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.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Introduction

There is no dispute the parties entered into Loan Agreements containing the Arbitration and Delegation Provisions. The existence of agreements to arbitrate is undisputed. Plaintiffs' challenges to arbitration should be delegated to the arbitrator.

There is nothing unique or unenforceable about the Delegation Provisions. Consistent with the FAA, the Delegation Provisions' plain language delegate to the arbitrator all challenges to enforceability and validity, including the arbitrator's authority to consider and rule upon any choice-of-law disputes. Plaintiffs have not demonstrated any reason why the Delegation Provisions' language is unenforceable.

Without a specific challenge to the Delegation Provisions' language itself, Plaintiffs failed to demonstrate a basis for denying enforcement of the Delegation Provisions. Binding Supreme Court precedent requires the Delegation Provisions be enforced. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

Plaintiffs attempt to meet their burden of proving an unconscionability defense to arbitration by citing the Effective Vindication Doctrine, Illinois statutory law, and routine choice-of-law analysis. These challenges, in addition to being factually unsupported and legally erroneous, fail under this Court's settled precedent that a "contract's forum-selection clause is enforceable, even though its choice-of-law clause is not." *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1026 (7th Cir. 2003). Plaintiffs' challenges to the Governing Law Provisions are immaterial because, even if Plaintiffs were correct (and they are not), whether

the Governing Law Provisions are valid is not a basis for denying enforcement of the Arbitration or Delegation Provisions.[1]

The FAA entitles Tribal businesses, like all other businesses, to contract for a chosen governing law. Plaintiffs identify no authority precluding as a matter of law a contractual agreement to apply the Tribe's law. Plaintiffs may freely challenge application of Tribal law during the arbitration. Such challenges should be resolved in arbitration based on an evidentiary record that examines the tribal sovereignty interests at issue under the guidance of federal law and federal policies governing, preserving, and enforcing tribal sovereignty.

The district court's Order should be reversed and the district court should be instructed to stay the case and compel individual arbitration.

[1] Plaintiffs' attempt to cast Defendants in a negative light with allegations regarding the Tribally owned and operated lending business. In addition to being unproven and untrue, Plaintiffs' accusations are irrelevant to this appeal and merely seek to distract this Court from the binding precedent that compels arbitration of these claims.

Argument

I. Plaintiffs do not challenge the Delegation Provisions.

Plaintiffs have not shown the Delegation Provisions are unenforceable. *Rent-A-Center* holds that "[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." 561 U.S. at 72. Although Plaintiffs do not substantively discuss *Rent-A-Center* in their response brief, they cannot avoid its holding.

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.)

This language is unremarkable and mirrors the typical delegation language routinely enforced by courts, including the Supreme Court in *Rent-A-Center*. *See* 561 U.S. at 66 (enforcing language delegating to the arbitrator "any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable").

Instead of challenging the enforceability or validity of the Delegation Provisions' specific language, Plaintiffs rely on separate Loan Agreement provisions that are completely unrelated to delegating gateway issues to the arbitrator. Appellees' Brief, at 20. Plaintiffs' misdirection is unavailing, because "[w]here a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." *Rent-A-Ctr.*, 561 U.S. at 71.

A. Plaintiffs' cited authorities on delegation are inapposite.

To avoid analyzing the Delegation Provisions themselves, as required by *Rent-A-Center*, Plaintiffs rely on a series of cases, culminating with the Fourth Circuit's holding in *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021), as support for focusing on other provisions of the Loan Agreement not contained in the Delegation Provisions. Plaintiffs' authorities are inapplicable.

In *Hengle*, the Fourth Circuit examined loan agreements that precluded application of federal law. 19 F.4th at 339. The court held that, "[b]y preventing the arbitrator from applying federal law, the arbitration provision necessarily restrains the arbitrator from considering federal law defenses to arbitrability, thereby precluding Plaintiffs from effectively vindicating their federal statutory rights." *Id.* at 342. Such a concern is absent here because the Loan Agreements expressly preserve Plaintiffs' rights under federal law and the Governing Law Provisions expressly include "applicable federal law." (Dkt. 7-1 at 4, 30). The Fourth Circuit's reasoning also is faulty because it focused on the arbitration agreements generally, not the delegation clauses specifically, and merely concluded that the Effective

Vindication Doctrine rendered the entire arbitration agreement, including the delegation clause, unenforceable.

The Eleventh Circuit recently examined loan agreements in *Dunn v. Global Trust. Management, LLC*, which—like here—included governing law provisions selecting the Tribe's law and "applicable federal law." No. 21-10120, 2024 WL 4379966, at *3 (11th Cir. Oct. 3, 2024). It observed that the "applicable federal law" in the context of examining the enforcement of arbitration agreements is the FAA. *Id.* Rather than foreclosing the ability of parties to assert defenses under the FAA, the agreements incorporated the FAA, i.e., applicable federal law, and the court found the delegation provisions were enforceable. *Id.* at *9.

While *Dunn* is directly on point, *Hengle* is distinguishable because the Fourth Circuit in *Hengle* faced an entirely different type of agreement that excluded federal law and the FAA. *Id.* at *11. The express preservation of federal law in Plaintiffs' Loan Agreements, like those in *Dunn*, is a material distinction from the loan agreements in *Hengle*, and the authorities it followed do not apply here.

B. Plaintiffs' challenge to only non-delegation provisions contravenes *Rent-A-Center*.

Plaintiffs' focus on other provisions of the Loan Agreements violates the Supreme Court's clear standard in *Rent-A-Center*. Indeed, the Ninth Circuit in *Brice v. Haynes Investments, LLC*, criticized the line of cases Plaintiffs rely upon because those cases failed to follow the binding precedent of *Rent-A-Center*. 13 F.4th 823, 835 (9th Cir. 2021), *reh'g en banc granted, opinion vacated sub nom. Brice v. Plain Green, LLC*, 35 F.4th 1219 (9th Cir. 2022).

Contrary to *Rent-A-Center*, Plaintiffs advocate an analysis that the Ninth Circuit observed in *Brice* would transform a delegation challenge to merely a "formal, procedural requirement" requiring a party to state only that the delegation clause is invalid. *Id.* But *Rent-A-Center* requires more. *Id.* A proper challenge to delegation requires a "substantive argument that the delegation provision *in and of itself* is unenforceable. A party challenging a delegation clause via contract-wide arguments must show how the claimed deficiencies *as applied to the delegation* clause render that specific agreement invalid." *Id.* (emphasis in original).

The Sixth Circuit enforced *Rent-A-Center's* requirement for a specific challenge by enforcing a delegation provision despite the plaintiffs' arguments about the potential application of tribal law. *Swiger v. Rosette*, 989 F.3d 501, 506 (6th Cir. 2021). An argument that the choice-of-law provision might serve to "avoid legal liability" constituted a challenge to the arbitration agreement as a whole and not a specific challenge to delegation as required by *Rent-A-Center*. *Id.*

The Fourth Circuit acknowledged that it reached the opposite conclusion of the Ninth Circuit in *Brice*, despite examining identical loan agreements. *Hengle*, 19 F.4th at 336 n.2. Plaintiffs do not substantively respond to the analysis in *Brice*, instead arguing only that *Brice* can be ignored because it settled after the court granted rehearing en banc.[2] The district court's similar disregard for *Brice* is

[2] Plaintiff's speculation about en banc review is unwarranted, Granting rehearing en banc "does not necessarily signify any particular outcome." *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 731 (9th Cir. 2007) (Thomas, J., concurring). Both

improper in light of the Eleventh Circuit's holding in *Dunn*, issued during this appeal, that tracked the reasoning in *Brice*. Regardless, no one can disregard *Rent-A-Center*.

The Governing Law Provisions emphasized by Plaintiffs are separate from, and not included in, the Delegation Provisions. Plaintiffs' disputes—just like the disputes in *Dunn*—are about "the choice-of-law provisions and their application to the arbitration agreements as a whole, and have been delegated to the arbitrator." *Dunn*, 2024 WL 4379966, at *13. Because there is no specific challenge to the Delegation Provisions themselves, they should be enforced and the parties compelled to arbitration.

By attempting to challenge the Delegation Provisions based on other provisions of the Loan Agreements instead of the delegation language, Plaintiffs and the authorities on which they rely violate the binding standard set forth in *Rent-A-Center*. *See* 561 U.S. 63 at 74 ("[H]ad [plaintiff] challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court.") (emphasis in original). Plaintiffs do not show how the Delegation Provisions themselves are unconscionable.

C. Plaintiffs are free to raise their challenges in arbitration.

The FAA requires that any doubts of arbitrability be resolved in favor of arbitration, regardless of whether the doubt involves construction of the contract or

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the Ninth and Seventh Circuits have commented that opinions vacated due to the granting of rehearing en banc retain persuasive value. *Id.* at 734-35.

resolution of a defense to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). "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, rather than a judicial, forum." *Id.* at 628. Despite an agreement to arbitrate, a party remains free to attack the validity of the agreement in arbitration. *Id.* at 632. By making the FAA applicable, the parties manifest intent and agreement that the arbitrator shall resolve all challenges to arbitration, including challenges to the law to be applied during arbitration.

Making the FAA expressly applicable, as the Loan Agreements do here, is dispositive of Plaintiffs' arguments about the impact of the Governing Law provisions. The plaintiffs in *Dunn* (like Plaintiffs do here) argued that by invoking tribal law, the loan agreements eliminated any source of law for an arbitrator to rely upon to resolve the plaintiffs' challenges. *Id.* at *8-9, 12. The Eleventh Circuit rejected that argument because it constituted a challenge to the loan agreements as a whole, rather than a specific challenge to the terms of the delegation provisions, as required by *Rent-A-Center*. *Id.* "[T]he choice-of-law provisions do not foreclose the arbitrator's ability to consider Plaintiffs' argument that their arbitration agreements are unenforceable under § 2 of the FAA." *Id.*

Nor do the Loan Agreements eliminate substantive law supporting arbitration. The Loan Agreements expressly preserve the FAA which manifests "a policy guaranteeing the enforcement of private contractual arrangements: the Act simply creates a body of federal substantive law establishing and regulating the

duty to honor an agreement to arbitrate." *Mitsubishi Motors Corp.*, 473 U.S. at 625 (internal quotations omitted).

Nothing in the Delegation Provisions here prevent Plaintiffs from raising any of their proposed challenges in arbitration or prohibits the arbitrator from considering and ruling on the enforceability of any aspect of the Loan Agreements, including the choice of law provisions. As explained in *Dunn*—consistent with *Rent-A-Center*—"[t]he relevant inquiry remains whether the delegation provisions themselves inhibit the arbitrator from considering Plaintiffs' arguments about the enforceability of their arbitration agreements under the FAA." *Dunn*, 2024 WL 4379966, at *10.

Plaintiffs also mischaracterize the Delegation Provisions as an attempt to evade state law. That is not what the Delegation Provisions do. As explained by the Eleventh Circuit, "in enforcing the parties' agreement to delegate threshold questions of arbitrability, we hold that these issues must be submitted to an arbitrator who will determine whether the agreements are arbitrable. Here, the parties agreed that the agreements would be reviewed, just not by a federal court." *Id.* at *14, n.9. A delegation provision is merely "about *who should decide* whether the parties have to arbitrate the merits." *Swiger*, 989 F.3d at 507 (emphasis in original) (internal quotations omitted).

Because the existence and formation of a contract is undisputed and the Delegation Provisions delegate all issues and claims to the arbitrator regardless of

their subject matter or source of law, there is no state law issue to address at this stage concerning the enforcement of the parties' agreement to arbitrate.

II. Plaintiffs' choice-of-law challenge is immaterial.

The Delegation Provisions do not contain a choice-of-law clause and do not contain a reference to any particular law. They need not do so. "[A] valid and enforceable choice-of-law provision is not a prerequisite to determining the enforceability of a delegation provision or the 'gateway' issue of arbitrability." *Dunn*, 2024 WL 4379966, at *13. This is because "if a contract does not specify what law applies, or if the contractually specified law cannot be applied, courts engage in a choice-of-law analysis." *Id.* For these reasons, the Supreme Court held it is premature to resolve a choice-of-law dispute at the arbitration-enforcement stage, i.e., the delegation stage, and that "the choice-of-law question . . . must be decided in the first instance by the arbitrator." *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995)).

Plaintiffs' choice-of-law arguments are premature and do not provide a basis for avoiding enforcement of the Delegation Provisions.

A. Choice-of-law considerations are premature at this stage.

Plaintiffs ignore controlling and persuasive authority holding it is premature to decide choice-of-law considerations at this point and ask this Court to do the same. These authorities provide that any choice-of-law considerations are decided after enforcement of the Delegation Provisions before this Court.

In *Vimar Seguros y Reaseguros, S.A.*, the Court held that "mere 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. 515 U.S. at 541. Likewise, in *Johnson v. Opportunity Financial, LLC*, the possibility that an arbitrator might enforce a choice-of-law provision that would be dispositive of a federal RICO claim did not preclude compelling arbitration, because "a plaintiff's chance of success plays no role in the analysis deciding whether arbitration must be had" and it would be premature to resolve the choice-of-law challenge. 2023 WL 2636712, at *5 (E.D. Va. Mar. 24, 2023). *Accord Broussard v. FinWise Bank, Inc.*, No. SA-21-CV-01238-OLG, 2022 WL 2057488, at *4 (W.D. Tex. May 12, 2022).

Indeed, the Supreme Court in *Mitsubishi Motors Corp.* (the case in which the Effective Vindication Doctrine has its origins) enforced arbitration of federal antitrust claims despite the contract at issue requiring arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association. 473 U.S. at 617. The contract also contained a choice-of-law clause selecting the laws of the Swiss Confederation. *Id.* at 637 n.19. Despite a challenge that the choice-of-law clause precluded a federal antitrust claim, the Supreme Court commented that any public policy concerns regarding the ability to enforce federal antitrust laws in arbitration would be an issue to address at the award enforcement stage. *Id.* "We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award." *Id.*

This Court too has held public policy defenses are properly asserted at the award enforcement stage. *Zimmer Biomet Holdings, Inc. v. Insall*, 108 F.4th 512, 517 (7th Cir. 2024). It is for this reason that the Effective Vindication Doctrine is a public policy defense to be asserted following arbitration at the award stage. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373 (4th Cir. 2012).

This makes particular sense here where the choice-of-law dispute requires a fact-based analysis and weighing of sovereign interests. *See, e.g.*, *Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 258 (7th Cir. 2023) (discussing the multi-factored analysis for tribal sovereign immunity of tribal businesses). Plaintiffs do not cite any authority that would require a tribal business to make such a threshold showing just to enforce a delegation clause.

Plaintiffs' challenges to tribal interests disguised as a choice-of-law challenge should be resolved by the arbitrator with the aid of an evidentiary record which will in turn aid in resolving Plaintiffs' challenges to the application of the Tribe's law.

B. Plaintiffs misconstrue the Loan Agreements' language.

Plaintiffs do not dispute that the terms of the Arbitration Agreement incorporate AAA's Consumer Arbitration Rules, including Rule 14 granting the arbitrator "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." Rule 14, AAA, Consumer Arbitration Rules, *available at* https://adr.org/consumer (last visited on January 8, 2025). Nor do Plaintiffs dispute that this language generally authorizes the arbitrator to consider and rule upon Plaintiffs' challenges to arbitration.

Instead, citing the Agreement's language that "If the AAA's rules or procedures are different than the terms of this Arbitration Agreement, the terms of this Arbitration Agreement will control" (Dkt. 7-1 at 22, 47), Plaintiffs argue that the Governing Law Provisions limit the Delegation Provisions and require all challenges to be resolved under the Tribe's law. But that is not what the Delegation Provisions state. Rather, the plain language delegates to the arbitrator all disputes "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.) It does not matter what the challenge is or under what law the challenge arises. The plain language delegates the challenge to the arbitrator to resolve it.

Plaintiffs' interpretation of the quoted language is also wrong because AAA's rules and procedures do not conflict with the relevant terms of the Arbitration Provisions. Both the Delegation Provisions and Rule 14 of AAA's Consumer Arbitration Rules grant the arbitrator authority to rule on all challenges to enforceability and validity. Nothing in either the Loan Agreements or the AAA rules directs the arbitrator to do so exclusively under the Tribe's law.

The Eleventh Circuit rejected the same type of argument in *Dunn*:

> While that clause may prevent the use of certain rules and procedures at arbitration, it 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.

2024 WL 4379966, at *11. AAA's rules and procedures and the Arbitration and Delegation Provisions here do not conflict because they all permit Plaintiffs to pursue their challenges in arbitration. The opportunity to pursue the challenge "is key in determining" that a delegation provision is enforceable. *Brice*, 13 F.4th at 831.

Plaintiffs also ignore that their pleadings assert federal claims too. Plaintiffs have not raised any argument as to how a choice-of-law clause preserving federal law prevents them from fairly arbitrating their federal claims.

Plaintiffs' proposed interpretation of the Loan Agreements also disregards binding authorities cited by Defendants by reading conflicts into the Loan Agreements that simply do not exist. Rather, the FAA's policy favoring arbitration imposes on a court a duty to harmonize the provisions of an arbitration agreement to avoid finding inconsistencies. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995). Invoking substantive law does not impair 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.*

Plaintiffs' interpretation is wrong, and the Delegation Provisions are not restricted by the Governing Law Provisions.

C. An invalid choice-of-law clause does not preclude arbitration.

There is no need for the Court to resolve disputed choice-of-law issues at this stage because it is undisputed the parties entered into contracts that require arbitration of all "Disputes," the scope of which include the claims at issue. The Court's review at the arbitration enforcement stage is limited to evaluating whether there is an arbitration agreement and that the parties' dispute falls within the scope of that agreement. *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 704 (7th Cir. 2022). A governing law provision is only relevant if there is a dispute about contract formation. *See Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 809 (7th Cir. 2011) (addressing choice-of-law because the dispute concerned contract formation), *abrogated on other grounds by Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC*, 104 F.4th 978, 984 (7th Cir. 2024). There is no such dispute here and there is no need to resolve the applicable law to address contract formation.[3]

Nor is resolving the applicable law issue necessary at this stage to address Plaintiffs' unconscionability challenge to the Arbitration Agreements or Delegation Provisions, because Plaintiffs do not show why it would be unconscionable to delegate any of their challenges to an arbitrator as required by *Rent-A-Center*.

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[3] Even if this Court needed to identify the applicable law regarding contract formation issues, the Tribe's law includes a Tribal Contract Code. (Dkt. 36-1 at ¶ 4; and *See* Dkt. 36-1 at p. 4, Section 3 of Tribal Contract Code - Requisites of a Contract.)

Regardless, when a choice-of-law dispute arises in the context of selecting the appropriate law for analyzing contract formation, a finding that a choice-of-law provision is invalid "does not end the analysis or invalidate the delegation provision." *Dunn*, 2024 WL 4379966, at *6. This is so because, when there is no contractual choice-of-law clause or when such a clause cannot be enforced, courts then engage in choice-of-law analysis. *Id.* The remedy is to identify the appropriate applicable law—not invalidate the entire agreement.

Ultimately, any alleged invalidity in a choice-of-law clause is inconsequential to enforcing an arbitration agreement. This was considered in *Faulkenberg*, when this Court examined whether to compel arbitration under an agreement containing a Texas choice-of-law provision. 637 F.3d at 809. This Court decided to analyze the contract formation challenge under Illinois law. *Id.* The decision to not enforce the Texas choice-of-law provision did not invalidate the entire arbitration agreement. *Id. Faulkenberg* is controlling here.

In *Stawski*, this Court held that finding a choice-of-law clause to be invalid under Illinois beer distributor laws did not preclude enforcement of the parties' agreement to arbitrate. 349 F.3d 1023, 1026 (7th Cir. 2003). Illinois's constitutional authority to restrict imports of alcohol supported an Illinois statute requiring application of Illinois law to contracts with beer distributors. *Id.* The Illinois statute therefore invalidated a contractual choice-of-law clause selecting Polish law. *Id.* But the enforcement of an Illinois statute did not supersede federal law regarding arbitration. *Id.* The Supremacy Clause and the FAA preempted any attempt to cite

Illinois state law as a basis for precluding arbitration. *Id.* "Thus the contract's forum-selection clause is enforceable, even though its choice-of-law clause is not." *Id.* at 1026. This authority is dispositive of Plaintiffs' challenge to compelling arbitration because, even if Plaintiffs were correct regarding the validity of the choice-of-law clause (they are not), such purported invalidity does not preclude enforcement of the parties' arbitration agreement.

The choice-of-law issue here is further unique because it involves an analysis of factual and legal questions regarding the interplay of federal, tribal, and state law, including tribal sovereign immunity, intertwined with Plaintiffs' underlying claims that cannot be resolved as a matter of law at this stage. *Mestek*, 72 F.4th at 258 ("The doctrine of tribal sovereign immunity is a core feature of Indian self-governance. It derives from tribes' status as 'separate sovereigns pre-existing the Constitution' and the 'common-law immunity from suit traditionally enjoyed by sovereign powers'") (internal citations omitted). Tribal sovereignty is a critical component of federal law that deserves careful analysis in an arbitration based on an appropriate factual record. Such an analysis delves into the merits of Plaintiffs' claims, which are not before this Court. There is no reason why a choice-of-law dispute needs to be resolved at this stage and why it cannot be considered by an arbitrator during the arbitration in conjunction with analyzing the tribal sovereignty interests at issue.

The Court should not prematurely rule on Plaintiffs' challenges to the Governing Law Provisions, because disposition of that challenge does not prevent enforcement of the parties' agreement to arbitrate.

D. Plaintiffs' cited authorities on statutory waiver are inapposite.

Plaintiffs' assertion that the Governing Law Provisions in the Loan Agreements violate Illinois state statute is immaterial to the question of arbitrability. None of the cases on which Plaintiffs rely—*To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 152 F.3d 658, 666 (7th Cir. 1998); *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990); *Korean Am. Broad. Co. v. v. Korean Broad. Sys.*, No. 09 C 6665, 2012 WL 1080260, at *4 (N.D. Ill. Mar. 29, 2012); *Franklin's Sys., Inc. v. Infanti*, 883 F. Supp. 246, 253 (N.D. Ill. 1995); *Flynn Beverage Inc. v. Joseph E. Seagram & Sons, Inc.*, 815 F. Supp. 1174, 1180 (C.D. Ill. 1993)—support their statutory waiver argument. These cases concerned states' franchise laws not at issue here. None of the cases involved arbitration agreements or challenges to enforcement of arbitration agreements. None of them addressed *Stawski* and this Court's holding that an agreement to arbitrate is enforceable even if the choice-of-law clause is deemed invalid.

III. The Effective Vindication Doctrine is inapplicable.

The Effective Vindication Doctrine does not apply to preserve state law claims, and Plaintiffs cite no federal circuit case authority holding otherwise. Plaintiffs' reliance on *Viking River* is misplaced because footnote 5 in *Viking River* did not change the scope of the Effective Vindication Doctrine. *See Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 n.5 (2022). The principle discussed in

footnote 5 of *Viking River* (and its citation to *Preston*)—that "[b]y 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"—comes directly from *Mitsubishi Motors Corp.*, in which the Supreme Court declined to apply the Effective Vindication Doctrine at the arbitration enforcement stage. *See id.*; *see also Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Mitsubishi Motors Corp.*, 473 U.S. at 628.

A. There is no waiver of federal law to reconcile with the FAA.

This Court recently reiterated this same principle in *Rodgers-Rouzier*, which interpreted footnote 5 of *Viking River* as recognizing 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 at 991. 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 985, , 992. These holdings say nothing about applying the Effective Vindication Doctrine to invalidate contracts containing both arbitration and choice-of-law provisions.

Justice Kagan's dissent in *Italian Colors* and subsequent cases relying on that dissent remain the correct application and scope of the Doctrine. It exists to reconcile the FAA with the rest of federal law over which the FAA does not have preemptive force. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting). It does not exist to preserve state statutory rights against a contractual choice-of-law provision. *Id.* With respect to state statutory rights, the Supremacy Clause controls and federal law preempts state law. *Id.* As a result,

Plaintiffs' assertion of state law, including the PLPA, cannot serve as a basis to avoid compelling arbitration as required by the FAA.

In *State Farm Mutual Automobile Insurance Co. v. Tri-Borough NY Medical Practice P.C.*, 120 F.4th 59, 89 (2d Cir. 2024), the Second Circuit cited to Justice Kagan's dissent and applied the Doctrine as defined in that dissent. In *Smith v. Board of Directors of Triad Manufacturing, Inc.*, this Court held that the Doctrine's application is "rare" but applied when an arbitration provision could not be reconciled with federal ERISA provisions. 13 F.4th 613, 621 (7th Cir. 2021).

There is no conflict with federal law present here to which the Doctrine needs to be applied.

B. Plaintiffs' arguments contradict the Doctrine's purpose.

In reality, Plaintiffs seek the opposite of what the Effective Vindication Doctrine exists to achieve, i.e., to reconcile the FAA with other federal laws over which the FAA lacks preemptive force. The issue here for the arbitrator is a choice-of-law dispute between application of Illinois law or the Tribe's and Federal law. A finding by this Court, at the outset of this case, that Illinois law must be applied improperly strips the arbitrator of jurisdiction to resolve the dispute and ignores federal tribal law. Unlike the distributor in *Stawski*, Illinois does not have authority over tribes. That power lies with the exclusive authority of the United States Congress. *See, e.g.*, *Mestek*, 72 F.4th at 258 (enforcing tribal sovereign immunity). Plaintiffs seek to misuse the Effective Vindication Doctrine to avoid proper delegation and preclude enforcement of federal law in favor of enforcing Illinois state law.

Plaintiffs' challenge is immaterial even under the Effective Vindication Doctrine. In *Stawski*, this Court cited *Mitsubishi's* discussion of the Effective Vindication Doctrine, observing that "[a]rbitration of statutory issues today is routine, even when substantive rights are not subject to waiver." *Id.* The "need to apply domestic substantive law" did not foreclose arbitration "any more than it did in *Mitsubishi*…." *Id.* There is no need to consider or resolve disputed choice-of-law issues here. Again, even if the Governing Law Provisions were deemed to be invalid, which they are not, *Stawski* recognizes that an invalid choice-of-law clause does not preclude enforcement of an agreement to arbitrate. Thus, this Court should compel arbitration and delegate to the arbitrator Plaintiff's challenges to the Governing Law provisions.

C. Plaintiffs fail to fully analyze the Doctrine's application.

Plaintiffs' Effective Vindication Doctrine analysis is also incomplete. As Plaintiffs acknowledge on page 32 of their brief, the Effective Vindication Doctrine considers whether a choice-of-law clause and forum clause operate in tandem as a prospective waiver. *Mitsubishi Motors Corp.*, 473 U.S. at 638 n.19. But, even were the Doctrine applicable when there is no claimed waiver of rights under federal law, "there is no basis for assuming the forum inadequate or its selection unfair" without evidence from the resisting party showing that enforcement would be unreasonable, unjust, or that proceedings would be unduly difficult or inconvenient. *Id.* at 633.

Plaintiffs do not identify anything about arbitrating with AAA pursuant to AAA's Consumer Arbitration Rules that operates in tandem with the Governing Law Provisions as a prospective waiver. Plaintiffs do not assert any arguments

challenging AAA's ability to conduct a fair arbitration. Plaintiffs did not submit any evidence at all. Plaintiffs, therefore, have not established the Effective Vindication Doctrine even applies.

The Court should compel arbitration and delegate all challenges to arbitration for resolution by the arbitrator.

D. Plaintiffs' argument regarding Tribal jurisdiction is misplaced.

Although it presents an issue for the arbitrator, Plaintiffs' argument regarding Tribal jurisdiction relies on erroneous legal arguments that "the Tribe does not have legislative jurisdiction over the transactions at issue" and that a "tribe's substantive jurisdiction…does not extend to dealings between non-Indians off the reservation." Appellees' Brief, at 40. Plaintiffs conflate the concepts of consent to tribal jurisdiction with consent to a choice-of-law provision.

Plaintiffs' challenges here are about a choice-of-law clause. But Plaintiffs cite authorities that concern consent to tribal jurisdiction—something entirely different. Consent to tribal jurisdiction is not an issue raised by Defendants' motion to compel arbitration and should be delegated to the arbitrator.

For purposes here, what matters is that the express terms of the Arbitration Agreements and consistent with the Delegation Provisions, the parties delegated adjudicative jurisdiction to the AAA over all disputes involving transactions between the parties. Plaintiffs do not cite any authority to hold that a choice-of-law provision is valid only if the selected forum has legislative jurisdiction over the parties.

Even so, Plaintiffs' arguments based on these authorities are misguided because consent to tribal jurisdiction (again, not at issue here) requires a factual analysis, and Plaintiffs failed to provide any factual record. The Supreme Court has held that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). The requisite factual inquiry considers whether such tribal regulation stems "from the tribe's inherent sovereign authority to set conditions on entry, preserve self-government, or control internal relations." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 337 (2008). It is not a question resolved by the non-member's geographical location. *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 939 (D.S.D. 2013).

Plaintiffs inaccurately summarize the Second Circuit's holding in *Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services*, 769 F.3d 105 (2d Cir. 2014). In that case, a New York regulatory agency was attempting to exercise jurisdiction over the Tribe's economic arms; the Tribe was not attempting to exercise jurisdiction over a consumer. *Id.* at 114. In a non-arbitration context, the Second Circuit held that, with further factual development, the Tribe might successfully demonstrate its tribal sovereignty to state law in the context of online lending. *Id.* The court merely held that the record on the motion for preliminary injunction lacked sufficient factual development for injunctive relief on the issue. *Id.* at 118 ("With the benefit of discovery, plaintiffs may amass and

present evidence that paints a clearer picture of the 'who,' 'where,' and 'what' of online lending, and may ultimately prevail in this litigation"). It did not hold what Plaintiffs contend here—that a non-tribal member cannot, as a matter of law, consent to federal law and the Tribe's law.

Plaintiffs cite *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), for the proposition that "an Indian Tribe does not have jurisdiction to prescribe rules of contract law governing Internet transactions with non-members of the Tribe off the reservation, and jurisdiction cannot be supplied by agreement." Appellees' Brief, at 18. But that was not this Court's holding in *Jackson*. This Court in *Jackson* only considered jurisdiction of a tribal court over a nonmember that had conducted business with a member-owned—not tribally-owned—company formed under South Dakota law. 764 F.3d at 782. Unlike *Jackson*, the Tribe's court is not attempting to exercise jurisdiction over the Plaintiffs. The issue in *Jackson* is not the issue here, and the plaintiff in *Jackson* raised a challenge to non-existent tribal arbitration rules and processes, not the AAA being a suitable forum for arbitration.

Plaintiffs' challenges are also inconsistent in other ways with the analysis in *Jackson*. In *Jackson*, the court assumed, without deciding the issue, that the choice-of-law clause selecting the tribe's laws was enforceable. *Id.* at 775. It noted that if the clause was unenforceable, then the law of Illinois or federal law would apply. *Id.* at n.23. An invalid choice-of-law clause would not have invalidated the arbitration agreement or the forum selection clause. *Id.*

Plaintiffs' tribal jurisdiction arguments are wrong, but more importantly, tribal jurisdiction is not at issue here. Plaintiffs instead have raised a routine choice-of-law dispute that should be delegated to the arbitrator.

IV. Plaintiffs' unconscionability challenge is legally erroneous.

The district court's Order declined to address Plaintiffs' unconscionability defense (A-1 at 3 n.6), but Plaintiffs reassert it in their response brief. This Court should delegate the issue of unconscionability to the arbitrator because the challenges to the Loan Agreements' Governing Law Provisions and interest rate provisions are challenges to the Loan Agreements as a whole. *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (observing in response to an unconscionability challenge that "one who challenges the entire contract containing an arbitration clause nonetheless must arbitrate").

In addition, Plaintiffs failed to meet their burden of proving unconscionability. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration."). Plaintiffs did not argue or submit any evidence of procedural unconscionability. (Dkt. 33.) Instead, Plaintiffs only assert substantive unconscionability based exclusively on unproven allegations about Defendants and the Tribal businesses at issue. There is no evidentiary record on which to conduct an unconscionability analysis that is required for a successful challenge to arbitration. Because Plaintiffs did not meet their burden, the unconscionability challenge should be delegated to the arbitrator.

A. Plaintiffs failed to establish the Arbitration Agreements or Delegation Provisions are unconscionable.

The allegations in Plaintiffs' First Amended Complaint on which Plaintiffs' unconscionability challenge relies do not address, much less establish, procedural or substantive unconscionability as a matter of law. Rather, Plaintiffs put forth untrue facts intended to impugn the reputation and character of the Tribe's ownership and operation of a legitimate business. Instead of addressing unconscionability, Plaintiffs' allegations improperly delve into whether the Defendants are arms of the Tribe entitled to an extension of the Tribe's sovereign immunity, an issue not before this Court and that has no bearing on the asserted unconscionability challenge.[4]

Plaintiffs again wrongly rely on *Jackson*. The Court in *Jackson* deemed the forum selection clause designating non-existent tribal arbitration rules and procedures to be both procedurally and substantively unconscionable under Illinois law. *Jackson*, 764 F.3d at 778. The evidentiary record demonstrated that the tribe's law did not contain any arbitration procedures and the plaintiffs agreed to be bound by a dispute resolution process that did not actually exist. *Id.* This Court did not deem the arbitration provision to be unconscionable because of the choice-of-law clause. *Id.* at 781. It held the arbitration provisions to be unconscionable because "it

[4] Arm-of-the tribe analysis is multi-factored and intended to identify the extent of the tribe's control of the business. *Mestek*, 72 F.4th at 261 (outlining factors for analyzing arm-of-the tribe status for purposes of tribal sovereign immunity). Plaintiffs' allegations, presented with no supporting evidence, do not address these relevant factors and are therefore immaterial even for tribal sovereign immunity analysis. Reliance on such allegations is obviously intended to distract and do not aid resolution of any issues on appeal.

allowed the Loan Entities to manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules." *Id.*

Because the parties here agreed to arbitrate with the AAA, none of the concerns raised in *Jackson* are present. And the analysis and holding in *Jackson* relied on the evidentiary record in that case. There is no such evidentiary record here.

The tribal sovereignty interests raised by Plaintiffs' challenges require a factual record, and Plaintiffs' summary conclusions about the import of Plaintiffs' allegations are wrong as a matter of law. *Jackson* ultimately reflects the fact-intensive nature of such challenges and the need for an evidentiary record that is absent here. If the issue of unconscionability is even before the Court, Plaintiffs have not met their burden for establishing unconscionability.[5]

B. Plaintiffs' arguments violate the FAA's equal-treatment rule.

Plaintiffs' contention that the selection of the Tribe's law constitutes unconscionability as a matter of law is erroneous because that finding would violate the FAA's equal-treatment rule. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 507 (2018) (holding that the FAA's "equal-treatment" rule permits invalidation of arbitration agreements by "generally applicable contract defenses, such as fraud,

[5] *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (rejecting merits of unconscionability challenge to entire agreement in conjunction with compelling arbitration because "there is little point in telling them to arbitrate the doomed 'unconscionability' argument, which has been rejected in this circuit as often as it has been raised").

duress, or unconscionability") (internal quotations omitted). *See also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (holding that the FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts").

What Plaintiffs propose here is not a generally applicable unconscionability defense, but instead a unique standard that deprives tribal businesses of the right to arbitrate disputes under the Tribe's law and federal law. If anything, the authorities discussed above confirm that no other business is denied the right to arbitrate under the FAA based on a disputed choice-of-law provision.

Imposing additional burdens on a tribal business at the outset of the case regarding a choice-of-law clause, despite an otherwise binding arbitration agreement, would eradicate the purposes of arbitration and subject tribal businesses to a unique standard that discriminates against legitimate organizations because of their tribal ownership. No such standard applies to any other business under the FAA. "[C]ourts must place arbitration agreements on an equal footing with other contracts…and enforce them according to their terms…." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Conclusion

For the foregoing reasons and the reasons set forth in Defendants' opening brief, Defendants request 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 6,982 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.

Dated: January 10, 2025

/s/ *Paul Croker*
Paul Croker
One of the Attorneys for Appellants

Certificate of Service

I hereby certify that on January 10, 2025, the Reply Brief 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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