' Combined Request to (1) Respond to New Matter and (2) Strike Exhibit. (Dkt. 37.) The filing rehashed the arguments asserted in Plaintiffs' previously-filed opposition and argued that the Tribal Contract Code should not be considered because there was no evidence as to which, if any, of its terms are applicable. (*Id.*)

III. Disposition by the district court.

Two days later—after Plaintiffs filed the Combined Request, on May 22, 2024, and before Defendants had an opportunity to respond—the district court entered the Order denying the Motion to Compel Arbitration. (A-1.) The Order states that, "[t]he Court has reviewed Plaintiffs' proposed additional filing." (A-1 n.3.)

The Order found that "[i]t is undisputed that the parties entered into loan agreements that contain provisions requiring individual arbitration." (*Id.* at 3.) But then the Order enlarged the scope of the Effective Vindication Doctrine beyond prospective waivers of rights under federal law to preclude arbitration where a contract waives any rights under state law. (*Id.*, n.6.) The Order expressly stated that it was only considering Plaintiffs' challenges under the Effective Vindication Doctrine. (*Id.*)

IV. Notice of appeal.

Defendants filed their Notice of Appeal and Docketing Statement on June 12, 2024. (Dkts. 41 and 42.) The district court *sua sponte* stayed the case pending the appeal. (Dkt. 43.)

Summary of Argument

Under *de novo* review, the Court should reverse the denial of the Motion to Compel Arbitration and issue a mandate instructing the district court to stay the case and compel the parties to individual arbitration. It is undisputed that Plaintiffs agreed to individual arbitration of their claims and that they now refuse to arbitrate. The district court did not find otherwise. This Court's standard for compelling arbitration is therefore satisfied.

Plaintiffs attack the express and plainly applicable Arbitration Provisions using a novel and erroneous interpretation of the Effective Vindication Doctrine—an interpretation that is inconsistent with any holding of the Supreme Court or any federal appellate court. Plaintiffs' conception of the Effective Vindication Doctrine is incompatible with the Federal Arbitration Act ("FAA"). It is improper under the FAA to resolve choice-of-law disputes in lieu of compelling, and as a basis for denying, arbitration. It is even more improper to resolve challenges to arbitration based on the nationality of one of the parties or to exclude tribally owned businesses from the FAA's mandate that all arbitration agreements be treated on equal footing with other contracts.

Despite the parties' agreements to arbitrate, and settled principles of law governing arbitrations, the district court ruled that the Arbitration Provisions could

not be enforced. In doing so, the Order improperly encroached on matters—Illinois lending laws and choice-of-law issues—expressly delegated to and reserved for the arbitrator. And the district court did so despite no specific challenge to the Delegation Provisions of the Loan Agreements, and without argument that the Delegation Provisions themselves were unfair or unduly limited. Plaintiffs instead challenged enforcement of the Loan Agreements in their entirety based on Illinois law and public policy regarding interest rates. The Order erroneously ruled that Illinois public policy on interest rates defeated the express language of the Delegation Provisions.

The type of analysis the district court employed in rejecting the Delegation Provisions because of the Loan Agreements' separate Governing Law Provisions and interest rate provisions has been deemed reversible error by the Ninth Circuit and, more recently, by the Eleventh Circuit. *Brice v. Haynes Invs., LLC*, 13 F.4th 823, 828 (9th Cir. 2021), *reh'g en banc granted, opinion vacated sub nom. Brice v. Plain Green, LLC*, 35 F.4th 1219 (9th Cir. 2022); *Dunn v. Glob. Tr. Mgmt., LLC*, No. 21-10120, 2024 WL 4379966 (11th Cir. Oct. 3, 2024). Such analysis plainly misapplies binding Supreme Court precedent.

In addition to failing to delegate the Effective Vindication Doctrine challenge to the arbitrator, the district court further misapplied the law by extending the Effective Vindication Doctrine to preserve claims asserted under state law. In short, the Order effectively limits the enforceability of arbitration agreements to those that call for application of federal law and the law of the consumer's home state. If

upheld, the Order will impair interstate commerce by, among other things, invalidating any agreement that does not expressly preserve alleged rights under the law of the consumer's home state, irrespective of the transaction's nature, where the transaction occurs, or that the grounds relied on for invalidation have been clearly delegated to the arbitrator. Extending the Effective Vindication Doctrine to any contract containing an arbitration agreement and a choice-of-law clause invoking federal law or a particular state or Tribe's substantive law would invalidate all routine choice-of-law agreements, and have far-reaching consequences affecting parties' ability to contract for and pursue the benefits of arbitration.

The Effective Vindication Doctrine is not intended to regulate the application of state laws and choice-of-law contract provisions. Rather, the Effective Vindication Doctrine exists to limit enforcement of arbitration provisions that effectively waive federal statutory rights, because the FAA cannot preempt other federal laws. Such tension is not presented by state substantive laws, such as Illinois lending laws, over which the FAA clearly has preemptive force on the issue of arbitrability. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022) did not hold differently. Indeed, the Order's interpretation of *Viking River* contradicts this Court's subsequent analysis of *Viking River*. *See*, *e.g.*, *Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC*, 104 F.4th 978, 991 (7th Cir. 2024).

The Order ultimately undermines strong federal policy favoring enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). It did so by emphasizing a general hostility to arbitration agreements

utilized by tribally-owned businesses. But the FAA exists to put all arbitration agreements on equal footing. This includes federal policy authorizing parties to select the law applicable to the dispute being arbitrated.

Accordingly, this Court should hold that the district court erred in rejecting the delegation provisions and in finding that the Effective Vindication Doctrine preserves Plaintiffs' state law rights under the Loan Agreements. A mandate should issue: (1) directing the district court to compel individual arbitration; (2) rejecting Plaintiffs' Effective Vindication Doctrine challenge, or alternatively, delegating Plaintiffs' challenges to the arbitrator; and (3) staying the case pending arbitration.

Argument

I. Standard of Review

An order denying a motion to compel arbitration is reviewed *de novo*. *Hartford Accident & Indem. Co. v. Lin*, 97 F.4th 500, 508 (7th Cir. 2024). Motions under the *forum non conveniens* doctrine are reviewed for abuse of discretion. *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 701 (7th Cir. 2022). Under an abuse of discretion standard, legal conclusions are reviewed *de novo*. *Grubhub Inc. v. Relish Labs LLC*, 80 F.4th 835, 844 (7th Cir. 2023). Because there are no factual disputes at issue, *de novo* review is appropriate here for all issues presented.

II. The Order should be reversed because the parties' Loan Agreements require individual arbitration.

It is undisputed that Plaintiffs (1) voluntarily entered into the Loan Agreements with Defendant W6LS, the Tribe's wholly-owned entity, and that they benefitted from loans the Tribe funded, (2) agreed to the Tribe's law and that the loans were made within the Tribe's jurisdiction, and (3) were fully aware of the specified dispute resolution procedure. But they nevertheless seek to escape those contractual obligations—including the specified Arbitration Provisions, Delegation Provisions, and the Governing Law Provisions—and impose Illinois law on the Defendants. Because Plaintiffs do not challenge the existence of an agreement to arbitrate their claims, this Court's requisite factors for compelling arbitration under the FAA are all satisfied.

The FAA applies here because the Loan Agreements are between Illinois residents and entities of a Tribe geographically located within Oklahoma and,

therefore, involve interstate commerce. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (holding that the FAA broadly applies to any contract involving interstate commerce). Under the FAA, all written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. There is a "liberal" national policy favoring the enforcement of arbitration agreements. *AT&T Mobility LLC* , 563 U.S. at 339. "[C]ourts must place arbitration agreements on an equal footing with other contracts…and enforce them according to their terms…." *Id.* "[A]ny doubt concerning the scope of the arbitration clause is resolved in favor of arbitration as a matter of federal law." *Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1032 (7th Cir. 2012).

"A court must enforce an arbitration clause where (1) there is a valid agreement to arbitrate, (2) the claims fall within the scope of the agreement, and (3) the opposing party refused to arbitrate." *Rock Hemp Corp.*, 51 F.4th at 702.

The district court correctly held here that that elements of the *Rock Hemp Corp.* standard are satisfied because it found that: (1) it is "undisputed that the parties entered into loan agreements that contain provisions requiring individual arbitration"; (2) the Loan Agreements cover the claims in the First Amended Complaint; and (3) Plaintiffs refuse to arbitrate absent an order compelling them to do so. (A-3.) The district court simply failed to follow this Court's standard.

Accordingly, the Order should be reversed and a mandate should issue with instructions that the district court compel individual arbitration and stay the case pending arbitration.

III. The Order should be reversed because the district court failed to enforce the parties' agreed upon Delegation Provisions.

The district court also erred because, pursuant to the Delegation Provisions, the questions of validity, arbitrability, and enforceability—including the Effective Vindication Doctrine analysis—are for the arbitrator. Not only did the district court wrongly decline to enforce the Delegation Provisions, but it also addressed the merits of Plaintiff's Effective Vindication Doctrine challenge, which plainly falls within the broad scope of issues contractually delegated to the arbitrator.

Parties may agree to arbitrate threshold issues including "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010). "[I]f there is a contract, then an arbitration clause may delegate all other issues, including defenses, to the arbitrator…." *K.F.C. v. Snap Inc.*, 29 F.4th 835, 837 (7th Cir. 2022).

A court may not override an agreed-to delegation provision "even if the court thinks a party's claim on the merits is frivolous." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019). Indeed, when parties to a contract have expressed with "clear and unmistakable evidence" their intent to delegate a "gateway issue," a court may not decide it. *Id.* (internal quotations omitted).

A. The Loan Agreements contain clear and unmistakable delegation clauses.

The Loan Agreements here clearly and unmistakably delegate all questions of arbitrability, validity, and enforceability to the arbitrator. They do so in several ways.

First, the Loan Agreements expressly define "Disputes" that must be arbitrated to include "claims or disputes arising from or relating in any way to: the interpretation, applicability, *validity, arbitrability*, *enforceability,* formation or *scope of* any Loan Agreement or *this Arbitration Agreement*…." (Dkt. 7-1 at 18, 43-44; emphasis added.) The Supreme Court has held that nearly identical language demonstrates a clear and unmistakable intent to delegate. *Rent-A-Center, W., Inc.,* 561 U.S. at 68-69 (enforcing delegation language that the arbitration "shall have exclusive authority to resolve any dispute relating to the … enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable"). Plaintiffs never argued, and the district court never found, that this language was not a clear and unmistakable delegation to the arbitrator. Nonetheless, the district court did not abide by the clause or the controlling authority.

Second, the Loan Agreements delegate the issue of arbitrability to the arbitrator by incorporating AAA's rules and procedures. (*Id.* at 21-22, 47.) District courts within the Seventh Circuit and all other federal appellate courts agree that incorporating AAA rules into a contract clearly and unmistakably delegates gateway matters to the arbitrator. *See Sha-Poppin Gourmet Popcorn LLC v.*

JPMorgan Chase Bank, N.A., 553 F. Supp. 3d 452, 458 (N.D. Ill. 2021) (observing that, although the Seventh Circuit has not addressed the issue, every other federal appellate circuit has found that incorporation of AAA' rules clearly and unmistakably demonstrates intent to delegate gateway matters). But the district court failed to follow this authority.

Third, AAA's rules and procedures provide for delegating validity and arbitrability challenges to the arbitrator. (Dkts. 27 and 36, at 10.) *See also* Rule 14(a), AAA, Consumer Arbitration Rules, *available at* https://adr.org/consumer (last visited on October 14, 2024). Specifically, Rule 14(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id.* Thus, arbitrators possess the authority to rule upon all challenges to their jurisdiction and the enforceability and arbitrability of any claim.

As shown, the Loan Agreements unquestionably delegate enforceability, validity, and arbitrability challenges to the arbitrator—expressly and by incorporating AAA's rules and procedures. This was undisputed below. The district court should have compelled arbitration upon finding the existence of an agreement to arbitrate, with the enforceability of that agreement to be determined by the arbitrator, not the district court.

B. Plaintiffs never challenged the Delegation Provisions.

There are two types of validity challenges to an arbitration provision under FAA § 2: (1) a challenge specifically to the validity of an agreement to arbitrate, and

(2) a challenge to the contract as a whole, including a challenge that one provision renders the whole contract invalid. *Rent-A-Ctr., W., Inc.*, 561 U.S. at 70.

The court may consider only the first type of challenge—whether an arbitration agreement is enforceable. Challenges to the agreement as a whole, however, are for the arbitrator. *Id.; see also*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (compelling arbitration despite state usury law claims because "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (holding that the FAA does not permit courts to rule on challenges to the contract as a whole because doing so obstructs the benefits of arbitration).

The procedure for challenging a delegation clause is the same. "[U]nless [the party opposing arbitration] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Ctr., W., Inc.,* 561 U.S. at 72. Because Plaintiffs did not specifically challenge the Delegation Provisions, five decades of Supreme Court precedent requires that the Delegation Provisions be respected and all challenges to the enforcement, validity, and arbitrability be delegated to the arbitrator for determination. The district court erred in failing to do so.

i. A public policy challenge to the contract is not a challenge to the Delegation or Arbitration Provisions.

Instead of challenging the Delegation Provisions, Plaintiffs challenged the Loan Agreements in their entirety. They did so by arguing that the interest rates exceeded Illinois laws and the Governing Law Provisions selected federal and Tribal law. Those provisions of the Loan Agreements are not part of, or relevant to, application of the Delegation Provisions. As the Supreme Court has made clear, enforceability challenges to the contract premised on state public policy regarding usurious interest rates are "irrelevant" because they attack the agreement as a whole. *Buckeye*, 546 U.S. at 446. Such attacks do not challenge specifically the Arbitration or Delegation Provisions. *Id.*

Before and after *Buckeye,* this Court similarly held that challenges to a contract as a whole are insufficient as challenges to delegation provisions. For example, in *Harter v. Iowa Grain Co.,* this Court held that the legality of the contracts was arbitrable when there was no claim that the "arbitration provisions *themselves* were the product of fraud, inadequate consideration or the like." 220 F.3d 544, 550 (7th Cir. 2000) (emphasis in original). Attacking the legality of the contract as a whole is insufficient. *Id. Accord Rock Hemp Corp.*, 51 F.4th at 704 (holding that alleged fraudulent inducement as to the contract was for arbitrator because it was not a challenge specific to the arbitration provision); *Parkland Env't Grp., Inc. v. Laborers' Int'l Union of N. Am.*, 390 F. App'x 574, 576 (7th Cir. 2010) (rejecting a fraud in the inducement challenge to arbitration that was "not particularized to the arbitration clause").

As this Court observed, "[t]he holding of *Buckeye* is that a challenge to the validity (as opposed to the existence) of a contract always goes to the arbitrator, no matter how states characterize their views about enforceability." *K.F.C.*, 29 F.4th at 838. An argument that a contract violates Illinois public policy "lays out a defense to enforcement of the agreement" and "arguments about the validity of a whole agreement go to the arbitrator." *Id.* Thus, whether a contract is enforceable "is the kind of issue that *Prima Paint*, *Buckeye*, and *Rent–A–Center* put squarely in the arbitrator's box." *Janiga v. Questar Cap. Corp.*, 615 F.3d 735, 742 (7th Cir. 2010).

Plaintiffs never challenged the validity of the Arbitration Provisions or the Delegation Provisions within the Loan Agreements and never denied that they agreed to those provisions. They only argued that the Loan Agreements' separate interest rate and Governing Law Provisions were contrary to Illinois public policy reflected in the Illinois consumer lending laws on which they base some of the counts in their Complaint. (Dkt. 33 at 2-3, 6, 11.) Those purported challenges are irrelevant to the issues of delegation and arbitration, go to the merits of Plaintiffs' claims under Illinois law, and are issues "squarely in the arbitrator's box." *Janiga*, 615 F.3d at 742.

ii. Plaintiffs' challenges do not concern delegation.

The district court erred in ruling that the "delegation clause must fall" for the same reasons as Plaintiffs "challenge to the arbitration agreement as a whole," *i.e.* that the interest rate and Governing Law Provisions are contrary to public policy. (A-4-5.)

This analysis is flawed because there is no stand-alone arbitration agreement. The Arbitration Provisions and Delegation Provisions are both within the Loan Agreements. Plaintiffs' purported challenges to the Delegation Provisions were in fact challenges to the Loan Agreements in their entirety. They were not challenges particularized to the Arbitration Provisions or the Delegation Provisions.

The district court's methodology is inconsistent with the Supreme Court's holding in *Buckeye* requiring a specific challenge to either the arbitration or delegation provision itself. 546 U.S. at 449. Plaintiffs did not challenge the Arbitration Provisions and Delegation Provisions with any particularized arguments. Rather, Plaintiffs merely argued that the district court (instead of the arbitrator) could resolve the enforceability challenges under the Effective Vindication Doctrine because the Loan Agreements' Governing Law Provisions call for applying the Tribe's law and federal law, not Illinois consumer lending laws on which the merits of Plaintiffs' claims are based. (Dkt. 33 at 11.) This purported challenge to delegation and arbitration based on the alleged invalidity of the Loan Agreements' substantive provisions is precisely the type of challenge rejected in *Buckeye*. 546 U.S. at 446, 449.

Consequently, the district court should not have assessed the validity of the Arbitration Provisions or the Delegation Provisions based on Plaintiffs' arguments challenging the Loan Agreements as a whole. Yet, that is precisely what the Order did.

The district court therefore erred in finding that Plaintiffs adequately challenged delegation and wrongly resolved Plaintiffs' challenges to enforceability and arbitrability.

C. The Delegation Provisions are enforceable.

In addition to Plaintiffs' failure to specifically challenge them, the Delegation Provisions are enforceable. The Governing Law Provisions in the Loan Agreements do not preclude Plaintiffs from pursuing, or the arbitrator from considering, any challenges to the Loan Agreements and arbitrability consistent with Rule 14 of AAA's Consumer Arbitration Rules. In an arbitration, Plaintiffs may invoke Illinois law, challenge the applicability of the Tribe's law, or argue against the enforceability of the Arbitration or Delegation Provisions. *See Janiga*, 615 F.3d at 744 ("*Prima Paint* and *Buckeye* do not banish these arguments; they simply assign the responsibility for evaluating them to an arbitrator").

i. The arbitrator's ability to arbitrate is not limited.

The district court never identified any issue that an arbitrator is precluded from addressing under the Loan Agreements' Delegation Provisions. The Delegation Provisions delegate all "claims or disputes arising from or relating in any way to: the interpretation, applicability, validity, arbitrability, enforceability, formation or scope of any Loan Agreement or this Arbitration Agreement," and "Disputes are subject to arbitration regardless of whether they are based on contract, tort, constitutional provision, statute, regulation, common law, equity or other source, and regardless of whether they seek legal, equitable and/or other remedies." (Dkt. 7-

1 at 18, 43-44.) All disputes about any of these issues—regardless of their source in law—are subject to arbitration.

The Loan Agreements' Governing Law Provisions are immaterial to delegation. They do not limit issues to be decided by the arbitrator to those arising under the Tribe's law or applicable federal law. To the contrary, consistent with the Delegation Provisions, Plaintiffs may assert their state law claims in their individual arbitration demands and the arbitrator must resolve those claims, including any related enforceability issues. (*Id.*)

ii. The arbitrator is empowered to resolve governing law disputes.

While the Arbitration Provisions invoke the Loan Agreements' Governing Law Provisions (which include the Tribe's law and applicable federal law), they also direct the arbitrator to apply "the terms of the Loan Agreement and this Arbitration Agreement." (Dkt. 7-1 at 21-22, 47.) That necessarily includes the incorporation of AAA's Consumer Arbitration Rules including Rule 14 and all the powers it reserves for the arbitrator. Thus, the Arbitration Provisions authorize the arbitrators to hear and rule upon all challenges to arbitration regardless of their source of law.

The Loan Agreements' broad and unrestricting language directing the arbitrator to apply the Governing Law Provisions and the terms of the Loan Agreements further confirms that the issues to be arbitrated and the powers of the arbitrator are not limited by the Governing Law Provisions, any more than those Governing Law Provisions would limit a judge's authority to decide the issues raised.

Here, the district court disregarded its duty to harmonize the provisions of the Arbitration Provisions to avoid creating inconsistencies, and instead read restrictions into the Governing Law Provisions that do not exist and improperly delved into the merits of Plaintiffs' claims under Illinois law. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995). Invoking substantive law does not limit application of separately selected procedural rules. *Id.* For example, an arbitration agreement selecting New York law and the rules of the National Association of Security Dealers should not be interpreted to include New York procedural rules limiting the powers of arbitrators. *Id.* One is substantive and the other procedural and neither "intrudes upon the other." *Id.*

Here, this means that the Governing Law Provisions of the Loan Agreements do not supersede or restrict the incorporation of AAA's rules and the powers Rule 14 reserves to the arbitrator. The Loan Agreements preserve Plaintiffs' opportunity to challenge the Governing Law Provisions during the arbitration and the arbitrator's ability to decide such challenges, while also preserving Plaintiffs' opportunity to assert potential claims arising under other sources of law.

iii. The possibility that the arbitrator may enforce the Governing Law Provisions is irrelevant.

At the outset, the Supreme Court has explained that the FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of . . . [the contract's] provisions…." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53–54 (2015). Parties may "choose to have portions of their contract governed by the law of Tibet" or even "the law of pre-revolutionary Russia…." *Id.*

A choice of law clause does not displace federal arbitration law. *See Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019) (holding that state contract principles may be preempted by the FAA); *Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd.*, 432 F. Supp 2d 1305, 1312 (S.D. Fla, 2006) ("A number of courts . . . have also concluded that federal law governs the question of arbitrability regardless of choice-of-law and arbitration clauses referencing foreign law").

Courts have compelled arbitration despite objections to the contract's choice-of-law clause. The Supreme Court rejected a challenge to arbitration premised on a choice-of-law clause selecting Japanese law, holding that this issue "…must be decided in the first instance by the arbitrator…." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995). "[M]ere speculation that the foreign arbitrators might apply Japanese law" potentially resulting in lessened liability under a federal statute, is not a basis for avoiding arbitration. *Id.*

Likewise, in *Johnson v. Opportunity Fin., LLC*, the plaintiff opposed arbitration by arguing that the choice-of-law provision selecting "federal law and the laws of the State of Utah" constituted an impermissible prospective waiver of the plaintiff's federal RICO claim premised on an alleged unlawful debt. 2023 WL 2636712, at **2, 5 (E.D. Va. Mar. 24, 2023). The plaintiff argued that because Utah law contains no restriction on usury rates, the plaintiff would lose on the merits in an arbitration. *Id.* The court, however, observed that the plaintiff could pursue the RICO claim during arbitration: "a plaintiff's chance of success plays no role in the analysis deciding whether arbitration must be had" and it would be premature for

the court to decide the potential of applying Utah law. *Id.* at *6. *Accord Broussard v. FinWise Bank, Inc.*, No. SA-21-CV-01238-OLG, 2022 WL 2057488, at *4 (W.D. Tex. May 12, 2022).

Here, Plaintiffs allege claims under federal law, and the Governing Law provisions preserve rights under federal law. There is no reason here to speculate about how an arbitrator might resolve choice-of-law disputes. Plaintiffs are not precluded from asserting those claims in arbitration. Neither the district court nor Plaintiffs have explained why their federal claims cannot be arbitrated. Regardless, Plaintiffs have not shown how they are precluded from pursuing their state law claims in arbitration. Under these clear authorities, Plaintiffs' speculation about how the arbitrator might resolve any choice-of-law dispute about Tribal law versus Illinois law is not a basis for denying arbitration.

The Order here does not identify any arguments that an arbitrator would be unable to consider and decide. The Loan Agreements delegated Plaintiffs' challenges to enforceability to the arbitrator, and the Court should enforce those Delegation Provisions.

D. The FAA does not impose a more stringent standard for tribally-owned businesses.

Plaintiffs advocated, and the district court accepted, a different analysis for enforceability of a delegation clause that directly conflicts with *Rent-A-Ctr*. The Order skipped analyzing the Delegation Provisions and instead relied on Plaintiffs' challenges to the Loan Agreements as whole by reasoning that this Court has not addressed the enforceability of delegation clauses specifically in loan agreements

with tribally-owned companies. (A-4.) But there is no industry-specific analysis for a delegation challenge. To the contrary, the Supreme Court has made clear that the type of contract "makes no difference" and the delegation analysis does not depend on "the substance of the remainder of the contract…." *Rent-A-Ctr., W., Inc.*, 561 U.S. at 72. The adequacy of a delegation challenge cannot depend on the subject matter of the contract or the parties thereto.

Nor does the FAA authorize industry-specific analysis or distinguish between consumer and commercial contexts. The FAA's savings clause directs that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law." 9 U.S.C. § 2. This is an "equal-treatment" rule that permits invalidation of arbitration agreements by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 507 (2018) (internal quotations omitted). Parties may oppose arbitration agreements by demonstrating that they were extracted through "fraud or duress or in some other unconscionable way that would render *any* contract unenforceable." *Id.* at 508 (emphasis in original). But the FAA prohibits any rule that "places arbitration agreements in a class apart from any contract, and singularly limits their validity." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (internal quotation omitted). There cannot be an industry-specific standard.

The district court ignored this clear Supreme Court precedent by establishing a prejudicial and unsupported standard created only for, and to the detriment of, tribal businesses. (A-4.)[7]

Because it directly contradicts *Rent-A-Ctr.*, the mistaken approach the district court applied has been rejected by the Ninth Circuit in *Brice*, and, more recently, by the Eleventh Circuit in *Dunn*. In both cases, the courts reversed district courts' orders—similar to the Order here—and enforced delegation provisions contained in loan agreements entered into by consumer borrowers and tribal businesses.

i. The Ninth Circuit's approach in *Brice v. Haynes Invs., LLC* is highly relevant and persuasive here.

In *Brice,* the Ninth Circuit rebuked the flawed reasoning prevalent in cases involving tribal contracts that allowed a borrower to "merely mention" a challenge to the delegation provision and then analyze the agreement's enforceability in its entirety. 13 F.4th at 828. It is wrong (as, the Ninth Circuit observed, some appellate courts have done) to analyze the issue as follows: "the arbitration agreement includes a delegation provision, but the entire arbitration agreement is unenforceable, thus, the delegation provision is too." *Id.* at 835-36.

[7] The Order's hostility towards tribal economic development also cannot be reconciled with explicit federal policy that the "United States has an obligation to guard and preserve the sovereignty of Indian Tribes in order to foster strong Tribal governments, Indian self-determination, and economic self-sufficiency among Indian Tribes" and to "promote economic self-sufficiency and political self-determination for Indian Tribes and members of Indian Tribes" by encouraging tribal business development including facilitating tribal economic ventures. 25 U.S.C. § 4301.

Instead, "[o]ur focus is not on what would happen in arbitration but on who should decide what happens in arbitration and whether having an arbitrator decide enforceability prevents a plaintiff from arguing that it should not be compelled to arbitrate." *Id.* The relevant inquiry is whether the delegation provision itself is enforceable or whether it restricts the arbitrator in some unconscionable way. *Id.* at 827, 836.

On this point, *Brice* cited the Supreme Court's holding in *Rent-A-Ctr.* *Id.* (citing 561 U.S. at 72-74). There, the Supreme Court held that, to challenge the delegation provision based on the contract's fee-splitting arrangement and discovery limitations, the plaintiff needed to argue that "these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable…." 561 U.S. at 74 (emphasis in original). For example, the plaintiff in *Rent-A-Ctr.*, needed to show that the arbitration procedure's limits on the number of depositions would make it unconscionable to arbitrate the issue of enforceability as required by the delegation provision. *Id.* The plaintiff did not make that showing. Instead, the plaintiff argued that those provisions "rendered the *entire* Agreement invalid." *Id.* The plaintiff therefore failed to challenge the delegation clause. *Id.*

Under *Rent-A-Ctr.*, the key issue for a court in analyzing enforceability of a delegation clause is whether the plaintiff has the opportunity to pursue plaintiff's challenges in arbitration. *Brice*, 13 F.4th at 830-31. Instructing an arbitrator to apply the law of a tribe, federal law, *and* the terms of an arbitration agreement, which designates all disputes as arbitrable regardless of their source in law, "does

not limit the arbitrator to considering only tribal law." *Id.* The selection of tribal law in the governing law clause of an arbitration agreement "do[es] not defeat its plainly stated mandate that the arbitrator decide[s] enforceability issues from whatever source they arise." *Id.* The possibility that an arbitrator will uphold the choice-of-law clause and apply tribal law in deciding an issue does not prevent the borrower from pursuing challenges in arbitration that arise under some other source of law. *Id.*

The district court's rejection of *Brice* by merely speculating about the meaning behind the post-opinion procedural developments was wrong. *Brice* correctly applied binding Supreme Court precedent under *Rent-A-Ctr.* And the district court did not.

ii. The Eleventh Circuit's similar approach in *Dunn v. Glob. Tr. Mgmt., LLC* should be followed by this Court.

Just recently, in *Dunn*, the Eleventh Circuit likewise held that loan agreements with a tribal business contained enforceable delegation provisions by making subject to arbitration "any issue concerning the validity, enforceability, or scope of this Account or the Arbitration Agreement." 2024 WL 4379966, at *8. In so finding, the Eleventh Circuit rejected the argument that the selection of tribal law in the agreements' choice-of-law clauses served as a legitimate basis for refusing to enforce the delegation provisions. *Id.* at *11-12. The agreements also invoked—rather than precluded—"applicable federal law," and invoking both tribal law and the FAA cannot be construed as restricting the arbitrator's choice-of-law analysis. *Id.* at *13.

Requiring an arbitrator to apply the terms of the arbitration agreements and the tribe's law does "not inhibit the arbitrator's ability to consider Plaintiffs' argument that their arbitration agreements are unenforceable, or to decide what law applies to that argument." *Id.* at *11. "[I[t neither prevents an arbitrator from considering arguments that are expressly permitted under the arbitration agreements—such as Plaintiffs' argument that their arbitration agreements are unenforceable—nor prevents the arbitrator from using other rules and procedures for determining what law to apply, if necessary." *Id.*

Like *Brice*, the Eleventh Circuit distinguished contrary analysis, including the Fourth Circuit's holding in *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021), where the arbitration was to be conducted subject only to tribal law and to the exclusion of federal law. Unlike *Hengle,* the agreements in *Dunn*—like those here—provided that the arbitration would proceed in accordance with *both* the tribe's law and the FAA. *Id.*

The Eleventh Circuit in *Dunn* further held that the plaintiffs' challenges premised on the Effective Vindication Doctrine and the choice-of-law clause's selection of tribal law were challenges to the loan agreements "as a whole." *Id.* at *12-14. Relying on *Rent-A-Ctr*, the court held those challenges were "an issue beyond the scope of the enforceability of the delegation provisions." *Id.* at *12. Rather, the delegation provisions are severable from the remainder of the agreements. *Id.* "[T]he issues of whether the choice-of-law provisions (1) are valid and enforceable, (2) can and do apply to the issue of arbitrability, and (3) render the

arbitration agreements unenforceable do not pertain to the enforceability of the delegation provisions." *Id.* at *13. "Instead, those disputes pertain to the "the validity, enforceability, [and] scope of" the choice-of-law provisions and their application to the arbitration agreements as a whole, and have been delegated to the arbitrator." *Id.*

To hold otherwise would require a finding that a choice-of-law provision was valid and enforceable at the outset of any analysis regarding compelling arbitration. *Id.* "But how an arbitrator will ultimately determine what law to apply is irrelevant…What is dispositive at this stage of the proceedings is that the parties have agreed to delegate all questions pertaining to the enforceability of their arbitration agreements, including the choice-of-law provisions, to an arbitrator." *Id.* at *14.

The analysis in *Brice* and *Dunn* is consistent with this Court's application of *Buckeye* for analyzing arbitration provisions specifically, as opposed to the agreement as a whole. Moreover, *Rent-A-Ctr* (relied upon by *Brice* and *Dunn*) is binding. To challenge the Delegation Provisions, Plaintiffs needed to establish why the Delegation Provisions themselves are unenforceable. Plaintiffs never challenged the Delegation Provisions, and the Order lacks any explanation as to how they are unenforceable. Consequently, the district court erred in failing to delegate Plaintiffs' challenges to the arbitrator and the Order should be reversed.

IV. The Order misapplied the Effective Vindication Doctrine by concluding that it extends beyond preserving federal substantive rights.

In addition to failing to enforce the Delegation Provisions, the district court also misapplied the Effective Vindication Doctrine. The doctrine is intended to preserve federal rights, not state law rights. It has no application here because the Loan Agreements did not require Plaintiffs to waive federal statutory rights—indeed, those rights are expressly preserved. The Order's erroneous expansion of the Effective Vindication Doctrine potentially invalidates any arbitration agreement that contains a choice-of-law provision limiting the application of another sovereign's law.

A. The Loan Agreements preserve federal statutory rights.

The district court's interpretation of the Effective Vindication Doctrine is erroneous. The doctrine is a judge-created exception to the FAA. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013). It arose from dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 n.19 (1985): "[w]e merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *See also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (discussing the exception's origins as dictum). But the doctrine's application requires caution so as to not undermine the liberal policy favoring arbitration agreements. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) (invalidating an arbitration agreement based on

speculative effective vindication arguments would undermine the liberal policy favoring arbitration).

i. The doctrine is intended to preserve federal substantive rights.

The Effective Vindication Doctrine balances the FAA with other federal laws over which the FAA has no preemptive force. It is inapplicable here because the Loan Agreements expressly preserve Plaintiffs' federal rights and federal law preempts state law that might otherwise stand as an obstacle to arbitration. At the outset, the Loan Agreements define the applicable law to include "Tribal Law and applicable federal law…." (Dkt. 7-1 at 4, 30.) The Arbitration Provisions reinforce—not preclude—the applicability of federal law in an arbitration, clarifying that "you are entitled to invoke the same body of federal law that you would have been entitled to invoke in litigation. In other words, proceeding in arbitration gives you access to the exact same body of federal remedies available in litigation." (*Id.* at 19, 45.) Because the Loan Agreements do not disclaim or hinder the application of federal law, the Effective Vindication Doctrine is inapplicable.

As explained in Justice Kagan's dissent in *Italian Colors*:

> *AT&T Mobility* involved a *state* law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other,

> and the effective-vindication rule serves as a way to reconcile any tension between them.

570 U.S. at 252 (Kagan, J., dissenting; emphasis in original). The doctrine "reconciles the [FAA] with all the rest of federal law…." *Id.* at 240.

The district court rejected Justice Kagan's dissent noting that her view "did not carry the day" and suggesting that a dissent is a poor source for authority. (A-7, 10.) The portion of the dissent quoted above and that matters here, however, was not a point of contention between the dissent and majority opinions. The divergence between those opinions concerned whether the expense of arbitration prevented effective vindication of federal antitrust laws, not whether the Effective Vindication Doctrine should apply to state law. *Id.* at 235. Justice Kagan dissented because the majority "disparag[ed]" the doctrine and, instead of applying it, compelled arbitration. *Id.* at 246. The language quoted above was Justice Kagan's reasoning for why *AT&T Mobility* had not discussed the Effective Vindication Doctrine. Nothing in the majority opinion suggests that the majority rejected Justice Kagan's description of the origins and purpose of the Effective Vindication Doctrine.

Indeed, the Ninth Circuit observed that "[t]he *Italian Colors* majority would agree with Justice Kagan's dissent on this point. The central premise of the Supremacy Clause is that federal law is superior to state law." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). The Ninth Circuit relied on Justice Kagan's dissent to hold that "[t]he 'effective vindication' exception, which permits the invalidation of an arbitration agreement when arbitration would

prevent the 'effective vindication' of a federal statute, does not extend to state statutes." *Id.*

ii. The majority of federal courts agree that the doctrine is limited to preserving federal substantive rights.

Subsequent decisions have adopted the same analysis as Justice Kagan and the Ninth Circuit in *Ferguson* to limit the Effective Vindication Doctrine to prospective waivers of federal statutory rights. "Recent Supreme Court cases confirm that there is absolutely no rule that prevents arbitration when a person cannot effectively vindicate his or her state statutory rights" and Justice Kagan "flatly rejected the possibility that the effective vindication rule applies to state statutory rights." *Torres v. CleanNet, U.S.A., Inc.*, 90 F. Supp. 3d 369, 377 (E.D. Pa. 2015).

Contrary to the Order's skepticism, Justice Kagan's dissent inspired a consensus in the federal courts that the Effective Vindication Doctrine is limited to preserving federal statutory rights. (A-9.) *See, e.g., Ham v. CarMax Auto Superstores, Inc.*, 2024 WL 2093655, at *6 (D.N.M. May 9, 2024) ("although the Tenth Circuit's position is unknown, other courts have held that the exception 'does not extend to state statutes'") (quoting *Ferguson*); *Walton v. Uprova Credit LLC*, 2024 WL 1241836, at *9 (S.D. Ind. Mar. 21, 2024) ("Justice Kagan…affirmed that the rule has no bearing on the vindication of state law"); *Butler v. ATS Inc.*, 2021 WL 1382378, at *8 (D. Minn. Apr. 13, 2021) (quoting Justice Kagan's dissent to rule that "[t]he whole point of the effective-vindication doctrine is to identify the point at which one federal statute (the FAA) must give way to another federal statute");

Billie v. Coverall N. Am., Inc., 444 F. Supp. 3d 332, 350 (D. Conn. 2020) (quoting Justice Kagan's dissent to rule that "[t]he doctrine, at its core, requires application of the FAA unless the FAA's mandate has been overridden by a contrary congressional command…Because state law simply cannot demonstrate a federal congressional command, plaintiffs' claims cannot rely on *Green Tree's* 'effective vindication' doctrine") (internal quotations omitted); *Keyes v. Ayco Co., L.P.*, 2018 WL 6674292, at *6 (N.D.N.Y. Dec. 19, 2018) (citing Justice Kagan's dissent to rule that Plaintiff does not cite to any authority, nor is the Court aware of any, declining to enforce an arbitration clause as a matter of federal law on the ground that the arbitral rules burden the plaintiff's ability to vindicate his or her state-law claims") (internal quotation omitted); *Andresen v. IntePros Fed., Inc.*, 240 F. Supp. 3d 143, 155 (D.D.C. 2017) (citing Justice Kagan's dissent and finding that "the Supreme Court impliedly clarified that effective vindication doctrine does not apply where state law is concerned").

In short, the doctrine exists to resolve conflicts between the FAA and another federal statute. Because no other federal laws are implicated by the Governing Law Provision or Delegation Provision in the Loan Agreements or by compelling arbitration here, the Effective Vindication Doctrine has no application. Ordinary federal preemption resolves any conflicts between the FAA and state laws, just as it would were the claim pending in court.

iii. Plaintiffs' cited authorities support Defendants' interpretation.

Even the authorities Plaintiffs cited in the district court discussed the doctrine as preserving only federal statutory rights. *See e.g., Hengle*, 19 F.4th at 338 (finding a prospective waiver because the choice-of-law and arbitration provisions "require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law"); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 242 (3d Cir. 2020) ("the question is whether a party can bring and effectively pursue the federal claim"); *Smith v. Western Sky Fin., LLC,* 168 F. Supp. 3d 778, 784 (E.D. Pa. 2016) ("The arbitration agreement before me is just the latest iteration employed by Western Sky and its affiliates in seeking to avoid the reach of federal law"); *Ryan v. Delbert Servs. Corp.*, No. 5:15-CV-05044, 2016 WL 4702352, at *5 (E.D. Pa. Sept. 8, 2016) ("Enforcing the delegation clause would effectively allow Delbert to subvert federal public policy and deny Ryan the effective vindication of her federal statutory rights before the arbitration of her claims even began").

As the Order correctly recognized, Plaintiffs' reliance on *Gingras v. Think Fin., Inc.,* 922 F.3d 112, 127 (2d Cir. 2019) was misplaced, because that case also concerned a waiver of federal law. (A-8 n.8.) After *Gingras*, the Second Circuit held that the Effective Vindication Doctrine did not apply in a case asserting only state law. *Doctor's Assocs., LLC v. Tripathi*, 794 F. App'x 91, 94 (2d Cir. 2019). There, the district court compelled arbitration and enjoined a separate case brought by the defendants in California state court. *Id.* at 93. Citing Justice Kagan's dissent in

Italian Colors, the Second Circuit rejected the defendants' reliance on the Effective Vindication Doctrine, because "these precedents expressly deal only with federal statutory rights, which the [defendants] did not assert in the California state-court action." *Id.* at 94. But the court continued that, even if the doctrine "were to apply in the context of state statutory rights," the defendants were not foreclosed from vindicating them, they were just required to pursue them in arbitration. *Id.*

The district court tried to distinguish *Doctor's Assocs., LLC* by suggesting that the arbitration agreement there only required arbitration of state law claims as opposed to waiving them. (A-8 n.8.) But "arbitration agreements" like those in the Loan Agreements here do not waive state law rights, as the Order suggests. The Governing Law Provisions select the Tribe's Law and applicable federal law, but (as discussed above) nothing prevents the arbitrator from considering and ruling upon state law claims and challenges to the Governing Law Provisions.

What Plaintiffs did not show, and what the district court did not and cannot find, is that Plaintiffs are foreclosed from challenging the application of the Tribe's law as to the commercial activities at issue in this case in an arbitration. Nothing in the Loan Agreements, the Arbitration Provisions or the Delegation Provisions precludes Plaintiffs from raising their claims under state law in arbitration. The parties simply agreed to a routine choice-of-law clause. The Effective Vindication Doctrine is not a tool for resolving choice-of-law disputes or limiting application of a choice-of-law provision.

Because the Loan Agreements here do not waive statutory rights under federal law, the Effective Vindication Doctrine does not apply.

B. *Viking River* neither discussed, nor altered, the doctrine's scope.

The Order concludes that, even if the Effective Vindication Doctrine had previously been limited to preserving only federal rights, footnote 5 of *Viking River* expanded the doctrine to preserve state law rights as well. (A-11.) The *Viking River* opinion, including the cited footnote, contains no discussion whatsoever of the doctrine.

Footnote 5 states:

> In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous. The basis of this principle is not anything unique about federal statutes. It is that the FAA requires only the enforcement of "provision[s]" to settle a controversy "by arbitration," § 2, and not any provision that happens to appear in a contract that features an arbitration clause. That is why we mentioned this principle in *Preston*, which concerned claims arising under state law. *See* 552 U.S. at 360, 128 S.Ct. 978 (noting that under the agreement, a party "relinquish[ed] no substantive rights ... California law may accord him").

596 U.S. at 653 n.5.

The cited language in footnote 5 from *Preston v. Ferrer* states:

> Finally, it bears repeating that Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard. *See supra,* at 983. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum." *Mitsubishi Motors Corp.,* 473 U.S., at 628, 105 S.Ct. 3346. So here, Ferrer relinquishes no substantive rights the TAA or other California

> law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum. 552 U.S. 346, 359 (2008).

Neither *Viking River* nor *Preston* discusses the Effective Vindication Doctrine. Both reiterate the unremarkable position that an agreement to arbitrate merely submits resolution of statutory rights to an arbitral forum pursuant to the parties' agreed upon procedure.

Indeed, *Viking River* reinforces that the FAA is not intended to preserve state law rights. There, the Court enforced an arbitration agreement as to individual claims under the California Labor Code Private Attorneys General Act ("PAGA") because the FAA preempted a state law to the contrary that prohibited the division of PAGA actions into individual and non-individual claims. 596 U.S. at 662. While compelling arbitration, the Court chose not to enforce state law because the FAA preempted state law.

Likewise, *Preston* had nothing to do with the doctrine. There the Court found that preemption and waiver were not even at issue. 552 U.S. at 352. Rather, the opinion analyzed how to reconcile the parties' California choice-of-law provision and their arbitration provision, which selected the rules and procedures of AAA. *Id.* at 362. The Court harmonized them by holding that the choice-of-law provision invoked California substantive rights to be resolved in accordance with AAA's procedure. *Id.* Here, incorporation of the Tribe's Law does not impair the separate incorporation of AAA's rules. Such harmonization is consistent with the delegation arguments addressed above.

Going outside of the opinions, the Order instead reviews the Effective Vindication Doctrine argument raised by the *Viking River* respondent in the appellate briefs. (A-8.) But the petitioner prevailed in the appeal in *Viking River*. The Order does not explain how *Viking River* impliedly adopted the *respondent's* interpretation of the Effective Vindication Doctrine when the majority held in favor of the *petitioner*, in an opinion that is at odds with the Order's interpretation of that doctrine. The Order here simply contradicts *Viking River's* holding.

i. The Order contradicts this Court's interpretation of *Viking River*.

This Court's recent analysis of *Viking River* further confirms the Order's erroneous interpretation of that holding. In *Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC*, this Court explained that footnote 5 of *Viking River* recognized that the FAA only applies to "the substantive validity and enforceability of the provisions governing the arbitration itself" and "not any other provision" in the contract. 104 F.4th 978, 991 (7th Cir. 2024). The FAA does not displace state law. *Id.* It just resolves any conflicts by preempting state laws that discriminate against the right to arbitrate. *Id.* at *4, 7, 9, 11.

There is no attempt to utilize the FAA here to displace Plaintiffs' state law rights. Whether Plaintiffs may obtain remedies under Illinois statutory law, as to their substantive claims, is merely another Dispute for the arbitrator to resolve pursuant to the Delegation and Arbitration Provisions. (Dkt. 7-1 at 18-19, 43-44.)

ii. The Order also conflicts with the interpretation of *Viking River* by other federal courts.

The Ninth Circuit's recent holding in *Rivas v. Coverall N. Am., Inc.* further confirms that the Effective Vindication Doctrine only applies to federal rights and that *Viking River* did not expand the doctrine's application to include state law rights. 2024 WL 1342738, *2 (9th Cir. Mar. 29, 2024) (unpublished). In *Rivas*, the Ninth Circuit applied *Viking River* because both cases concerned arbitration of a PAGA claim under California law. *Id.* The Ninth Circuit held that, pursuant to *Viking River*, an individual PAGA claim could be compelled to arbitration while non-individual PAGA claims could not, and remanded for the district court to analyze Article III standing of the non-individual PAGA claims. *Id.* at *1. In doing so, the Ninth Circuit rejected the plaintiff's argument that the Effective Vindication Doctrine prevented arbitration of the PAGA claim. *Id.* at *2.

The Ninth Circuit reasoned that "this [effective vindication] exception does not extend to state statutes and so does not apply to [the plaintiff's] PAGA claim." *Id.* (internal quotation omitted). In applying *Viking River* to the same type of PAGA claim at issue in *Viking River*, the Ninth Circuit in *Rivas* held that the Effective Vindication Doctrine is limited to protecting rights under federal statutes. *Id.* Plaintiffs' interpretation of footnote 5 from *Viking River* directly contradicts the Ninth Circuit's holding in *Rivas* which applied *Viking River*.

In a case in which Plaintiffs' counsel here were also counsel of record, a district court recently rejected the same arguments Plaintiffs make here:

> Mr. Walton attempts to invoke *Viking River Cruises, Inc. v. Moriana* for the proposition that the Supreme Court has

> condoned the application of the prospective waiver rule to claims arising under state law. 596 U.S. 639, 653 n.5 (2022), reh'g denied, 143 S. Ct. 60 (2022). In that decision, the Court characterized as "erroneous" the petitioner's argument "that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes." *Id.* Stripped of its context, this footnote would surely lend itself to Mr. Walton's portrayal. However, nowhere in the *Viking River's* decision did the Court mention the prospective waiver doctrine (or its alternative namesake, the effective vindication exception). To the contrary, the Court simply reiterated that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in the arbitral forum." *Id.* at 653 (cleaned up). In other words, substantive statutory rights—whether they be federal or state—are not nullified simply by virtue of their resolution in an arbitral, rather than a judicial, forum.

Walton v. Uprova Credit LLC, 2024 WL 1241836, at *9 (S.D. Ind. Mar. 21, 2024).

Fahy v. Minto Dev. Corp., 2024 WL 1116050, at *13 (N.D. Ill. Mar. 14, 2024), also cited in the Order, is similarly flawed. *Fahy* mischaracterizes the discussion in footnote 5 of *Viking River* as concerning the "prospective waiver doctrine" even though neither *Viking River* nor *Preston* (discussed in the footnote) refers to the doctrine. *Id.* In interpreting the language in *Viking River*, it is critical to recognize that it is *not* discussing the Effective Vindication Doctrine. The district court's order in *Fahy* suffers from the same fatal flaws as the Order here, resulting in an incorrect statement of the scope of the Effective Vindication Doctrine.

The Order's conclusion simply cannot be reconciled with Justice Kagan's explanation of the Effective Vindication Doctrine's origins and its purpose, as recognized by numerous district and circuit courts.

C. A waiver of federal rights cannot be implied.

The Order's faulty Effective Vindication Doctrine analysis is also incomplete because, choice-of-law issues aside, it omits any analysis regarding the selected arbitral forum. As explained by the majority opinion in *Italian Colors*, the doctrine involves a two-pronged analysis and comes into play when "the choice-of-forum and choice-of-law clauses operated in tandem" to create an unconscionable result regarding the dispute resolution procedure. 570 U.S. at 235. Here, Plaintiffs challenge choice-of-law issues. But they did not argue, and the Order never found, that the AAA is an unsuitable arbitral forum, or that the AAA's procedural rules create an unconscionable result. The district court therefore erred because it did not apply both prongs of the required analysis or make the findings about the arbitral forum that are necessary when applying the doctrine.

The Order correctly distinguished *Harris v. FSST Mgmt. Servs., LLC*, as a case involving a waiver of federal law. (A-14.) But *Harris* demonstrates the proper, full analysis of the doctrine, an analysis the district court here failed to conduct. 2023 WL 5096295, at *1 (N.D. Ill. Aug. 9, 2023). In *Harris*, the court found that a contractual provision limiting final resolution of any AAA award to a tribal court operated as an improper prospective waiver. *Id.* at *3. This was because "[h]anding exclusive review of an arbitrator's award to a tribal court—even if that award originated from a AAA or JAMS arbitrator—permits a tribal court to apply its own law on its own terms when that law does not afford litigants the opportunity to vindicate their federal and state rights." *Id.* at *7. In other words, the court found an implied prospective waiver where the agreement was: (1) silent on the

applicability of federal law; and (2) left final resolution to the tribal court, without any regard for federal law or the arbitrator's authority or analysis.

Here, there can be no implied waiver because the Loan Agreements expressly preserve federal statutory rights and do not limit the authority of the arbitrator to resolve the issues presented. The Arbitration Provisions also expressly authorize Plaintiffs the right to an appeal "administered by the Arbitration Organization pursuant to AAA's Consumer Appellate Arbitration Policy," as well as "review by a court…governed by Sections 10 and 11 of the Federal Arbitration Act," thereby providing Plaintiffs with rights beyond those provided under federal law. (Dkt. 7-1 at 22, 48.) Furthermore, the Loan Agreements grant a limited waiver of tribal sovereign immunity specific to enforcing in the appropriate court an arbitration award issued in accordance with the Arbitration Provisions. (*Id.* at 22-23, 48.) This provides a consumer the opportunity to enforce a properly issued award with a federal court.[8] Unlike *Harris*, there is no tandem operation of a choice-of-law clause and choice-of-forum clause from which to imply a prospective waiver.

In *Huntley v. Rosebud Economic Devl. Corp.*, the district court compelled arbitration despite a choice-of-law clause that required application of tribal law. No. 22-CV-1172-L-MDD, 2023 WL 5186247, at *6 (S.D. Cal. Aug. 11, 2023). The agreement authorized arbitration with AAA or JAMS but was silent as to the applicability of federal law. *Id.* There was no choice of forum clause. *Id.* "Without

[8] The district court's order in *Harris* appears to demonstrate unexplained and unfounded bias against tribal courts with which the Defendants take issue.

the tandem choice of law and choice of forum clauses," it was uncertain whether federal law was precluded. *Id.* at *7. Because the choice of law clause did not expressly waive federal law and the agreement provided for arbitration with AAA, the court could not find a tandem operation between those two clauses designed to waive rights under federal law. Resolution of the issue was therefore a question for the arbitrator. *Id.*

The Loan Agreements leave nothing uncertain here. They expressly preserve federal statutory rights. There is nothing concerning about AAA administering the arbitration under its procedural rules to which the parties agreed, and Plaintiffs have not challenged AAA's administration of the arbitration. For this additional reason, the Effective Vindication Doctrine is inapplicable.

D. The Order undermines the FAA's purpose.

As a practical matter, application of the Effective Vindication Doctrine is unnecessary here. Plaintiffs' concerns are not about the arbitration process or arbitrating with AAA. They raised no such objection in opposing Defendants' motion below. Instead, they are challenging the Governing Law Provisions which select laws other than Illinois state law. For this challenge, it would not matter what law the Loan Agreements invoked because Plaintiffs simply want to find a way to rely on Illinois consumer lending laws on which some of Plaintiffs' claims depend. (Dkt. 7-1 at 5-6, 30-31.) Plaintiffs exploited a novel view of the Effective Vindication Doctrine as a tool to preempt any choice-of-law analysis that would otherwise routinely occur in any run-of-the-mill contract action. The Effective Vindication

Doctrine is not the mechanism for asserting this challenge and Plaintiffs have not identified any reason why a AAA arbitrator cannot fairly resolve such challenges.

Allowing the Effective Vindication Doctrine as a basis for challenging a choice-of-law provision would call into question every arbitration provision containing a choice-of-law.

i. The FAA supports the parties' freedom to specify the governing law.

The Order's application of the Effective Vindication Doctrine undermines the very purpose of the FAA, as well as the parties' freedom to select what law will govern their contracts.

The FAA embodies a federal policy favoring arbitration, and its principal purpose is to enforce arbitration agreements according to their terms. *AT&T Mobility LLC*, 563 U.S. at 345. The goal is to streamline proceedings to achieve efficiencies in resolving disputes, including through reduced costs and more expeditious resolution. *Id.* This includes authorizing the parties' agreement regarding the governing law to avoid conflict of laws disputes. *Mastrobuono*, 514 U.S. at 59. *See also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("the FAA lets parties tailor some, even many…features of arbitration by contract, including…choice of substantive law"); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

Critically, the FAA "cannot be held to destroy itself" or interpreted to eviscerate arbitration agreements. *AT&T Mobility LLC*, 563 U.S. at 343 (internal quotation omitted). The Order's interpretation of the Effective Vindication Doctrine does just that. It uses the FAA—which exists to support arbitration—to prevent the arbitration of disputes arising under any contract containing a routine governing law clause. In other words, the Order's reasoning would deprive parties of the freedom to contract on the issues of who will decide their dispute and under what framework this will be done. This Order's reasoning would deprive the parties of this freedom.

This is not just an issue of tribal law. For example, if the Loan Agreements' Governing Law Provisions here had selected Utah law (such as in *Johnson*, 2023 WL 2636712 at *5), Plaintiffs' arguments would be the same. They would contend the selection of Utah law (which lacks statutory usury limits) prospectively waives Illinois usury law. Plaintiffs would consider the selection of Utah law to be an unlawful "waiver" of Illinois law, but Plaintiffs offer no explanation as to how the Effective Vindication Doctrine may be applied as a matter of federal law to resolve the competing interests of conflicting state laws. There is no federal interest served in resolving that dispute.

Nor can the Order be reconciled with federal law. Indeed, the United States Congress expressly prohibited the Consumer Financial Protection Bureau from establishing a usury limit applicable to an extension of credit. 12 U.S.C. § 5517(o) ("No authority to impose usury limit. No provision of this title shall be construed as

conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law").

By way of another example, the National Bank Act provides the exclusive means for asserting usury challenges against nationally chartered banks. *See, e.g., Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 11 (2003). This protects such banks from "possible unfriendly State legislation" and its provisions "supersede both the substantive and the remedial provisions of state usury laws." *Id.*; *see also Nat'l Ass'n of Indus. Bankers v. Weiser*, No. 1:24-CV-00812-DDD-KAS, 2024 WL 3169735, at *2 (D. Colo. June 18, 2024) (enjoining State of Colorado from subjecting banks to Colorado's lower interest rate caps that did not apply in states where the banks entered into the transactions). Plaintiffs' position would render invalid all agreements to arbitrate with nationally chartered banks despite federal preemption of state law rights.

ii. The Order inexplicably invalidates arbitration of federal claims.

The Order also does not explain why Plaintiffs' federal claims asserted in the First Amended Complaint cannot be arbitrated, regardless of the Effective Vindication Doctrine's scope. The Governing Law Provisions expressly preserve Plaintiffs' federal rights. (Dkt. 7-1 at 19, 45.) Plaintiffs alleged claims under federal law. (Dkt. 7.) Plaintiffs presented no argument as to why they are unable to fairly arbitrate their federal claims and why arbitration cannot be enforced as to federal claims. But the Order invalidated "the arbitration agreement in full." (A-16.) This

cannot be reconciled with any of the policies or reasoning supporting the FAA and the Effective Vindication Doctrine. Consistent with all the authorities discussed above, there is no basis for invalidating an agreement to arbitrate federal claims through an agreement that expressly preserves federal substantive rights.

In sum, the Order's application of the doctrine improperly takes choice-of-law issues from the arbitrator and prohibits parties from agreeing to eliminate potential conflict-of-laws disputes. This consequently imposes additional burdens by precluding choice-of-law provisions and mandating a conflict-of-law dispute in court instead of in arbitration as agreed by the parties. It puts conflict-of-laws analysis at the forefront of every arbitration enforcement dispute, which runs further afoul of the FAA. The Order undermines the FAA's purpose and should be reversed.

Conclusion

It is undisputed that (1) the parties entered into loan agreements that contain provisions requiring individual arbitration; (2) the Loan Agreements cover the claims in the First Amended Complaint; and (3) Plaintiffs refuse to arbitrate absent an order compelling them to do so. Therefore, the standard to compel arbitration is satisfied.

Moreover, the Loan Agreements clearly and unmistakably delegate all questions of arbitrability, validity, and enforceability to the arbitrator. Plaintiffs did not specifically challenge the Delegation Provisions of the Loan Agreements, argue why the Delegation Provisions themselves were unfair, or otherwise identify any issue that an arbitrator would not be empowered to resolve in arbitration.

Finally, Plaintiffs seek to expand and exploit the Effective Vindication Doctrine beyond its purpose, when doing so undermines the FAA's purpose and strips parties of the agreed right to arbitrate. In this context it also discriminates against legitimate business organizations because of their tribal ownership and in a manner that applies to no other business under the FAA. Neither the United States Supreme Court nor any federal appellate court has ever validated the use of the doctrine in this manner, and it should not be adopted here. A contract containing an arbitration provision involving an entity owned by a tribe should be treated on equal footing with any other agreement to arbitrate that courts routinely enforce.

For the foregoing reasons, Defendants respectfully request that the Court reverse the Order and remand with instructions that the district court stay the case, compel individual arbitration, and grant such further relief as the Court deems just and proper.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(B)(7)(i) and Cir. R. 32(c) because this brief contains 13,626 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally space typeface using Microsoft Word in 12-point Century Schoolbook typeface for text and footnotes.

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Dated: October 18, 2024.

Circuit Rule 30(d) Statement

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the Appendix.

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Dated: October 18, 2024.

Certificate of Service

I hereby certify that on October 18, 2024, the Brief and Short Appendix of Defendants-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated: October 18, 2024.

APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Joshua Harris, *et al.*,

Plaintiffs,

v.

W6LS, Inc. d/b/a WithU and WithU Loans, *et al.*

Defendants.

No. 23 CV 16429

Judge Lindsay C. Jenkins

MEMORANDUM OPINION AND ORDER

Plaintiffs Joshua Harris and Donita Olds brought this putative class action against Defendants W6LS, Inc. and Caliber Financial Services, Inc.,[1] contending that loan agreements they entered into with W6LS violate state and federal law. [Dkt. 7.] Defendants move to compel arbitration, as required by the loan agreements. [Dkt. 26.][2] Plaintiffs do not dispute that the arbitration agreement exists and purports to require individual arbitration; instead, they argue that the arbitration agreement is unenforceable because it waives their substantive state law rights. Supreme Court precedent supports Plaintiffs' position, so the motion to compel arbitration is denied.[3]

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[1] The Court does not resolve any issues with respect to the 20 Doe Defendants who have not been identified. [*See* Dkt. 7.]

[2] Defendants state that they are specially appearing for the purpose of moving to compel arbitration and "do not waive and expressly reserve their ability to challenge this Court's subject matter jurisdiction due to Defendants' sovereign immunity from suit." [Dkt. 27 at 1 n.1.] This statement is puzzling. "Subject-matter jurisdiction is the first issue in any case," and the Court has "an independent obligation to determine that jurisdictional requirements are satisfied." *Ware v. Best Buy Stores, L.P.*, 6 F.4th 726, 731 (7th Cir. 2021) (cleaned up). There is no jurisdictional problem, here, however. Defendants contend that they enjoy tribal sovereign immunity [Dkt. 27 at 1], but this type of sovereign immunity is not jurisdictional, *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822–23 (7th Cir. 2016), so the Court can entertain the motion to compel without overstepping the bounds of its Article III power.

[3] The Court has reviewed Plaintiffs' proposed additional filing. [Dkt. 37.]

I. Background

Little need be said about the substance of Plaintiffs' allegations in this posture. Harris and Olds each took out a $600 loan from W6LS d/b/a WithU Loans. [Dkt. 7 ¶¶ 25–26; Dkt. 7-1 Exh. A–B (copies of the loan agreements).][4] The contracts disclosed interest rates approaching 500% annually. [Dkt. 7 ¶¶ 25–26.] The contracts also contained identical arbitration provisions. [Dkt. 7-1 at 16–23 (Harris's agreement), 42–49 (Olds's agreement).][5] The arbitration provision permits either party to require any "Dispute" to be decided by individual arbitration, rather than litigation, and that the provision is broad enough to cover the disputes at issue here. [Dkt. 7-1 at 18–23; Dkt. 27 at 3–9; *see* Dkt. 33 (not contesting this point).] The arbitration provision states that federal law and the law of the Otoe-Missouria Tribe of Indians ("Tribal Law") apply to the loan agreement. [Dkt. 7-1 at 19; *see id.* at 4 (defining "Applicable Law" to mean federal and Tribal Law).]

Plaintiffs filed a putative class action alleging that Defendants' loans violate state and federal law. [Dkt. 7.] Defendants move to compel individual arbitration as required by the loan agreements. [Dkt. 26.]

II. Legal Standard

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs when courts must compel arbitration. Section 2 of the FAA provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy

[4] Citations to exhibits refer to the electronic pagination, not the page numbers in the underlying documents. Citations to briefs refer to the pagination in the briefs themselves.

[5] Hereafter, for convenience, the Court cites the relevant portion of Harris's agreement without citing the identical portion of Olds's agreement.

thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A motion to compel is granted "if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate." *Scheurer v. Fromm Fam. Foods LLC*, 863 F.3d 748, 752 (7th Cir. 2017). However, an arbitration agreement that violates public policy is not enforceable. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013).

III. Analysis

It is undisputed that the parties entered into loan agreements that contain provisions requiring individual arbitration. [Dkt. 27 at 3–9; Dkt. 33 at 1.][6] The only question, therefore, is whether the arbitration agreement is enforceable. The Court agrees with Plaintiffs that it is not.

A. Delegation Clause

At the threshold, the Court must determine whether Plaintiffs have challenged the clause delegating the question of the enforceability of the arbitration provision to the arbitrator. [Dkt. 7-1 at 18 (defining arbitrable disputes to include those relating to the "enforceability" of "this Arbitration Agreement").] This question is for the arbitrator unless Plaintiffs have "challenged the delegation provision specifically." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010). Plaintiffs argue that the

[6] The briefs discuss equitable estoppel, but Defendants clarify that they only argue that Plaintiffs are estopped from challenging the existence and validity of the loan agreements, not the arbitration provision [Dkt. 36 at 1–2], so the Court does not discuss this issue. Nor does the Court address Plaintiffs' arguments besides the prospective waiver doctrine.

"delegation clause is unenforceable for the same reasons as the underlying arbitration agreement." [Dkt. 33 at 10–11.] Defendants contend that *Rent-A-Center* requires Plaintiffs' arguments about the delegation clause to be distinct from their arguments about the arbitration agreement as a whole; because Plaintiffs' arguments "have nothing to do with the delegation provisions," Defendants urge that they do not constitute a specific challenge to the delegation provision. [Dkt. 36 at 10.]

The Court disagrees. "The Seventh Circuit has not addressed the enforceability of delegation provisions in tribal lending contracts," *Fahy v. Minto Dev. Corp.*, —F. Supp. 3d—, 2024 WL 1116050, at *8 (N.D. Ill. Mar. 14, 2024), but the Second, Third, and Fourth Circuits have held that under *Rent-A-Center*, "[a] party may contest the enforceability of the delegation clause with the same arguments it employs to contest the enforceability of the overall arbitration agreement." *Hengle v. Treppa*, 19 F.4th 324, 335 (4th Cir. 2021) (citation omitted); *accord Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019). In the absence of Seventh Circuit authority to the contrary, the Court will follow the consensus view of the circuits that have addressed this issue.

Defendants point to the Ninth Circuit's opinion in *Brice v. Haynes Investments, LLC*, which came out the other way than the Second, Third, and Fourth Circuits. 13 F.4th 823, 833–36 (9th Cir. 2021); *see id.* at 836 ("Although some of the out-of-circuit decisions properly tee up the question, none of them follow through."). [Dkt. 36 at 10–11.] The problem for Defendants is that, as they acknowledge, the Ninth Circuit voted to rehear *Brice* en banc and vacated the panel opinion, 35 F.4th 1219 (9th Cir. 2022),

and then the case settled. "Defendants submit that the original opinion is nonetheless highly persuasive," but they do not explain why or cite authority for the proposition that the Court should treat the vacated opinion as persuasive. [Dkt. 36 at 10 n.1.]

In fact, the opposite is true. *Brice* was not a case where Ninth Circuit precedent precluded the panel from reaching what it viewed as the correct decision, which could have required en banc review even if the panel opinion's reasoning was sound. *Cf. Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc) (discussing when a panel may depart from circuit precedent). Rather, the *Brice* panel created a circuit split, and the full Ninth Circuit likely granted rehearing en banc because it doubted that outcome. Under these circumstances, the Court treats the grant of en banc review as a signal that the *Brice* panel erred, which reinforces the correctness of the Second, Third, and Fourth Circuits' approach.

The Court holds that Plaintiffs have adequately challenged the delegation clause under *Rent-A-Center*, and if they succeed on their challenge to the arbitration agreement as a whole, the delegation clause must fall with the rest of the agreement.

B. Prospective Waiver Doctrine

Plaintiffs argue that the arbitration agreement as a whole is unenforceable because it impermissibly purports to waive state substantive rights. [Dkt. 33 at 4–5.] The crux of this issue is whether the prospective waiver (or effective vindication [*see* Dkt. 36 at 2]) doctrine applies only to waivers of federal substantive rights, or if it also extends to state substantive rights. The Court concludes that it does.

1. Early Supreme Court Caselaw

Beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court has indicated that an arbitration provision that prospectively waived statutory rights is invalid on public policy grounds. It "note[d] that in the event the [arbitration provision's] choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy." 473 U.S. 614, 637 n.19 (1985) (collecting authorities).

The Court has reiterated the doctrine in subsequent cases. In *14 Penn Plaza LLC v. Pyett*, the Court stated that "federal antidiscrimination rights may not be prospectively waived," but "an agreement to arbitrate those statutory claims" does not constitute "a prospective waiver of the substantive right." 556 U.S. 247, 265 (2009) (citation omitted). *Italian Colors* explained that the Supreme Court has "expressed a willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's *right to pursue* statutory remedies," which "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights," but it did not invalidate an individual-arbitration provision that might have made it too costly to economically pursue certain claims. 570 U.S. at 235–36 (cleaned up).

The *Italian Colors* dissent argued that the doctrine only applied to waivers of federal substantive rights and that the majority erred by relying on a case involving state law to uphold an arbitration provision:

> *AT&T Mobility* [*LLC v. Concepcion*, 563 U.S. 333 (2011),] involved a *state* law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them.

Id. at 252 (Kagan, J., dissenting). This view, of course, did not carry the day. *See id.* at 235–38 & 238 n.5 (majority op.) (holding that the prospective waiver doctrine does not require that a party be able to pursue its claims in an economically effective manner and rejecting the dissent's attempt to distinguish *AT&T Mobility*).

2. *Viking River*

Recently, the Court decided *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), a case that is central to the arguments here. The Court stated, in a footnote:

> In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous. The basis of this principle is not anything unique about federal statutes. It is that the FAA requires only the enforcement of "provisions" to settle a controversy "by arbitration," [9 U.S.C.] § 2, and not any provision that happens to appear in a contract that features an arbitration clause. That is why we mentioned this principle in *Preston* [*v. Ferrer*], which concerned claims arising under state law. See [552 U.S. 346, 359 (2008)[7]] (noting that under the agreement, a party "relinquished no substantive rights California law may accord him").

[7] *Viking River* cites *Preston* at page 360, but the quotation actually appears on page 359. The Court has modified the citation to reflect the correct page.

Id. at 653 n.5 (cleaned up). Plaintiffs argue that this footnote confirms that "[t]he prospective waiver doctrine applies to state statutory claims as well as federal." [Dkt. 33 at 4.][8] Defendants counter that *Viking River* was not a prospective waiver case and that the opinion "contains no discussion whatsoever on the doctrine and does not alter the consensus of federal courts that the doctrine is limited to preserving federal statutory rights." [Dkt. 36 at 4–5.]

While Defendants are correct that *Viking River* did not expressly mention the prospective waiver or effective vindication doctrine, context makes clear that footnote 5 is about that doctrine. The *Viking River* opinion cites *Preston*, which in turn cites *Mitsubishi* in context of the prospective waiver doctrine. *See* 596 U.S. at 653 n.5; *Preston*, 552 U.S. at 359. And the argument the Supreme Court was responding to was about the prospective waiver doctrine. Viking River stated in its reply brief:

> While Moriana repeatedly invokes *Mitsubishi* for the supposed rule that "an arbitration agreement cannot waive an entire statutory cause of action," that rule applies only to waivers of "federal statutory rights," not state-law ones. *Italian Colors*, 570 U.S. at 235. When it comes to

[8] Plaintiffs also cite the Second Circuit decision *Gingras* in support of this proposition, but that decision does not support their argument. While *Gingras* referenced state law claims in connection with the prospective waiver doctrine, it had no need to decide whether a waiver of substantive state law rights makes an arbitration agreement unenforceable because the agreement there also waived federal substantive rights. 922 F.3d at 127. In a later decision, the Second Circuit did not read *Gingras* to settle this question. *Doctor's Associates, LLC v. Tripathi*, 794 F. App'x 91, 94 (2d Cir. 2019) (nonprecedential) ("[T]hese precedents expressly deal only with federal statutory rights, which the Tripathis did not assert in the California state-court action. Moreover, even if some variant of the effective-vindication rule were to apply in the context of state statutory rights, *see, e.g.*, [*Gingras*, 922 F.3d at 127], such a rule would not apply here …." (cleaned up)).

Doctor's Associates also does not help Defendants because the arbitration clause there simply required the parties to arbitrate their state law claims; it did not waive those rights. *See id.* The same reasoning applies to federal rights, *see 14 Penn Plaza*, 556 U.S. at 265, so *Doctor's Associates* is neutral on the question of whether the prospective waiver doctrine applies to substantive state law rights.

> state efforts to insulate a state law from bilateral arbitration, the FAA and the Supremacy Clause supply the rule of decision."

Reply Brief at 6 n.1, 2022 WL 839398 (cleaned up).

Nor can Defendants escape the conclusion that *Viking River* meant what it said when it rejected this argument: "In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous." 596 U.S. at 653 n.5. This is not, as Defendants argue, "reiterat[ing] the unremarkable position that an agreement to arbitrate merely submits resolution of statutory rights to an arbitral forum pursuant to the parties' agreed upon procedure." [Dkt. 36 at 5.] That is what the Supreme Court stated in the main text on the same page:

> Moriana is correct that the FAA does not require courts to enforce contractual waivers of substantive rights and remedies. The FAA's mandate is to enforce *arbitration agreements*. … An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum.

596 U.S. at 653 (cleaned up). Footnote 5 makes a distinct point, that the prospective waiver principle applies to state as well as federal substantive rights. *Id.* at 653 n.5.

The Court also disagrees that a "consensus" of courts had recognized that the prospective waiver doctrine does not apply to state substantive rights prior to *Viking River*. Defendants principally rely on the dissent in *Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting), but the dissent did not prevail, and the relevant passage did not note a point of agreement with the majority, *see id.* at 235–38 & 238 n.5 (majority op.) (disagreeing with the dissent's discussion of *AT&T Mobility*); *see also Students*

for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) ("A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion."). The *Italian Colors* dissent did not speak for a majority of the Supreme Court regarding the prospective waiver doctrine.

The lower court cases that Defendants contend constitute the consensus suffer from one of two flaws. Some do not squarely address whether the doctrine applies to state substantive rights. For example, in *Hengle*, the Fourth Circuit confronted a waiver of federal and state law in favor of tribal law and concluded that the waiver rendered the arbitration provision invalid. 19 F.4th at 336–42; *accord Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 784 (E.D. Pa. 2016); *Ryan v. Delbert Servs. Corp.*, 2016 WL 4702352, at *5 (E.D. Pa. 2016). *Hengle* framed the doctrine in terms of waiver of federal rights, but it did not address whether an arbitration clause that retains federal rights but waives state rights is enforceable. Staying that "[an] arbitration provision [that] impermissibly waives federal substantive rights without recourse to federal substantive law" "is unenforceable as a violation of public policy," 19 F.4th at 338, is not equivalent to saying that an arbitration clause that waives state substantive rights but retains federal rights *is* enforceable.

The pre-*Viking River* cases that do expressly discuss whether the prospective waiver doctrine applies to state substantive rights rely on the *Italian Colors* dissent. *See Torres v. CleanNet, U.S.A., Inc.*, 90 F. Supp. 3d 369, 377–78 (E.D. Pa. 2015); *see also Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 935–36 (9th Cir. 2013) (not cited by Defendants but relying on the *Italian Colors* dissent for the same point). But

because these decisions predated *Viking River*, they necessarily could not explain how following the *Italian Colors* dissent is consistent with the *Viking River* majority. Perhaps the *Italian Colors* dissent was the most persuasive authority available on the question of whether the doctrine applies to state rights at the time, and nothing in the *Italian Colors* majority expressly contracts the dissent's view. That is no longer the case post-*Viking River*, however, so these decisions' persuasive value is minimal.

Defendants' final point about *Viking River* also misses the mark. They argue that it matters that "the holding in *Viking River* enforced an arbitration agreement as to individual claims because the FAA preempted contrary state law. … [T]he Court did not enforce state law while at the same time compelling arbitration. This further shows the FAA is not concerned with preserving rights under state law." [Dkt. 36 at 5.] This does not follow. The Supreme Court's reasoning is "just as binding" as its holdings. *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019). Footnote 5 appeared in a discussion of why the arbitration agreement was enforceable, and its reasoning—explaining that *Preston* (and implicitly *Mitsubishi*) do not distinguish between federal and state sources of substantive rights—speaks for a majority of the Supreme Court. 596 U.S. at 653 & n.5. Even if the footnote was technically unnecessary to the *Viking River* decision, it is telling that the majority expressly stated that "[t]he basis of this principle is not anything unique about federal statutes," 596 U.S. at 653 n.5, rather than reserving the question, as the Supreme Court often does. *See, e.g.*, *Luna Perez v. Sturgess Pub. Schs.*, 598 U.S. 142, 149 (2023) (noting that a previous opinion "went out of its way to reserve rather than decide [a] question" (citation omitted)); *cf. Reich*

v. Cont'l Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994) (noting the persuasive value of recent, considered dicta).

3. Post-*Viking River* Caselaw

Defendants next cite post-*Viking River* decisions to bolster their argument that the Supreme Court did not recognize that the prospective waiver doctrine applies to waivers of state substantive law in addition to federal substantive law. [Dkt. 36 at 5–6.] These efforts fail.

Defendants cite *Rivas v. Coverall North America, Inc.*, 2024 WL 1342738 (9th Cir. Mar. 29, 2024) (nonprecedential), which they submit "further confirms that *Viking River* did not extend the doctrine to preserving state rights." [Dkt. 36 at 5.] There, the plaintiff could not afford to pay his share of the arbitration filing fee, which he argued meant he could not "effectively vindicate his rights in arbitration because the delegation clause purported to require cost-splitting just to appoint an arbitrator to decide gateway issues of arbitrability." 2024 WL 1342738, at *2 (cleaned up). *Rivas* noted that *Italian Colors* left open the possibility that the prospective waiver doctrine "may 'perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable,'" *id.* (quoting *Italian Colors*, 570 U.S. at 236), but it cited pre-*Viking River* circuit precedent holding that this doctrine 'does not extend to state statutes,' *see id.* (quoting *Ferguson*, 733 F.3d at 936). *Ferguson* relied on the *Italian Colors* dissent, with which it thought the *Italian Colors* majority would agree on Supremacy Clause grounds. 773 F.3d at 935–36. But *Viking River* took the opposite view, 596 U.S. at 653 n.5, and the Ninth Circuit did not explain how continuing to follow the *Italian Colors* dissent squares with *Viking River*.

See Rivas, 2024 WL 1342738, at *2. *Rivas* is not binding on this Court, and its lack of analysis on this point renders it unpersuasive.

Defendants also cite *Walton v. Uprova Credit LLC*, which interpreted *Viking River* not to extend the prospective waiver doctrine to state statutes:

> Extending the prospective waiver rule to state law claims is, in our view, incompatible with the rule's purpose. The prospective waiver rule rests on the uncontested understanding that, in crafting the FAA, Congress did not intend to preempt rights created by other federal statutes. …
>
> Mr. Walton attempts to invoke *Viking River Cruises, Inc. v. Moriana* for the proposition that the Supreme Court has condoned the application of the prospective waiver rule to claims arising under state law. In that decision, the Court characterized as "erroneous" the petitioner's argument "that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes." Stripped of its context, this footnote would surely lend itself to Mr. Walton's portrayal. However, nowhere in the Viking River's decision did the Court mention the prospective waiver doctrine (or its alternative namesake, the effective vindication exception). To the contrary, the Court simply reiterated that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in the arbitral forum." In other words, substantive statutory rights—whether they be federal or state—are not nullified simply by virtue of their resolution in an arbitral, rather than a judicial, forum.
>
> More relevant to the case at bar is the holding in *Italian Colors*, where the Supreme Court upheld arbitration agreements that precluded class arbitration of federal antitrust claims, despite the allegation that individual claims were not worth the expense involved in proving them. … Though Justice Kagan rejected the majority opinion's narrow interpretation of the prospective waiver rule, she, too, affirmed that the rule has no bearing on the vindication of state law …. Rather, when compelling arbitration under the FAA conflicts with state law, standard preemption principles dictate that federal law must prevail.
>
> In light of these controlling principles, we disagree with Mr. Walton that the disclaimer of state law renders the delegation clause unenforceable under the prospective waiver rule. No fair reading of the rule's purpose, nor of Supreme Court caselaw, supports such a conclusion. The delegation clause at issue here repeatedly affirms the applicability of

> federal law and therefore contains no waiver of federal rights. By that measure, the delegation clause is enforceable.

—F. Supp. 3d—, 2024 WL 1241836, at *8–9 (S.D. Ind. Mar. 21, 2024) (cleaned up). [*See* Dkt. 36 at 5–6.]

The *Walton* court thoroughly explained why it believes that the prospective waiver doctrine does not apply to state statutes, but this Court respectfully disagrees. The *Walton* court reads *Viking River* not to address prospective waiver, *see* 2024 WL 1241836, at *9 ("[N]owhere in the *Viking River*'s decision did the Court mention the prospective waiver doctrine (or its alternative namesake, the effective vindication exception)."), but this Court interprets footnote 5 to be a response to an argument about the scope of the prospective waiver doctrine. *See Viking River*, 596 U.S. at 653 n.5; Reply Brief at 6 n.1, 2022 WL 839398. The *Italian Colors* dissent's analysis that the doctrine does not apply to substantive state law rights, no matter how well reasoned, must give way to the *Viking River* majority.

Plaintiffs cite two district court opinions that reached the same conclusion as this Court does. [Dkt. 33 at 4–5.][9] In *Fahy*, the court reasoned:

> The defendants also contend that the prospective waiver doctrine applies only to waivers of federal law. But the Supreme Court directly addressed this contention in *Viking River Cruises, Inc. v. Moriana*. In that case, the defendant argued in briefing that the prospective waiver doctrine applied only to waivers of federal statutes. The Court rejected the defendant's argument as "erroneous" and highlighted its discussion of the prospective waiver doctrine in *Preston v. Ferrer*, a case that concerned state law claims. The defendants attempt to downplay the significance of the Supreme Court's language by calling it "dicta." But the Seventh Circuit has stated that absent controlling precedent,

[9] Plaintiffs also cite *Harris v. FSST Management Services*, —F. Supp. 3d—, 2023 WL 5096295, at *4 (N.D. Ill. Aug. 9, 2023), but in that case, there was a waiver of federal and state law, making it distinguishable on the same grounds as *Gingras*. [*See* Dkt. 36 at 7.]

> considered Supreme Court dictum "provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it." *Reich*, [33 F.3d at 757].
>
> This Court finds no reason to discount the Supreme Court's express rejection of the defendant's argument in *Viking River Cruises, Inc.*

2024 WL 1116050, at *13–14 (cleaned up); *accord Fitzgerald v. Wildcat*, —F. Supp. 3d—, 2023 WL 5345302, at *9–10 (W.D. Va. Aug. 18, 2023). The Court agrees with these decisions, which in its view correctly recognize that footnote 5 in *Viking River* is a clear statement about the scope of the prospective waiver doctrine.

Defendants counter that "Plaintiffs' position and their cited cases … cannot be reconciled with Justice Kagan's explanation of the Effective Vindication Doctrine's origins and its purpose. Plaintiffs and the cases they rely upon offer no rationale as to why the FAA or a federal court should have any interest in preserving rights under any particular state law." [Dkt. 36 at 6–7.] Plaintiffs need not reconcile their position with a dissent, however, and even if Defendants are correct about the policy rationale underlying the prospective waiver doctrine, that would not change the fact that a majority of the Supreme Court said that the doctrine applies to state law rights.[10]

[10] The fact that the two *Italian Colors* dissenters who remained on the Court when it decided *Viking River* joined the majority in that decision does not imply that *Viking River*'s articulation of the prospective waiver doctrine is the same as the *Italian Colors* dissent's. In *Edwards v. Vannoy*, the majority suggested that it was inconsistent for Justice Kagan to "impugn today's majority for supposedly shortchanging criminal defendants" when she had dissented from *Ramos v. Louisiana*, the rule of which the Supreme Court declined to give retroactive effect in *Edwards*. 593 U.S. 255, 275 (2021). The dissent replied: "I dissented in *Ramos* precisely because of its abandonment of *stare decisis*. Now that *Ramos* is the law, *stare decisis* is on its side. I take the decision on its own terms, and give it all the consequence it deserves." *Id.* at 295 (Kagan, J., dissenting) (citations omitted). This Court does not assume that the dissenters in *Italian Colors* continued to adhere to that opinion's conception of the prospective waiver doctrine when they voted in *Viking River*. Those Justices could have declined to join footnote 5 if they disagreed with it, which would have rendered it a plurality

* * *

For the foregoing reasons, the Court holds that *Viking River* establishes that the prospective waiver doctrine applies to waivers of substantive state law rights, in addition to federal rights.

C. Application to W6LS's Arbitration Agreement

Having concluded that the prospective waiver doctrine applies to substantive state rights, the Court now applies the doctrine to the arbitration agreement here. If the contracts included a waiver of federal rights, ample precedent supports holding that the arbitration agreement is wholly invalid. *See, e.g.*, *Hengle*, 19 F.4th at 342–44; *Williams*, 965 F.3d at 241–42; *Gingras*, 922 F.3d at 127; *cf. Italian Colors*, 570 U.S. at 235–36.[11] *Viking River* clarified that the prospective waiver doctrine applies to state substantive law as well as federal substantive law. 596 U.S. at 653 n.5. The Court therefore concludes that the principles in *Hengle* and the other cases apply here too. Because the agreement purports to waive the application of all state substantive law, the arbitration agreement is unenforceable in full. *See Fahy*, 2024 WL 1116050, at *12–14 (holding that both the delegation clause and arbitration provision were unenforceable because the agreement purported to waive substantive state rights); *Fitzgerald*, 2023 WL 5345302, at *9–11 (same). Defendants argue only that the

opinion. *See Viking River*, 596 U.S. at 664–65 (concurring opinion of Barrett, J., joined by Kavanagh, J., and by Roberts, C.J., in relevant part, not joining Part II of the majority, and dissenting opinion of Thomas, J.); *cf., e.g.*, *Johnson v. Guzman Chavez*, 594 U.S. 523, 525 (2021) ("Justice ALITO delivered the opinion of the Court, except as to footnote 4.").

[11] *Brice* is on the other side, concluding that the question of whether the contract waived federal substantive law was a question for the arbitrator because the delegation clause was enforceable. 13 F.4th at 828–32. But as discussed above, *Brice* is not persuasive.

prospective waiver doctrine does not apply to substantive state law rights; they make no alternative argument that if the Court holds that the doctrine applies to state law, the Court should nevertheless enforce the arbitration agreement. [*Cf.* Dkt. 36 at 7–8 (arguing only that the contracts do not waive federal rights).] They have therefore waived any argument they could have made on this point. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010). The Court holds that because the arbitration agreement purports to waive all substantive state law rights, it is unenforceable.

IV. Conclusion

For the foregoing reasons, Defendants' motion to compel arbitration [Dkt. 26] is denied.

Enter: 23-cv-16429
Date: May 22, 2024

Lindsay C. Jenkins
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.7.1.1
Eastern Division

Joshua Harris, et al.

Plaintiff,

v.

Case No.: 1:23−cv−16429
Honorable Lindsay C. Jenkins

W6LS, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, May 22, 2024:

MINUTE entry before the Honorable Lindsay C. Jenkins: Defendants' motion to compel arbitration [26] is denied. See attached Order for further details. Defendants' answer to the first amended complaint is due by June 12, 2024 and the parties are to file a joint status report by July 8, 2024 that proposes a fact discovery schedule. Mailed notice. (jlj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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