

Nos. 20-1062 (L), 20-1063, 20-1358, 20-1359

**In the United States Court of Appeals
for the Fourth Circuit**

**GEORGE HENGLE; SHERRY BLACKBURN; WILLIE ROSE;
ELWOOD BUMBRAY; TIFFANI MYERS; STEVEN PIKE; SUE
COLLINS; LAWRENCE MWETHUKU, ON BEHALF OF THEMSELVES AND
ALL INDIVIDUALS SIMILARLY SITUATED,
*Plaintiffs-Appellees,***

v.

**SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF
UPPER LAKE EXECUTIVE COUNCIL; TRACEY TREPPA, VICE-
CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE
COUNCIL; KATHLEEN TREPPA, TREASURER OF THE HABEMATOLEL
POMO OF UPPER LAKE EXECUTIVE COUNCIL; CAROL MUÑOZ,
SECRETARY OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE
COUNCIL; AIMEE JACKSON-PENN, JENNIFER BURNETT, AND
VERONICA KROHN, MEMBERS-AT-LARGE OF THE HABEMATOLEL POMO
OF UPPER LAKE EXECUTIVE COUNCIL; ALL IN THEIR OFFICIAL CAPACITIES;
SCOTT ASNER; AND JOSHUA LANDY,
*Defendants-Appellants.***

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, No. 3:19-cv-00250 (NOVAK, D.)

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' arbitration arguments rest on a single flawed premise—that their agreements are “the very same form contracts” this Court refused to enforce in previous tribal lending cases. Opening/Response Brief of Appellees (“Resp.”) 20; *see also id.* at 1, 2, 17, 19. That is wrong. Plaintiffs' agreements are fundamentally different because they expressly apply federal law, rather than attempting to waive it in whole or in part. They make clear that “any arbitration shall be governed by the [Federal Arbitration Act] FAA.” JA1185. They allow Plaintiffs to assert the same claims before a neutral arbitrator that could be litigated in federal court. And they allow a federal court to review the arbitrator's decision.

Plaintiffs, like the district court, provide no precedent for setting aside the delegation clause, or the arbitration agreement more generally, in contracts that embrace federal law. And Plaintiffs, like the district court, miss the mark in emphasizing two provisions of their contracts electing Tribal law instead of state law. Those provisions say nothing about federal law and provide no basis for ignoring the rest of the contracts, which make clear that federal law applies. The plain language of the contracts and precedent from the Supreme Court and this Court require granting the motion to compel

arbitration, including on the threshold question of arbitrability. The Court need go no further.

If the Court nevertheless reaches the question whether to honor the parties' choice of Tribal law, this Court's precedents require it to follow the direction of Virginia's highest court. And the Virginia Supreme Court has already answered the question definitively. In *Settlement Funding*, the court enforced an agreement to apply a state law with no usury limit, notwithstanding the borrower's claim that doing so would violate Virginia's anti-usury policy. Plaintiffs' effort to empty *Settlement Funding* of its meaning is belied by the decision's plain language and procedural history. The decision answers the public policy question presented here.

The Court should also decline to recognize a cause of action allowing Plaintiffs to seek injunctive relief against the Tribe's government for alleged state-law violations. There is no dispute that such claims lack Congressional authorization. And there is no basis for Plaintiffs' and the Department of Justice's effort to analogize to *Ex parte Young* claims. That equitable cause of action is a product of the supremacy of *federal law* under the Constitution. It does not allow private plaintiffs to bring official-capacity suits under *state law*. And the suggestion that *Bay Mills* authorized Plaintiffs' claims is incorrect.

It rests on the flawed premise that the Supreme Court dramatically expanded *Young*—and dramatically narrowed both state and tribal officials’ immunity—through a handful of scattered quotes and citations in a decision *rejecting* an attack on established immunity principles. The law does not permit Plaintiffs to foist their erroneous view of Virginia law on officials of a coequal sovereign.

Finally, Plaintiffs ask this Court to disregard settled principles of statutory interpretation and permit them to pursue claims for equitable relief under RICO. The district court correctly recognized that the text, structure, history, and consistent interpretation of the statute confirm that private plaintiffs are limited to pursuing damages claims.

The decision below should be reversed on all but the RICO issue.

COUNTERSTATEMENT OF ISSUE ON CROSS-APPEAL

Whether the district court correctly concluded that RICO prohibits private plaintiffs from seeking injunctive relief, consistent with the text, structure, and history of the statute.

ARGUMENT

I. THE PARTIES’ AGREEMENTS TO ARBITRATE ARE VALID AND ENFORCEABLE.

Plaintiffs’ arbitration arguments are variations on a single theme: Because this Court declined to compel arbitration in cases involving *different*

tribal lenders and *different* arbitration agreements, Plaintiffs' agreements to arbitrate must be disregarded as well.

That is not how the law works. “[A]rbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms,” not the terms in other contracts. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Indeed, in the *Gibbs* cases, which Plaintiffs emphasize, the district court evaluated several different arbitration agreements and, in portions of its opinion that were not appealed, *granted* motions to compel arbitration under contracts that “do[] not disavow federal law, wholesale,” and, “as a whole contemplate[] the application of federal law to the arbitration proceedings.” *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 298, 303 (E.D. Va. 2019).

Unlike the agreements this Court has previously considered, Plaintiffs' agreements expressly *embrace* the application of federal law. They:

- Make clear that “any arbitration shall be governed by the FAA,” JA1185;
- Provide that any conflict between Tribal law and the FAA shall be resolved in favor of the FAA, *id.*;
- Permit the arbitrator to invalidate the arbitration agreement based on “such grounds as exist in law or in equity for the revocation of any contract,” by incorporating § 2 of the FAA, 9 U.S.C. § 2; *see* JA1185;

- Require arbitration of “all claims based upon a violation of any . . . *federal* constitution, statute, or regulation,” JA1184 (emphasis added);
- Invoke federal law generally or specific federal laws other than the FAA fifteen times in the agreements and accompanying notices, including by stating that the loan transaction “involv[es] both interstate commerce and Indian commerce under *the United States Constitution* and *other federal* and tribal laws,” JA1184–92 (emphases added);
- Contain no provision disclaiming federal law or attempting to limit which federal laws apply;
- Authorize the arbitrator to “award statutory damages and/or reasonable attorneys’ fees” that are “allowed by statute or applicable law,” JA1185; and
- Allow the parties to obtain judicial review in federal court of any arbitration award, by incorporating § 11 of the FAA, 9 U.S.C. § 11; *see* JA1185.

The agreements thus allow Plaintiffs to raise any challenges to arbitration, and any federal claims, just as they could in federal court.

The Supreme Court has repeatedly held that the parties’ choice of an arbitral forum must be honored where that choice does not abridge substantive federal rights. Because Plaintiffs’ arbitration agreements do nothing more than swap an arbitral forum for a judicial forum, the agreements should be enforced.

A. The Delegation Clause Is Enforceable Because The Agreements Empower The Arbitrator To Resolve Plaintiffs' Prospective Waiver Argument.

As Appellants explained, Opening Brief (“Br.”) 25–31, the district court asked the correct question in assessing the validity of the delegation clause: Can the arbitrator use the same tools available to a federal court in ruling on Plaintiffs’ prospective waiver argument? But the court blatantly misread the arbitration agreement and this Court’s precedent in answering that question “no.” Nothing in Plaintiffs’ brief cures the district court’s errors.

As the district court recognized, the determinative factor in the enforceability of the delegation clause is whether the FAA applies. *See* JA1730–34. The FAA operates on an agreement to delegate “just as it does on any other” agreement. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). The statute “creates ‘a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.’” *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382 n.2 (4th Cir. 1998) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). “Once a dispute is covered by the FAA, federal law applies to *all questions* of interpretation, construction, validity, revocability, and enforceability.” *Smith Barney, Inc. v. Critical Health Sys. of N.C.*, 212 F.3d

858, 860–61 (4th Cir. 2000) (emphasis added) (citation omitted). That includes whether an arbitration agreement prospectively waives federal rights—Plaintiffs’ challenge here—as that is a ground “for the revocation of any contract.” 9 U.S.C. § 2; see *Gibbs v. Haynes Investments, LLC*, 2020 WL 4118239, at *5 (4th Cir. July 21, 2020).

The FAA is presumed to apply absent “an unequivocal expression of the parties’ intent” to foreclose it. *Porter Hayden*, 136 F.3d at 383. Indeed, in *Porter Hayden*, this Court employed that presumption in holding that the FAA governed even though: (1) the contract was *silent on the FAA*; and (2) one possible reading of the agreement was that state law *displaced the FAA*. *Id.* at 382; see Br. 26–27. Plaintiffs do not even cite, let alone address, *Porter Hayden*, despite the central role it played in Appellants’ opening brief.

This case is easier than *Porter Hayden* because the agreements, far from being silent on the FAA, expressly *embrace* it:

This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. Thus, *any arbitration shall be governed by the FAA* and subject to the laws of the Habematolel Pomo of Upper Lake.

JA1185 (emphasis added). The contracts also specify that the FAA prevails in the event of a conflict between federal and tribal law: “The arbitrator shall

apply applicable substantive Tribal law consistent with the Federal Arbitration Act.” JA1185; *see* Br. 30. Those provisions constitute an “unequivocal expression of the parties’ intent” to *apply* the FAA. *Porter Hayden*, 136 F.3d at 383. And because the FAA applies, the arbitrator can apply federal law to evaluate Plaintiffs’ prospective waiver argument (and other arbitrability challenges). *Smith Barney*, 212 F.3d at 860–61.

Plaintiffs offer no explanation for how a provision saying that the FAA “govern[s]” could actually mean the opposite. They reference the district court’s conclusion that the transition word “thus” strips that language of its most natural meaning, *see* Resp. 22; JA1782–83, but Appellants explained why that reading would render superfluous other portions of the provision, Br. 29–30. Plaintiffs do not attempt to defend this flawed interpretation.

Plaintiffs instead rely on the same choice-of-law provisions that the district court emphasized, Resp. 18–19, but those provisions cannot nullify the clear statement that an arbitration “shall be governed by the FAA,” JA1185. Those provisions merely clarify that Tribal law applies instead of *state law*, even if arbitration occurs on state land at a place of the borrower’s choosing. Br. 30–31. A “general choice-of-law provision does not displace federal arbitration law,” and thus a contract’s invocation of a particular “substantive

law” to govern its terms “is *irrelevant to the decision whether the FAA applies.*” *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 n.7 (4th Cir. 2012) (emphasis added). Indeed, “[t]he Supreme Court has . . . squarely rejected the argument that a federal court should read a contract’s general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law.” *Porter Hayden*, 136 F.3d at 382 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). At the most, the choice-of-law provisions could create ambiguity about the FAA’s applicability, which must be resolved in favor of the FAA. *Porter Hayden*, 136 F.3d at 382–83.

In short, agreements saying that the FAA “govern[s]” must be read to mean exactly that. Because the arbitrator can evaluate Plaintiffs’ prospective waiver argument by applying federal law in the same manner as a federal court, the delegation clause should be enforced.¹

¹ To the extent this Court’s recent decisions permit (or are read to permit) courts to address challenges to the arbitration agreement as a whole whenever Plaintiffs assert they are challenging a delegation clause, they are in significant tension with *Henry Schein*, 139 S. Ct. 524 (2019). There, the Supreme Court held that if the parties have delegated such challenges to the arbitrator, she must get first crack at resolving them, even if the case for arbitrability is weak or even frivolous. *Id.* at 529–31.

B. The Parties' Agreements Do Not Prospectively Waive Federal Rights.

Even if the Court disregards the delegation clause and resolves Plaintiffs' prospective waiver argument, it should still reverse. The numerous contractual provisions embracing federal law, *see supra* at 4–5, preclude finding a prospective waiver. The arbitration agreements permit borrowers to pursue any substantive federal claims they have—including the federal-law claims in Plaintiffs' complaint. Appellants would be free to respond as they would in federal court—such as by invoking sovereign immunity, in Tribal Appellants' case—but the success of the claims would not turn on whether they are litigated in an arbitral or judicial forum.

For starters, the declaration that the FAA “govern[s]” indicates that the contracts protect potential federal claims. As just explained, an arbitrator applying the FAA can invalidate agreements that nullify federal rights. 9 U.S.C. § 2; *see supra* at 6–7. It would be illogical and self-defeating for the arbitration agreement to both apply the FAA and extinguish federal claims in the same breath—the invocation of the FAA would nullify arbitration, allowing the federal claims to proceed in court.

In fact, the agreements repeatedly reference federal law, confirming that they do not waive federal rights. The contracts require arbitration of “all

claims based upon a violation of any . . . *federal* constitution, statute, or regulation.” JA1184 (emphasis added); *see also id.* (also requiring arbitration of “all . . . *federal* or state law claims”) (emphasis added). The contracts invoke federal law numerous times, including by clarifying that the loan transactions “involv[e] both interstate commerce and Indian commerce under the *United States Constitution* and *other federal* and tribal laws.” JA1185 (emphases added). And they permit the arbitrator to “award statutory damages and/or reasonable attorneys’ fees” that are “allowed by statute or applicable law,” JA1185—a reference best read to incorporate both the “federal and tribal laws” applicable to the transaction, *id.*² These repeated references to federal law are more than enough to confirm that it applies. *See Porter Hayden*, 136 F.3d at 382; *Rota-McLarty*, 700 F.3d at 697 n.7.

² Plaintiffs thus miss the mark with their series of baseless attacks on Tribal law. *See* Resp. 23–24. That Tribal law provides different remedies from federal law is irrelevant. The contracts preserve Plaintiffs’ rights to pursue any available federal statutory remedies *in addition to* their remedies under Tribal law. Moreover, the fact that the Tribe has chosen to broadly incorporate federal consumer protection law into its law provides additional evidence that the Tribe is not resisting the application of federal law—unlike in the previous cases this Court has resolved. Br. 37–38; *see also* Br. for HPUL Consumer Fin. Servs. Reg. Comm’n as Amicus Curiae at 7–10 (“Comm’n Br.”).

By incorporating the FAA, the agreements also provide for federal court review of an arbitral award, which is further proof that there is no desire to nullify federal law. Although the agreements *permit* enforcement of an arbitrator's award "before the applicable governing body" of the Tribe, JA1185, nothing in the agreements makes tribal jurisdiction exclusive. And because the FAA applies, the contracts respect not only the right to enforce an arbitral award in federal court, but also the right to obtain "back-end judicial review." *Henry Schein*, 139 S. Ct. at 530; *see* 9 U.S.C. § 10. Plaintiffs do not appear to disagree, instead highlighting a provision that precludes courts from *intervening* in pending arbitrations. Resp. 25. But federal law does not require that courts be allowed to intrude on pending arbitrations. Instead, the case Plaintiffs cite emphasizes the importance of review "at the award-enforcement stage," which these agreements permit. *Vimar Seguros y Reaseguros, S.A., v. M/V Sky Reefer*, 515 U.S. 528, 540–41 (1995).

In response, Plaintiffs rely heavily on the contracts' choice-of-law provisions, but they do not nullify the explicit contemplation elsewhere in the agreements that substantive federal law applies. Again, those provisions simply clarify that tribal law applies instead of *state law*. Br. 30–31, 35–36. They do not "express a preference between federal and [Tribal] law." *Porter*

Hayden, 136 F.3d at 383 n.5. The district court acknowledged this point, at least with respect to one of the choice-of-law provisions in the arbitration agreement as well as the choice-of-law provision in the contract as a whole. JA1731; JA1751. And even *Dillon v. BMO Harris Bank, N.A.*—which Plaintiffs emphasize—held that “a foreign choice of law provision, of itself, will not trigger application of the prospective waiver doctrine.” 856 F.3d 330, 334 (4th Cir. 2017). The Court should not interpret choice-of-law provisions saying nothing about federal law to somehow silently retract the many other provisions of the contract that expressly contemplate that federal claims may be pursued in arbitration.

Finally, the doctrines of equitable or judicial estoppel, combined with the arguments set forth in Appellants’ briefs, would prevent Appellants from later arguing that the agreements materially restrict the application of federal law. *See, e.g., Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996). For all of these reasons, there is no basis for finding a prospective waiver. *Haynes*, 2020 WL 4118239, at *5 (“[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,’ courts should

enforce the parties' contract under the FAA.") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).³

C. This Court's Precedents Do Not Require Invalidation Of The Arbitration Agreements.

Because Plaintiffs' contracts expressly embrace federal law, they are categorically different from the previous tribal loan contracts this Court has invalidated on prospective waiver grounds. Plaintiffs' statement that the contracts here are "the very same form contracts that this Court rejected" in prior cases, Resp. 20, is misleading in the extreme.

Start with this Court's recent decisions in *Haynes* and *Sequoia*. Unlike here, those contracts contained numerous provisions expressly disclaiming the applicability of federal law. The contracts:

- Expressly repudiated the FAA, by stating that the parties could consult it only "for guidance." *Haynes*, 2020 WL 4118239, at *7 n.6. Here, by contrast, the FAA "govern[s]." JA1185.

³ Even if there were uncertainty regarding the applicability of federal law, judicial resolution of Plaintiffs' prospective waiver challenge should be deferred until the award-enforcement stage of the arbitration proceedings. As this Court recognized in *Gibbs v. Sequoia Cap. Operations, LLC*, it is inappropriate for a court to evaluate prospective waiver challenges prior to arbitration where "there is uncertainty as to the effect of the choice-of-law provision at issue." 2020 WL 4118283, at *5 (4th Cir. July 21, 2020); *see also Haynes*, 2020 WL 4118239, at *5 (same); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371–73, 373 n.16 (4th Cir. 2012).

- Disclaimed the applicability of federal law, stating that any reference to federal law for guidance “does not represent acquiescence of the [tribe] to *any federal law unless found expressly applicable* to the operations of the [tribe].” *Sequoia*, 2020 WL 4118283, at *2 (emphasis added); *see also Haynes*, 2020 WL 4118239, at *2. The contracts here contain no such language.
- Referenced only federal laws “applicable under the Indian Commerce Clause,” a subset of federal law that is at best narrow. *Sequoia*, 2020 WL 4118283, at *2; *see also Haynes*, 2020 WL 4118239, at *2. By contrast, the contracts here embrace “the United States Constitution and other federal and tribal laws.” JA1185.
- Limited the arbitrator to “remedies available under Tribal law.” *Sequoia*, 2020 WL 4118283, at *4; *see also Haynes*, 2020 WL 4118239, at *7. Here, there is no limitation; the arbitrator may award all possible statutory remedies. JA1185.
- Precluded enforcement of the arbitrator’s decision in federal court and limited the tribal courts to review of “whether the conclusions of law are erroneous under Tribal law.” *Haynes*, 2020 WL 4118239, at *7. The agreements here allow back-end review in federal court and place no limitations on that review. *See supra* at 12.

In short, the contracts in *Haynes* and *Sequoia* expressly repudiated the FAA, substantially limited what federal claims could be asserted, and attempted to insulate arbitral decisions from federal court review. The contracts here do none of those things.

The contracts in *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016) and *Dillon*, are likewise materially different from the contracts here. The *Hayes* agreement specified that it was “subject *solely* to the *exclusive* laws and jurisdiction of the [tribe],” and that “no other state *or federal law or*

regulation shall apply.” 811 F.3d at 669 (emphases added); see *Haynes*, 2020 WL 4118239, at *6 (referencing this provision in describing *Hayes*’s holding). Another provision provided that the agreement would be construed in accordance “*only* with the provisions of the laws of the [tribe], and that *no* United States state or *federal law applies* to this Agreement.” *Hayes*, 811 F.3d at 669–70 (emphases added). The arbitration agreements here contain none of these provisions. So it is flat wrong to say this case involves “the very same form contracts that this Court rejected in *Hayes*.” Resp. 20.

The contracts in *Dillon* likewise provided that “*no other state or federal law or regulation shall apply*” and disclaimed “consent to application of state or *federal law* to us, the loan, or this Agreement.” 856 F.3d at 336 (emphases added); *Haynes*, 2020 WL 4118239, at *6 (referencing this language in describing *Dillon*’s holding). Again, there is no similar language here.⁴

⁴ The out-of-Circuit cases relied upon by Plaintiffs, Resp. 28, similarly involved agreements expressly disclaiming federal law. See *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 239–40 (3d Cir. 2020) (referencing “federal law as is applicable under the Indian Commerce Clause” and providing that “neither we nor this [Loan] Agreement are subject to any other federal or state law regulation”); *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 118 (2d Cir. 2019) (the agreements are “subject solely to the exclusive laws and jurisdiction of the [Tribe]” and “no other state or federal law or regulation shall apply”); *MacDonald v. CashCall, Inc.*, 883 F.3d 220,

At the end of the day, the *only* commonalities between the contracts in prior cases and the contracts here are choice-of-law provisions that elect Tribal law while saying nothing about federal law. But this Court has never read such clauses, standing alone, to displace federal law. *See supra* at 8–9, 14–15. Instead, it has read such clauses as displacing solely other states’ laws. To diverge from that approach here—where the contracts elsewhere expressly reference federal law—would make no sense.

As the record here reflects, Br. 9–15, the Tribe has sought to operate its businesses differently, and that is reflected in its contracts. Those differences require enforcing the parties’ agreements.

D. The Court Should Honor The Parties’ Agreement To Sever Any Provisions That Would Defeat Arbitration.

Plaintiffs do not dispute that the parties expressly agreed to sever any provisions found to render the arbitration provision unenforceable. *See* JA1185 (“If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.”). That choice must be respected, because it is improper to hold “entire arbitration agreements unenforceable every time a particular

224 (3d Cir. 2018) (“[N]o United States state or federal law applies to this Agreement.”)

term is held invalid.” *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001); *see* Br. 39–40 (collecting other authorities).

Plaintiffs’ contrary argument again rests on a mischaracterization. Invoking *Hayes* and *Dillon* once more, Plaintiffs assert that “one of the animating purposes of the agreement” was to preclude the application of federal law. Resp. 28 (citations omitted). But the panels in those cases reached those conclusions based on extensive contractual language unambiguously aimed at that result. *See supra* at 14–17. Further, in those cases, the sheer number of provisions expressly disclaiming federal law made it hard to fathom how severance would have worked or what would have been left thereafter. *See, e.g., Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 84–85 (D.C. Cir. 2005). Perhaps recognizing this difficulty, or perhaps because the core purpose of their contracts really was to nullify federal law, the defendants in *Haynes* and *Sequoia* did “*not* seek[] to sever any provisions of the Arbitration agreements.” *See* Joint Reply Br. 17, *Sequoia*, 2020 WL 4118283 (4th Cir. Feb. 13, 2020) (Nos. 19-2108(L), 19-2113), ECF Nos. 34, 27 (emphasis added); *see also* Br. of Appellants, *Haynes*, 2020 WL 4118239 (4th Cir. Sept. 9, 2019) (No. 19-1434), ECF No. 22 (raising no severance arguments).

Here, by contrast, the contracts reference federal law, including the FAA, so extensively as to preclude the conclusion that “application of federal law would defeat the purpose of the arbitration agreement in its entirety.” *Dillon*, 856 F.3d at 336–37; *see Hayes*, 811 F.3d at 675–76. Plaintiffs have identified at most two provisions that, they assert, render arbitration unlawful. Even if the Court were to agree with that assessment, those provisions could easily be severed without disturbing the rest of the contracts. That would wholly cure Plaintiffs’ objections and leave a fully functioning agreement in place. *See Booker*, 413 F.3d at 85 (enforcing arbitration agreement after severing a “discrete illegal provision in the agreement”).

In these circumstances, the law requires enforcing a severance provision. *See, e.g., Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 288 (3d Cir. 2004) (“[W]here disregard of the offending conditions leaves a fair agreement that will accomplish the primary objective of the parties, enforcement of that agreement will normally be appropriate.”); *Morrison v. Circuit City Stores*, 317 F.3d 646, 675 (6th Cir. 2003) (“[C]ourts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement.”).

II. THE DISTRICT COURT ERRED IN INVALIDATING THE PARTIES' AGREEMENT TO APPLY TRIBAL LAW.

The choice-of-law provision Plaintiffs agreed to is virtually identical to the one the Virginia Supreme Court enforced in *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007). The only difference is that the parties in *Settlement Funding* chose Utah law. Like Tribal law, Utah law imposes no interest rate cap, and in several other respects is *less* protective of consumers than Tribal law. *See* Comm'n Br. 9–10.

Plaintiffs bury their discussion of *Settlement Funding* at the end of their choice-of-law analysis, Resp. 43, but that is exactly backwards. Virginia conflict-of-law rules apply here, Br. 44 n.16, and so precedent requires starting with decisions from the Commonwealth's highest court, *see Nature Conservancy v. Machipongo Club, Inc.*, 579 F.2d 873, 875 (4th Cir. 1978). Here, *Settlement Funding* provides a complete answer to the question presented: The choice-of-law provision does not violate Virginia public policy.

A. *Settlement Funding* Requires Enforcing The Parties' Choice of Law.

In *Settlement Funding*, the Virginia Supreme Court considered the exact question at issue here: whether the lower court “erred in refusing to apply the law of the jurisdiction stipulated in the choice of law provision of a

contract and in its application of Virginia’s usury law.” 645 S.E.2d at 437. There, as here, the borrower argued that applying the other jurisdiction’s law would violate Virginia’s public policy against usury, because that law contained no interest rate limit. Br. of Appellee at *4–5, *Settlement Funding*, 2006 WL 4701777 (Jan. 5, 2007) (No. 061373). Drawing on the longstanding Virginia rule favoring enforcement of choice-of-law clauses, the Virginia Supreme Court rejected that argument and concluded that “the circuit court erred in refusing to *apply Utah law in the construction of the loan agreement*.” 645 S.E.2d at 439 (emphasis added); *see also id.* at 438 (under Virginia law, “the parties’ choice of substantive law should be applied”).

Plaintiffs ignore this black-and-white holding, instead insisting that the Virginia Supreme Court reversed only the lower court’s finding that it lacked sufficient evidence of Utah law. Resp. 44. But that overlooks the Supreme Court’s statement that the circuit court “erred in refusing to *apply Utah law*.” 645 S.E.2d at 439 (emphasis added). If Plaintiffs were right, the Virginia Supreme Court would have remanded to permit the lower court to decide whether Virginia or Utah law should apply, after considering the substance of Utah law and the borrower’s Virginia public policy arguments. But that is not what happened. And on remand, the circuit court did not address the

borrower's public policy argument (or any other argument against enforcement)— it applied the direction it had received and ruled that the loan agreement was “not usurious” under *Utah* law. *Commonwealth, State Lottery Dep't v. Settlement Funding, LLC*, 2008 WL 6759945, at *2 (Va. Cir. June 9, 2008).

Plaintiffs offer nothing in response. They point to a footnote declining to “address Settlement Funding’s remaining assignment of error,” 645 S.E.2d at 439 n.2, but that footnote cuts against them. Settlement Funding’s first assignment of error was that Utah law applied; its second was that the circuit court erred in its application of “Virginia usury statutes.” *Id.* at 437–38. Because the Virginia Supreme Court affirmatively directed the circuit court “to apply Utah law,” *id.* at 439, there was no need to address how Virginia law might apply—as the circuit court confirmed on remand by applying Utah law.

Plaintiffs’ citations to decisions from a different Virginia circuit court and a federal district court change nothing. Resp. 44 n.7. Neither decision is binding here. And neither decision explained the Virginia Supreme Court’s statement that the circuit court “erred in refusing to apply Utah law,” *Settlement Funding*, 645 S.E.2d at 437, or addressed the proceedings on remand. See *Commonwealth v. NC Fin. Sols of Utah, LLC*, 2018 WL 9372461,

at *12 (Va. Cir. Oct. 28, 2018) (no mention of either); *Haynes*, 368 F. Supp. 3d at 929 n.49 (same).⁵

The Court thus need look no further than *Settlement Funding* to reject the district court's public policy ruling.

B. The Choice-of-Law Provision Does Not Violate Virginia Public Policy.

Even apart from *Settlement Funding*, Plaintiffs cannot justify disregarding the choice-of-law provision. Plaintiffs suggest that under Virginia law, courts can cast aside the parties' choice of law whenever they deem that choice to be against public policy. Resp. 29. But like many jurisdictions, Virginia embraces contracting parties' right to choose what law applies. *See* Br. 44–46. Indeed, the very authority Plaintiffs cite confirms that there must in fact be a public policy so “compelling,” *Willard v. Aetna Cas. & Sur. Co.*, 193 S.E.2d 776, 779 (Va. 1973), that diverging from it would “shock[] . . . one's sense of right,” *Tate v. Hain*, 25 S.E.2d 321, 325 (Va. 1943). Plaintiffs cannot establish any such policy here.

⁵ In their opening brief, Appellants explained that the *NC Financial* decision is also distinguishable because it presented an independent basis for disregarding the parties' choice of Utah law—the lack of any sufficient nexus between Utah and the parties. *See* Br. 50. Plaintiffs offer no response.

1. Virginia Does Not Have A “Compelling” Anti-Usury Policy That Defeats The Parties’ Choice Of Law.

Virginia does not have the kind of overwhelming anti-usury policy needed to justify the district court’s ruling. As Plaintiffs must acknowledge, Resp. 45 n.9, Virginia’s usury law is full of exceptions, permitting high or unlimited interest rates or finance charges in a variety of contexts, Br. 52–53. These many exceptions preclude any finding that it would shock the conscience to apply a different sovereign’s policy choices regarding interest rates.

Plaintiffs likewise fail in suggesting that Virginia at least has a compelling public policy against *their loans*, such that their Virginia-law claims must be allowed to proceed. Resp. 46. The statute they invoke in support of this theory—Virginia Code § 6.2-1501(A)—does not extend to invalidate loans issued by businesses located outside the Commonwealth. *See* Resp. 46; Br. 53–54.

When the Virginia legislature attempts to extend its usury law outside the Commonwealth, it says so expressly. For example, other statutes purport to apply “whether or not the person has an office or conducts business at a location in the Commonwealth,” *see, e.g.*, Va. Code §§ 6.2-1801(A); 1901; 2001; 2201; or to “persons making . . . loans over the Internet,” *id.* §§ 6.2-1827; 6.2-2225.

By contrast, the provision Plaintiffs invoke contains no such language. *See* Va. Code. § 6.2-1501(A). For the Court nevertheless to interpret § 6.2-1501(A) to have the same reach would render superfluous the language declaring other statutes to have that broader scope—a basic statutory interpretation mistake. *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (The “cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant.”) (citation omitted).

Further, a different statutory provision prohibits the “[c]ollection of loans made outside the Commonwealth” *only* if those loans exceed the interest rates “permitted by the law applicable to such loan in the state in which the loan was made.” Va. Code § 6.2-1529. That provision confirms that the collection of a loan issued in Utah under Utah law (or from Tribal jurisdiction under Tribal law) is permissible, even if the interest rate charged exceeds Virginia’s usury limitations.

Rather than engaging with the text of these statutes, Plaintiffs resort to arguments about § 6.2-1501(A)’s “purpose.” Resp. 46–47. But “[v]ague notions of a statute’s ‘basic purpose’ are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.” *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661

(2016) (quotations omitted); *see also, e.g. United States v. Otuya*, 720 F.3d 183, 190 (4th Cir. 2013) (describing “elementary rationale” that “arguments about purpose . . . cannot contradict a law’s plain text”).

Indeed, forthcoming amendments to the statute confirm that Virginia does not currently purport to extend its policy choices in § 6.2-1501(A) to businesses outside the Commonwealth. The Virginia legislature recently enacted amendments to the statute, set to take effect in January 2021, stating that the prohibition on making loans above the statutory interest rate will apply “whether or not the person has a location in the Commonwealth.”⁶ If the statute already had the out-of-state scope Plaintiffs assert, this amendment would be unnecessary. *See Burke v. Commonwealth*, 510 S.E.2d 743, 746 (Va. 1999) (“When new provisions are added to existing legislation by

⁶ The amendment provides in full: “No person shall engage in the business of making loans to individuals for personal, family, household, or other nonbusiness purposes, and charge, contract for, or receive, directly or indirectly, on or in connection with any loan interest, charges, compensation, consideration, or expense that in the aggregate is greater than the interest permitted by § 6.2-303, *whether or not the person has a location in the Commonwealth*, except as provided in and authorized by this chapter, Chapter 18 (§ 6.2-1800 et seq.), or Chapter 22 (§ 6.2-2200 et seq.) and without first having obtained a license from the Commission.” Va. Code § 6.2-1501(A) (2021) (effective January 2, 2021) (new language italicized).

amendment, we presume that . . . the legislature acted purposefully with the intent to change existing law.”); *Broadnax v. Commonwealth*, 485 S.E.2d 666, 669 (Va. 1997) (same).⁷

Finally, correspondence from the Virginia government agencies tasked with implementing the statute confirms that Virginia does not believe its laws apply to Plaintiffs’ loans. In our opening brief, Appellants highlighted a letter from the Virginia Bureau of Financial Institutions (“VFBI”)—the agency responsible for administering Virginia’s consumer finance laws—confirming the Commonwealth does not have jurisdiction over the Tribal businesses. JA171 (Tribal businesses are “not required to be licensed under the laws that are enforced by the Bureau,” which include Chapter 6.2 of the Virginia Code). Plaintiffs suggest that the Court should disregard the views of the VFBI in favor of Virginia’s Attorney General, Resp. 47–48 n.10. But the Attorney

⁷ The legislature’s amendment to § 6.2-1501 does not apply to loans issued before the amendment’s effective date. The provision makes no mention of retroactivity, and thus applies only prospectively. *Berner v. Mills*, 579 S.E.2d 159, 161 (Va. 2003) (The absence of an “express provision that the statutory changes would be effective retroactively . . . compels a conclusion that the amendments to those sections are effective prospectively, not retroactively.”).

General has the same view. Several months ago, he unsuccessfully urged the legislature to accelerate the effective date of the § 6.2-1501(A) amendment, in order to more quickly ensure that the “same rules apply equally to internet-based and brick-and-mortar lenders.” The letter, which itself recognized the VFBI’s regulatory authority, noted that “triple-digit interest rate loans . . . currently are available and legal in Virginia.” Ltr. from A.G. Mark Herring to Gov. Ralph Northam re: HB 789 and S.B. 421 (Apr. 1, 2020), *available at* <https://perma.cc/MU6J-NHXG>.

Plaintiffs cannot contend that enforcing the choice-of-law provision would violate a compelling public policy against usury where, as here, Virginia has not even attempted to regulate their loans.⁸

2. Virginia Has Not Foreclosed Parties From Agreeing To Apply Another Jurisdiction’s Laws.

Plaintiffs’ likewise misconstrue Virginia law in arguing that the Commonwealth has precluded parties from departing from its usury law,

⁸ Plaintiffs’ last attempt to distinguish *Settlement Funding* thus fails as well. Plaintiffs assert that the decision is explained by the fact that the Utah bank “was expressly exempt from Virginia’s usury laws.” Resp. 45. There is no basis for thinking this distinction mattered to the Virginia Supreme Court. *See* Br. 49 n.19. But the argument also fails on its own terms, because the Tribal businesses are likewise “exempt from Virginia’s usury laws,” as Virginia regulators have confirmed. *See supra* at 27.

through what Plaintiffs label an “anti-waiver” provision. Resp. 32–33 (citing Va. Code § 6.2-306(A)). That statute, which was mentioned only once in the district court’s opinion and did not form the basis of its holding, *see* JA1755, cannot bear the weight Plaintiffs place on it.

First, the statute does not apply by its own terms. It speaks only to a situation where a “borrower waives the benefits of this chapter or releases any rights he may have acquired under this chapter.” Va. Code § 6.2-306(A). Plaintiffs have no such rights or benefits because the Virginia usury laws do not apply to their loans. *See supra* at 24–28; *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004) (refusing to apply Texas law rather than the parties’ chosen law because Texas law “excluded [plaintiffs] from its protection”).

Second, no precedent supports Plaintiffs’ argument that § 6.2-306(A) prevents the enforcement of a choice-of-law provision where a borrower would theoretically have rights under Virginia law. Indeed, § 6.2-306(A) did not stop the Virginia Supreme Court from holding in *Settlement Funding* that parties remain free to apply a different jurisdiction’s usury law to their loan agreements. *Settlement Funding* was decided 20 years *after* § 6.2-306(A) was first enacted. *See* Va. Code § 6.1-330.58 (1987), reenacted in 2010 as Va. Code

§ 6.2-306(A). Yet neither the Virginia Supreme Court nor the circuit court on remand even suggested the statute precluded the application of Utah law.

For their part, Plaintiffs cite no authority supporting their view of the statute. Even their cases refusing to enforce choice-of-law provisions do not rely on § 6.2-306(A) in the way Plaintiffs urge. The *Gibbs* district court decision did not even mention the statute, 368 F. Supp. 3d 901, and *NC Financial Solutions* treated the statute just as the district court did here (mentioning it once in passing). *See* 2018 WL 9372461, at *11–12. This Court should not interpret Virginia law in a way no Virginia court has seen fit to do.

Third, this Court’s decision in *Volvo Construction* does not hold otherwise—and if anything undercuts Plaintiffs’ position. The opinion says nothing about § 6.2-306(A) or Virginia law. Applying North Carolina law, *Volvo Construction* held that it would violate the fundamental policy of Arkansas to apply South Carolina law. 386 F.3d at 606–10.

Nor did *Volvo Construction* generally suggest that anti-waiver provisions require setting aside the parties’ choice of law. *See* Resp. 31–33. This Court did not hold that the presence of an anti-waiver provision in the relevant Arkansas law required it to apply Arkansas law to the agreement. Instead, the Court “beg[a]n with the proposition that not every statutory

provision constitutes a fundamental policy of a state.” *Id.* at 607. It then concluded that the underlying Arkansas law “embodie[d] a fundamental policy” based on the anti-waiver provision together with other strong evidence from both the legislature and the Arkansas Supreme Court. *Id.* at 610.

That analysis points the opposite way here. The mere mention of public policy in § 6.2-306(A) cannot alone establish a “fundamental policy.” Instead, Virginia’s strong public policy of honoring the parties’ choice of law, coupled with *Settlement Funding*, the dozens of exceptions and exemptions in Virginia usury law, and the absence of any effort by Virginia to regulate Plaintiffs’ loans, precludes finding a “compelling” anti-usury policy here.⁹

C. Plaintiffs’ Unconscionability Arguments Provide No Basis For Affirmance.

The Court should likewise reject Plaintiffs’ effort to attack the choice-of-law provision as unconscionable—a separate ground for invalidation that

⁹ Plaintiffs’ reliance on *Blake Constr. Co/Poole & Kent v. Upper Occoquan Sewage Auth.*, 587 S.E.2d 711 (Va. 2003), is similarly off point. That case did not involve § 6.2-306(A) or a choice-of-law provision. Instead, all parties agreed that Virginia law applied, and disagreed only over whether a different anti-waiver provision allowed them to avoid a provision of Virginia law. *See* Br. 51 n.19. Plaintiffs do not address this distinction. Plaintiffs’ citation to *Martin Bros. Contractors v. Va. Military Inst.*, 675 S.E.2d 183 (Va. 2009), *see* Resp. 32, which involved the same anti-waiver provision applied against another Virginia law contract, is misplaced for the same reason.

the district court expressly did not reach, JA1722, and that Plaintiffs said they would address in the first instance on any remand, Pls.' Opp. For Leave To Appeal Under § 1292(b) ("§ 1292 Opp.") at 3 n.2, *Hengle v. Asner*, 2020 WL 855970 (E.D. Va. Feb. 4, 2020), ECF No. 123.

This Court "need not consider an alternative ground for affirmance that was not addressed by the district court." *Smith v. Collins*, 964 F.3d 266, 282 (4th Cir. 2020) (citation omitted); *see also Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006) ("[W]e are a court of review, not of first view.") (quotations omitted). There is no reason to deviate from that rule here. When opposing certification of the choice-of-law ruling for appeal, Plaintiffs urged the district court to limit the question to the specific issue actually resolved by the court—whether the choice-of-law provision violated Virginia's public policy—and the district court agreed. *See* § 1292 Opp. 3 n.2; JA1829 n.1. Plaintiffs cannot change position now and seek to broaden the issue before this Court on interlocutory review. Moreover, even as they argue unconscionability as applied to the choice-of-law provision, Plaintiffs tell this Court that unconscionability, as applied to the arbitration agreements, should "be addressed by the district court in the first instance" if it reverses on prospective waiver. Resp. 25 n.3. Plaintiffs offer no explanation for why this

Court should remand unconscionability as applied to one aspect of the contract, but decide unconscionability as to another, without the benefit of any district court decision on either.

Given the procedural deficiencies with Plaintiffs' unconscionability arguments, Appellants will not respond at length, other than to correct Plaintiffs' clear misstatements of law and fact. On the law, the standard for unconscionability is higher than Plaintiffs suggest: They must prove, by "clear and convincing evidence," that the choice-of-law provision is "one that no man in his senses and not under a delusion would make, on the one hand, and [that] no fair man would accept on the other." *Fransmart, LLC v. Freshii Development, LLC*, 768 F. Supp. 2d 870–71 (E.D. Va. 2011) (quoting *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992)). Plaintiffs notably offer no Virginia authority invalidating loans like theirs as unconscionable based purely on interest rates. Resp. 37–38.

On the facts, Plaintiffs mischaracterize the record in suggesting that there are "inconsistencies between the arbitration contracts and Tribal law" that "render[] them confusing and misleading." Resp. 36. To begin, the contracts allow the arbitrator to award the remedies permitted by both federal and Tribal law. *See supra* at 15.

There is also no support for Plaintiffs' suggestion that consumers cannot proceed directly to AAA/JAMS arbitration and must instead proceed through a tribal dispute resolution mechanism. Resp. 37–40. Plaintiffs invoke Tribal law, but it makes clear that a request for dispute resolution “must be made in accordance with the terms of the Consumer’s loan agreement.” JA277. And Plaintiffs’ agreements clearly allow them to proceed directly to arbitration. JA1184 (“We will follow and you agree to follow Our policy of arbitrating all disputes, including the scope and validity of this Arbitration Provision.”); JA1184–85 (specifying AAA/JAMS as the arbitral forum). Any doubt is eliminated by the fact that Appellants moved to compel arbitration rather than invoking some other dispute resolution procedure.

Plaintiffs’ attacks on the Tribal Commission are likewise unfounded. The Commission’s submission speaks for itself on the regulation it provides. *See* Comm’n Br. at 10–12. Nor is there any basis for suggesting that a Commission chaired by a knowledgeable Tribal official, and that derives technical assistance from two former senior government officials who took an oath to enforce federal law, is “rigged.” Resp. 38.

In the end, however, this Court need not address unconscionability in this appeal. Rather, the Court should simply apply the Virginia Supreme

Court's holding in *Settlement Funding*, which compels reversal of the district court's choice-of-law ruling.

III. THERE IS NO AUTHORIZATION FOR PLAINTIFFS' NOVEL CAUSE OF ACTION AGAINST SOVEREIGN GOVERNMENT OFFICIALS.

Plaintiffs and DOJ do not appear to dispute that: (1) Congress, not the Executive or Judicial Branches, has “plenary and exclusive” authority to abrogate tribal immunity, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); and (2) there is no “congressional authorization” for Plaintiffs’ state-law claims, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). As Tribal Appellants have explained, those principles compel dismissal. Br. 60–61.

Plaintiffs’ and DOJ’s attempts to sidestep these rules fail. There is simply no legal basis for allowing private plaintiffs to sue government officials in their official capacities for alleged violations of *state law*—let alone for conduct that Plaintiffs agreed took place within the government’s jurisdiction. Allowing Plaintiffs’ claim to proceed in the guise of an *Ex parte Young* suit would trample longstanding sovereign immunity principles and expand that limited cause of action beyond all recognition. And for no good reason: As outlined above, Virginia does not believe the Tribe is infringing on what

Plaintiffs term a “fundamental aspect of [its] sovereignty.” Resp. 3. *See supra* at 24–28. The law does not permit Plaintiffs to countermand that choice and impose their personal view of the law on sovereign government officials.

A. The Supreme Court Has Never Sanctioned Official-Capacity State-Law Claims Against Government Officials.

Plaintiffs and DOJ fail to offer any binding precedent sanctioning Plaintiffs’ novel claims.

First, Plaintiffs’ effort to invoke the *Ex parte Young* “exception to sovereign immunity,” Resp. 48 (quotations omitted), ignores both the holding and rationale of that decision. As the Supreme Court has made clear, *Young* permits suits against government officials only where a plaintiff’s complaint “alleges an ongoing violation of *federal* law and seeks relief properly characterized as prospective.” *Verizon Md., Inc. v. Md. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002) (emphasis added). The reason that *Young* concerns only violations of federal law is that its rationale for abrogating officials’ sovereign immunity is the supremacy of federal law under the Constitution. 209 U.S. 123, 160–61 (1908). The Supreme Court has thus expressly rejected attempts to extend the doctrine to permit suits under *state* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). Plaintiffs ignore the requirement that a claim involve “federal law,” *see* Resp. 58, and DOJ,

amazingly, omits that key word from its purported quotation, *see* Br. for United States as Amicus Curiae (“DOJ Br.”) at 12.

Second, Plaintiffs invoke various precedents involving *personal-capacity* lawsuits, but those cases cannot justify their *official-capacity* claims. *See* Resp. 51–52. Personal-capacity lawsuits “seek to impose *individual* liability upon a government officer” for her actions. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) (emphasis in original). Sovereign immunity is therefore generally not available as a defense. *See id.* But in official-capacity lawsuits, “the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.” *Id.* Because such actions are an effort to bind the government by superficially different means, they may be “barred by sovereign immunity.” *Id.* at 1290–91.

The Supreme Court cases Plaintiffs cite outside the *Young* context, Resp. 51–52, fall on the personal-capacity side of the ledger, to the extent they even address suits against tribal officials. They accordingly do not authorize Plaintiffs’ official-capacity claims. *See Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash.*, 433 U.S. 165, 171 (1997) (personal-capacity lawsuits against individual members of a tribe for “fishing off the reservation”); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514

(1991) (noting, in dicta, that “individual agents or officers of a tribe” may be “liable for damages,” which necessarily indicates a personal-capacity suit).

Nor is there merit to DOJ’s assertion that the longstanding distinction between personal- and official-capacity lawsuits should be disregarded as impractical. DOJ Br. 13. Sovereign immunity is a fundamental principle that cannot be cast aside based on arguments about practicality. *See, e.g., Bay Mills*, 572 U.S. at 794. In any event, DOJ’s position is hard to square with its efforts to persuade the Supreme Court of the importance of this precise distinction a mere three years ago:

Where a plaintiff names an employee of the sovereign as a defendant, rather than the sovereign itself, the suit may nevertheless be barred by sovereign immunity, *depending on whether the claim seeks relief from the individual in an official capacity or a personal capacity*.

Br. for United States as Amicus Curiae at 5–6, *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (No. 15-1500) (“DOJ *Lewis* Br.”) (emphasis added). The Supreme Court agreed, stating that the “distinction between individual- and official-capacity suits is paramount here,” because “[d]efendants in an official-capacity action may assert sovereign immunity.” *Lewis*, 137 S. Ct. at 1291.

Third, *Bay Mills* did not—via a single state-law citation, *see* Br. 67–68—create a new cause of action obliterating the longstanding limitations set forth

above. The Court’s reference to a possible suit by Michigan “against tribal officials or employees (rather than the Tribe itself) seeking an injunction,” *Bay Mills*, 572 U.S. at 796, is best understood as respecting those limitations. The cases the Court cited in support of that possibility involved efforts to enforce *federal* law (*i.e.*, *Young* actions). *See* Br. 66–67. And the Court’s assertion that “Indians going beyond reservation boundaries are subject to any generally applicable state law,” *Bay Mills*, 572 U.S. at 795, was supported only by a citation involving taxation of private parties—at most a personal-capacity issue, *see id.* (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005)). These limited references should not be read as surreptitiously creating a novel *state-law official-capacity* action—particularly because doing so would violate the Congressional-authorization requirement that framed the whole opinion. *See* Br. 68.¹⁰

In any event, the portion of the opinion Plaintiffs rely on is dicta. Br. 65–68. Contrary to DOJ’s suggestion, DOJ Br. 10, nothing about the Court’s

¹⁰ DOJ did not endorse this cause of action in *Bay Mills*. The portions of their amicus brief they now highlight, *see* DOJ Br. 7, cited cases involving criminal prosecutions of individuals and personal-capacity actions, *see* Br. for United States as Amicus Curiae at 33–34, *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782 (2014) (No. 12-515)—nothing like Plaintiffs’ lawsuit.

discussion of alternate remedies was “necessary to th[e] result” in *Bay Mills*. The reference to alternative remedies was part of the Court’s analysis of Congress’s intent in enacting the Indian Gaming Regulatory Act (“IGRA”). 572 U.S. at 794. It immediately followed the Court’s admonition that speculation about Congressional intent provides no basis for “disregard[ing the] clear language” of a statute, especially “when the consequence would be to expand an abrogation of immunity.” *Id.*; see also *Montanile*, 136 S. Ct. at 661 (no need to consider purpose when text is clear). One of Plaintiffs’ own cases defines dictum as a “statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding[.]” *Lenneer v. Wilson*, 937 F.3d 257, 273 (4th Cir. 2019). The “analytical foundations” of the Court’s holding on the scope of the IGRA would undeniably make sense even without the state-law citation supporting a suggestion about a possible cause of action Michigan could attempt to bring.¹¹

¹¹ Plaintiffs’ out-of-Circuit cases do not justify a contrary conclusion. Appellants have already explained the flaws in the Second Circuit’s reasoning in *Gingras*. See Br. 60–69. The Eleventh Circuit’s discussion of official-capacity state-law suits in a dispute between sovereigns shares those defects, but also relies on the faulty premise that tribal immunity is “narrower” than states’ immunity, *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015), which the Supreme Court rejected in *Lewis*, 137 S. Ct. at 1291. And

Plaintiffs’ remaining suggestion that Supreme Court dicta is nonetheless compelling, Resp. 51, ignores this Court’s clear holding: Dicta that conflicts with Supreme Court precedent cannot carry the day. *See* Br. 64–65 (citing, *e.g.*, *Yamaha MotorCorp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 572–73 (4th Cir. 2005)). Plaintiffs offer no explanation of how their argument is consistent with this Court’s approach in *Yamaha*.

The stark consequences of permitting Plaintiffs’ new cause of action provide further reason to reject it. Contrary to Plaintiffs’ passing suggestion, Resp. 55, tribes do not stand in the same subordinate relation to states as states do to the federal government. *See Bay Mills*, 572 U.S. at 789 (Tribes’ sovereign immunity “is a matter of federal law and is not subject to diminution by the States.”). Instead, tribes and states enjoy the same immunity from suit. *Lewis*, 137 S. Ct. at 1291; *Williams v. Big Picture Loans*, 929 F.3d 170, 176–77 (4th Cir. 2019) (applying state instrumentality principles to tribe); Br. for New Mexico as Amicus Curiae (“N.B. Br.”) at 19–20. As a result, accepting

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006), has nothing to do with this case. It involved the arrests of individual members of a tribe that itself lacked immunity, and was explicitly based on the “idiosyncratic features” of a treaty and statute that relate only to the Narragansett tribe. *Id.* at 22, 30.

Plaintiffs' and DOJ's position would also expose *state officials* to whatever claims private plaintiffs might conceptualize based on other states' laws.

Plaintiffs and DOJ wrongly suggest this is water under the bridge, because *Pennhurst* implicitly sanctioned such claims over 35 years ago. Resp. 55; DOJ Br. 15; *see* Br. 61–62 (explaining flaws with this position). If that is so, where is the evidence? Plaintiffs have never, in the entire course of this litigation, identified a single example of such a lawsuit. Neither has DOJ. The lack of *any* precedent for their theory is strong proof that it is just plain wrong.

And lawsuits against state officials are not a purely theoretical concern—they are easy to imagine. Here are just a few hypotheticals:

- Because of a global pandemic, a University of Texas student living with her parents in Massachusetts must take her courses online. She believes the school is discriminating against her and other students, so she seeks to enjoin Texas state officials based on Massachusetts anti-discrimination laws.
- That same student takes out a student loan from the Texas Higher Education Coordinating Board. When her loan becomes due, she sues under Massachusetts lending laws to enjoin the Board from collecting on her loan.
- A New York resident calls to rent a campsite at a state park in Vermont. After he is turned down, he sues under the New York Human Rights Law seeking to enjoin Vermont state officials from running an allegedly discriminatory campground.
- A West Virginia resident purchases a Virginia fishing permit online. She alleges that Virginia's method for distributing fishing permits violates West Virginia's Constitution and seeks to enjoin Virginia state officials from distributing future permits on that basis.

- South Dakota’s state-owned public radio station puts on a concert near the Yankton Sioux Reservation, to the chagrin of a tribal member who seeks to enforce the tribe’s public nuisance law against state officials in South Dakota.

Perhaps some or all of these lawsuits would ultimately fail on the merits.

In the meantime, states and their officials, including the state attorneys general who would defend such cases, would have to bear the costs of protracted litigation—time, money, and distraction. It is therefore unsurprising that no state filed a brief supporting Plaintiffs—not even one of the fourteen states (including Virginia) or the District of Columbia who filed an amicus brief supporting the plaintiffs suing tribal lending businesses in *Big Picture*. The reason is clear—those states recognize that it is essential to “[t]reat[] states and tribes similarly” to “show[] appropriate respect for both sovereigns.” Br. for the District of Columbia et al. as Amici Curiae at 3, *Big Picture*, 929 F.3d 170 (4th Cir. 2019) (No. 18-1827).

There is simply no reason to think the Supreme Court intended to open this Pandora’s box through passing phrases in *Bay Mills*—especially given the Court’s emphasis in that case on adhering to settled sovereign immunity precedent. That precedent compels dismissal of Plaintiffs’ claims.

B. At Minimum, Plaintiffs' Particular Claim Is Unsupportable.

Even if this Court were inclined to acknowledge the possibility in some cases of an *Ex parte Young*-like suit against tribal officials for a violation of state law, it would be inappropriate to recognize that cause of action in this case. Nothing in *Bay Mills* authorized state-law claims by *private plaintiffs* for conduct occurring *within tribal jurisdiction*. And the Supreme Court has long precluded suits that are nominally against government officials but in reality are against the government itself.

1. *Bay Mills* Did Not Authorize Private Plaintiffs To Commandeer Sovereign Authority.

The sentence in *Bay Mills* that Plaintiffs highlight as purportedly supporting their cause of action references only the possibility of *Michigan* seeking an injunction under state law. 572 U.S. at 796. As Tribal Appellants and New Mexico have explained, there is no basis for reading that language to permit claims by private plaintiffs. Br. 64–74; N.M. Br. 16–22.

Plaintiffs' and DOJ's response—that private parties can bring *Ex parte Young* lawsuits—is a non-sequitur. Resp. 58–59; DOJ Br. 15–16. It is undisputed that private parties can invoke *Young* to vindicate federal laws that provide them with private rights, absent Congressional preclusion of such claims. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015).

But those lawsuits do not implicate principles of inter-sovereign comity, because federal law is supreme to any state law that might otherwise provide government officials with a claim to immunity.

Here, by contrast, Plaintiffs seek to subject Tribal officials to the law of a coequal sovereign—squarely implicating comity considerations. Those considerations require narrowing any potential state-law cause of action to claims *by states and tribes*, which is at most what *Bay Mills* envisioned, rather than permitting private parties to serve as private attorneys general. *See* Br. 70–71; N.M. Br. 2–3, 19–21. This case well illustrates the harms of a contrary approach: Plaintiffs purport to stand in for Virginia and vindicate what they perceive to be its interests and the meaning of its law, Resp. 55–56, but directly undermine the Virginia Legislature’s articulation of how far those interests reach, and the Virginia Executive Branch’s determination of how to enforce those laws against other sovereign entities. *See supra* at 24–28. Allowing such claims to proceed thus does not just trample sovereign immunity, but also the essence of sovereignty.

2. No Precedent Allows Plaintiffs To Sue Government Officials For Conduct Within Their Jurisdiction.

Bay Mills also cannot be read to authorize a suit for activity taking place within Tribal jurisdiction. Plaintiffs agreed—at least before filing this

lawsuit—that their loans were “made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake.” JA1186. That language means just what it says, and neither Plaintiffs nor DOJ have offered an alternative interpretation, or an explanation for why it does not foreclose Plaintiffs’ claims. Moreover, the contracts’ plain language is consistent with Virginia’s view that the loans were made outside the Commonwealth. *See supra* at 27–28 (discussing VFBI letter). These undisputed points provide an independent reason why *Bay Mills* does not permit Plaintiffs’ state-law claims. *See Bay Mills*, 572 U.S. at 791 (casino was “*outside* Indian lands”); *Gingras*, 922 F.3d at 117 (cause of action only for “off-reservation conduct”).

The unchallenged *legal* effect of Plaintiffs’ contracts likewise compels rejection of DOJ’s *factual* argument that Plaintiffs loans “go beyond reservation boundaries.” DOJ Br. 5 (quotations omitted). None of the cases DOJ invokes involved a situation where the parties had agreed to undisputed contractual terms specifying that the conduct being challenged occurred within Tribal jurisdiction. Moreover, none of those cases involved attempts to sue government officials protected by sovereign immunity. Instead, the cases

DOJ mines for soundbites involve unrelated legal claims regarding payday lending activity, which is not at issue here. *See* Br. 8 n.1.¹²

Further, the rule DOJ appears to endorse—that tribal officials can be sued under state law whenever they contract with a party physically located outside tribal land, regardless what the contracts say—is hard to square with its professed concern for tribal economic development, self-government, and self-determination. DOJ Br. 1. Because tribal governments face barriers to traditional methods of raising revenue, such as taxation, they must look for other ways to develop their economies. *See, e.g., Bay Mills*, 572 U.S. at 807, 809–13 (Sotomayor, J., concurring). A rule subjecting tribes to costly litigation whenever they engage in contracts with parties outside the reservation would have a widespread impact, including on gaming. It would also foreclose e-commerce, devastating The Tribe, as well as many others throughout the country that cannot successfully operate ventures such as gaming because of a small land base or remote location. *See, e.g., id.* at 809–13. Isolating tribes

¹² If this Court were to reject the legally binding effect of Plaintiffs' agreements, further factual development and briefing would be necessary to resolve the location of the challenged conduct.

from the modern economy would further exacerbate the deep-rooted harms that the reservation policies of the 1800s have inflicted on tribes.

3. Plaintiffs' Lawsuit Is In Substance A Suit Against The Tribe.

Finally, as DOJ acknowledges, *Ex parte Young* does not permit a claim where “the judgment sought would expend itself on the public treasury or domain, or interfere with public administration.” DOJ Br. 11 (quoting *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Contrary to DOJ’s suggestion in this case, DOJ Br. 12–13, this analysis does not simply turn on how Plaintiffs caption their claims. It is not the “label[]” in the complaint that matters, but the practical effect of the relief sought. *Edelman v. Jordan*, 415 U.S. 651, 666 (1974); see DOJ Lewis Br. 9–10 (urging application of *Edelman*).

Plaintiffs’ lawsuit fails because they *do* seek to interfere with the Tribe’s “treasury” and “public administration.” *Stewart*, 563 U.S. at 255. The law does not permit nominally injunctive relief that raids state treasuries. *Edelman*, 415 U.S. at 665. Here, Plaintiffs seek to avoid repaying principal on their loans—*i.e.*, money loaned out from the Tribal treasury. More broadly, in both its original and current iteration, this lawsuit represents an effort to foreclose the Tribe from implementing and enforcing its duly elected laws. See

Br. 59–60. There is thus little doubt that the Tribe “is the real, substantial party in interest.” DOJ Br. 11 (quoting *Stewart*, 563 U.S. at 255).

* * *

The absence of Congressional authorization, a doctrinal justification, or support in precedent is ample reason to reject Plaintiffs’ state-law claims against Tribal Appellants. But it is also important to note that reversing on this issue will not result in the Tribal businesses operating without “legal accountability.” Resp. 1. The record before this Court makes clear that the Tribe welcomes accountability, both through regulation by an independent Commission and fair adjudication by a neutral arbiter of the few consumer complaints that arise under Tribal or federal law. *See* Br. 9–10, 14–15.

Plaintiffs and federal agencies can also attempt to enforce existing or new federal laws, provided those efforts are consistent with principles of sovereign immunity. And tribes and states can work together on potential jurisdictional conflicts, as the Supreme Court recently envisioned. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020) (invoking examples of such cooperation and noting that “Oklahoma and its Tribes have proven they can work successfully together as partners”). This cooperative approach is the modern trend. *See, e.g.*, Conference of Western Attorneys General, American

Indian Law Deskbook § 14:1 (June 2020) (noting the “increasing trend for states to develop mechanisms for establishing communication and cooperation with tribes”); *id.* §§ 14:13–14:14 (describing that approach as preferable to “lengthy litigation,” and emphasizing the “theme of equal partnership and respect”).

The Tribe epitomizes this approach. It has entered into a memorandum of understanding regarding e-commerce with one state (New Mexico), is actively engaging with others, and routinely educates state officials on its business. *See* Br. 71 & n.25; JA76–77. These efforts involve a more careful balancing of the relevant interests—sovereign and otherwise—than recognition of the novel, boundless cause of action Plaintiffs urge here.

IV. RICO DOES NOT PERMIT PRIVATE PLAINTIFFS TO OBTAIN INJUNCTIVE RELIEF.

The district court correctly found that RICO forecloses Plaintiffs’ claim for injunctive relief against Tribal Appellants. That conclusion precludes Plaintiffs’ effort to apply the statute to Tribal Appellants through *Ex parte Young*. *See Armstrong*, 575 U.S. at 327 (“The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations.”); *see also* JA1788 (citing *Armstrong*).

A. RICO's Text And Structure Foreclose Plaintiffs' Claims For Injunctive Relief.

The district court's ruling flowed from "the plain language of the statute." JA1784 (quoting *United States v. Passaro*, 577 F.3d 207, 213 (4th Cir. 2009)). The statute at issue, 18 U.S.C. § 1964, has three relevant parts. The first, § 1964(a), sets forth district courts' broad equitable jurisdiction "to prevent and restrain violations" of RICO by issuing "appropriate orders." 18 U.S.C. § 1964(a). The second, § 1964(b), makes clear *who* can pursue those remedies: "The *Attorney General* may institute proceedings *under this section*." *Id.* § 1964(b) (emphasis added). That provision also clarifies that the Attorney General can obtain preliminary, in addition to final, injunctive relief. *See id.* ("Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions . . . as it shall deem proper.").

The remaining provision, § 1964(c), is different. It allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to "sue therefor in any appropriate United States district court" and recover treble damages plus costs and fees. Unlike § 1964(b), it does not allow such persons to initiate proceedings "under this section." Nor does it mention equitable relief.

As the district court correctly concluded, the statute authorizes private plaintiffs to bring a damages claim at law, while permitting the Attorney General alone to “institute proceedings” for the much broader equitable remedies envisioned by § 1964(a). JA1785–86. The “inclusion of a single statutory reference to private plaintiffs [in § 1964(c)], and the identification of a damages and fees remedy for such plaintiffs . . . logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.” *Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 795 (D. Md. 2009) (emphasis in original) (quoting *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1082–83 (9th Cir. 1986)).

Plaintiffs’ contrary reading would make a mess of the statute. For starters, if § 1964(a) allowed anyone to pursue the remedies it sets forth, then the language in § 1964(b) that “[t]he Attorney General may institute proceedings under this section” would serve no purpose. Subsection (a) already would have allowed the Attorney General to do so. Interpretations that would render part of a statute surplusage are to be avoided, especially where, as here, the alternative reading “gives effect to every clause and word of a statute.” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quoting *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 106 (2011)).

Further, Plaintiffs' reading would have the anomalous result of allowing anyone to obtain a permanent injunction but permitting only the Attorney General to get such relief on a preliminary basis. Plaintiffs identify no other statute adopting that approach, nor any reason for adopting it here.

Contrary to Plaintiffs' suggestion, Resp. 65, comparing RICO to the antitrust statutes confirms the district court's conclusion. Sections 1964(a)-(c) are modeled on similar provisions in the Sherman Act, which were reenacted under the Clayton Act. *See* 15 U.S.C. §§ 4, 15(a). Just like RICO, the Sherman Act invests district courts "with jurisdiction to prevent and restrain violations" of the law (the analogue to § 1964(a)), and then authorizes U.S. Attorneys "to institute proceedings in equity to prevent and restrain such violations" (the analogue to § 1964(b)). Ch. 646, 26 Stat. 209-210 (1890) (reenacted as 15 U.S.C. § 4). The Sherman Act also includes a separate provision allowing "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to "sue therefor in any district court of the United States" and recover treble damages plus costs and fees (the analogue to § 1964(c)). 26 Stat. 210 (reenacted as 15 U.S.C. § 15(a)).

Long before RICO was enacted, those provisions had been interpreted *not* to permit private parties to obtain injunctive relief. *Gen. Inv. Co. v. Lake*

Shore & Mich. S. Ry., 260 U.S. 261, 286 (1922); *Payne Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). Because Congress modeled RICO after these antitrust provisions, “we can only assume it intended them to have the same meaning that courts had already given them” in the antitrust context. *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992).

Plaintiffs’ invocation of the Clayton Act underscores their error. Although that Act permits private parties to obtain equitable relief, it does so through a separate cause of action. *See* 15 U.S.C. § 26. As the Supreme Court has explained, this provision “*filled a gap* in the Sherman Act by authorizing equitable relief in private actions.” *California v. Am. Stores Co.*, 495 U.S. 271, 287 (1990) (emphasis added). There is no comparable provision in RICO.

Finally, on at least two occasions, Congress has considered adding a similar provision to RICO. But each time Congress declined to do so, further reinforcing that RICO as written does not provide for private equitable relief. *See Minter*, 593 F. Supp. 2d at 795. And because the text, structure, and history of the statute all point in the same direction, *see supra* at 51–53, there is no need to consider Plaintiffs’ invocation of the statute’s remedial purpose and request for a liberal construction, Resp. 65–66.

B. The District Court's Ruling Follows The Consistent Interpretation Of The Statute.

On two separate occasions, this Court has suggested that private plaintiffs are not entitled to equitable relief under RICO. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999) (“While section 1964(c) of RICO grants private parties a right to seek treble damages from a RICO violator, *it makes no mention whatever of injunctive or declaratory relief.*”) (emphasis added); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (“There is substantial doubt whether RICO grants private parties such as Dan River a cause of action for equitable relief.”).

District courts in this Circuit have reached the same conclusion. *See Galaxy Distrib. of W. Va., Inc. v. Standard Distrib., Inc.*, 2015 WL 4366158, at *3 (S.D. W. Va. July 16, 2015) (“RICO, though providing for a civil cause of action in damages, does not expressly or implicitly create a private right of action for equitable relief”); *Minter*, 593 F. Supp. 2d at 796 (“[T]his Court holds that there is no private right of injunctive relief under civil RICO”); *R.J. Reynolds Tobacco Co. v. Mkt. Basket Food Stores, Inc.*, 2007 WL 319965, at *8 (W.D.N.C. Jan. 30, 2007) (“Congress expressly provided for equitable relief in civil RICO actions where the Government commences the action but

did not with respect to civil RICO actions initiated by private citizens.”). Plaintiffs identify no in-Circuit case holding otherwise.

Nor is this a case where these district courts have followed an outlier approach contradicted by the majority of circuits, as Plaintiffs suggest. *See* Resp. 66–67. The Ninth Circuit has held that RICO does not permit private parties to obtain equitable relief. *Wollersheim*, 796 F.2d at 1082–83 (“[N]o other remedy [beyond damages] was intended to be conferred on private plaintiffs.”) (emphasis in original). The Fifth Circuit has indicated its agreement. *See In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988) (“Congress indeed had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy.”).

Further, DOJ—which is responsible for both criminal and civil enforcement of RICO throughout the Nation—has long held the same position. DOJ’s amicus brief in this case explains why the district court’s decision should be affirmed—and why a contrary decision would “impair” DOJ’s ability to enforce the statute. *See* DOJ Br. 1, 17–32. And unlike its novel position on sovereign immunity, *see supra* at 36–40, DOJ’s position concerning RICO has been consistent. As just one example, in *National Organization for*

Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001)—the case on which Plaintiffs most heavily rely, Resp. 62–65—the Solicitor General filed an amicus brief urging reversal of the Seventh Circuit, making the same arguments DOJ advances here.¹³ Br. for the United States as Amicus Curiae at 19, *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9 (2006)(No. 04-1244).¹⁴

Plaintiffs' position on RICO thus contravenes not only the statute's text, structure, and history, but also the weight of precedent. The district court was right not to “engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.” *California v. Sierra Club*, 451 U.S. 287, 297 (1981).¹⁵ Accordingly, this Court should affirm the dismissal of Plaintiffs' RICO claims against Tribal Appellants.

¹³ Because *Scheidler* was decided on other grounds, the Supreme Court remanded the case for further review without considering the scope of RICO. *See Scheidler*, 547 U.S. at 16.

¹⁴ *See also* U.S. Dep't of Justice, Civil RICO: A Manual for Federal Attorneys § II.D (2007) (“Rather than authorize private civil RICO plaintiffs to seek equitable remedies, Congress in Section 1964(c) granted private parties the right to bring suit to recover treble damages and attorney’s fees.”).

¹⁵ Because the district court determined that RICO foreclosed Plaintiffs' request for an injunction, it did not address whether RICO permits lawsuits against Tribal Appellants, who compose the Tribe's governing body. *See, e.g., Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261 (1981) (noting the existence of “respectable authority” that municipal corporations “can[]not, as such, do a

CONCLUSION

The district court's rulings on arbitration should be reversed and the matter should be remanded to compel arbitration. The district court's rulings on choice of law and sovereign immunity should be reversed, and its ruling on the availability of injunctive relief under RICO should be affirmed.

criminal act or a willful and malicious wrong"). If this Court were to reverse the district court's RICO ruling, it should reject Plaintiffs invitation to resolve the issue in the first instance.

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Respectfully Submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) in that—according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the motion contains 12,680 words, excluding the portions exempted by Rule 32(f).

/s/ Rakesh N. Kilaru

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CERTIFICATE OF SERVICE

On this 13th day of August, 2020, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case who are registered CM/ECF users will be served by that system.

/s/ Rakesh N. Kilaru

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