16-2019-cv(L)

16-2132-cv(CON), 16-2135-cv(CON),16-2138-cv(CON), 16-2140-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JESSICA GINGRAS AND ANGELA C. GIVEN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

THINK FINANCE, INC.; TC LOAN SERVICE, LLC; KENNETH E. REES, FORMER PRESIDENT AND CHIEF EXECUTIVE OFFICER AND CHAIRMAN OF THE BOARD OF THINK FINANCE; TC DECISION SCIENCES, LLC; TAILWIND MARKETING, LLC; SEQUOIA CAPITAL OPERATIONS, LLC; TECHNOLOGY CROSSOVER VENTURES; AND JOEL ROSETTE, TED WHITFORD, AND TIM MCINERNEY, IN THEIR OFFICIAL CAPACITIES AS OFFICERS AND DIRECTORS OF PLAIN GREEN, LLC,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Vermont
No. 5:15-cv-101 (Hon. Geoffrey W. Crawford)

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1971, Public Citizen, Inc. is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and courts on a range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae.

Public Citizen has a longstanding interest in issues concerning mandatory arbitration because arbitration may hinder consumers' access to remedies for unlawful and wrongful conduct. Public Citizen is also concerned about the victimization of consumers by predatory lending, and about the threat to legal protections against such lending posed when payday lenders use native American tribal entities to shield their operations.

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[1] All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from amicus curiae, no person or organization, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Tribal payday lending schemes have proliferated as private lenders seek to avoid accountability for usurious lending practices behind a smokescreen of tribal authority. When injured plaintiffs file suit, lenders typically invoke concepts of tribal sovereignty to avoid state- and federal-law regulation of their activities, and also seek to divert claims into arbitration. *See*, *e.g.*, *Parnell v. Western Sky Fin., LLC*, __ F. App'x __, 2016 WL 6832933 (11th Cir. Nov. 21, 2016); *Parm v. Nat'l Bank of Calif.*, 835 F.3d 1331 (11th Cir. 2016); *Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014); *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014); *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014); *People ex rel. Owen v. Miami Nation Ents.*, __ P.3d __, 2016 WL 7407327 (Cal. Dec. 22, 2016). This case exemplifies these themes. The plaintiffs seek injunctive relief compelling three tribal defendants to cease unlawful activities in Vermont.[2] Those defendants assert that tribal sovereign immunity shields them from such relief.

[2] "Tribal defendants" refers to the defendants-appellants sued in their official capacity, and "non-tribal defendants" refers to the remaining defendants-appellants.

The Supreme Court, however, has repeatedly stated that tribal officers are subject to injunctions compelling compliance with state law. *See*, *e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2051 (2014). The tribal defendants contend that the Supreme Court's statements are mistaken, and that the Eleventh Amendment reasoning of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), suggests that tribal officials may not be enjoined from violating state law. But *Pennhurst*, while prohibiting federal courts from entertaining suits for injunctive relief against officials for violating their own states' laws, does not prohibit states from providing remedies for violations of their laws in their territory by officials of other states. The extension of tribal sovereign immunity that the tribal defendants seek, by contrast, would deny effective remedies against unlawful activities by tribal officers within state jurisdictions. *Pennhurst* does not support that extraordinary result.

The tribal defendants likewise seek immunity from suits for injunctive relief under federal law—RICO—arguing that governmental entities are incapable of forming the malicious or fraudulent intent they say is required for RICO liability. The doubtful proposition that

governments may not form unlawful intents, however, does not avail the defendants, because *government officials* surely may do so. Moreover, plaintiffs' RICO claim rests in part on the theory that the defendants engaged in unlawful lending activity, which does not require the type of intent that the defendants disclaim.

Finally, all defendants seek to divert this litigation into arbitration, despite the district court's conclusion that the plaintiffs have raised litigable challenges to the enforceability of their arbitration agreements. The defendants argue that the agreements delegate questions of their own enforceability to an arbitrator, but the agreements do not clearly and unmistakably give the arbitrator authority to decide arbitrability. Furthermore, even if they did, the plaintiffs have properly challenged the enforceability of any such delegation.

ARGUMENT

I. Tribal Immunity Does Not Give Tribal Officers Carte Blanche to Violate State and Federal Law.

Nearly twenty years ago, the Supreme Court recognized that tribal sovereign immunity, a doctrine that "developed almost by accident," already "extend[ed] beyond what [was] needed to safeguard tribal self-governance." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756,

758 (1998). Since then, tribes' increasing participation in heavily regulated commercial sectors, including consumer lending, has increased "conflict and inequities" arising from inadequate checks on tribal entities' off-reservation conduct. *Bay Mills*, 134 S. Ct. at 2051 (2014) (Thomas, J., dissenting). Nonetheless, the tribal defendants ask this Court to expand the doctrine of tribal immunity in a way that would effectively permit tribal entities to engage in off-reservation lending practices that violate state and federal law. This Court should refuse the invitation.

A. Plaintiffs May Sue to Prevent Tribal Officers from Violating State Law Outside of Tribal Lands.

Although tribal immunity may bar plaintiffs from seeking money damages from tribal entities, the district court properly allowed plaintiffs to seek injunctive relief preventing the tribal defendants from violating state and federal law when doing business off-reservation. The tribal defendants concede that prospective-relief officer suits are available to enforce federal law but argue that such suits are barred by tribal immunity insofar as they seek to enforce state law. This argument contradicts the Supreme Court's longstanding approval of state-law

prospective-relief suits against tribal officers, most recently reaffirmed in *Bay Mills*.

1. Supreme Court Precedent Allows Actions for Prospective Relief Against Tribal Officers' Violations of State Law.

The tribal defendants do not attempt to dispute that they must comply with state law while within state jurisdiction. Nor could they, because "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). Instead, they argue that they cannot be compelled by injunction or declaratory judgment to comply with their legal obligations when acting on behalf of a tribal entity.

The Supreme Court has expressly held to the contrary: "[W]hether or not [a] Tribe itself may be sued … without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible," *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171 (1977), even where those tribal members are tribal officers, *see id.* at 168 n.3. Less than three years ago, the Supreme Court reiterated

that "tribal immunity does not bar [a state-law] suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 134 S. Ct. at 2035 (emphasis omitted) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

The tribal defendants dismiss the statement in *Bay Mills* as dictum, and they hardly discuss *Puyallup*, which *held* that a state-law prospective-relief claim may proceed against tribal officers. Regardless, even if a Supreme Court pronouncement "is fairly characterized as *dictum*," this Court is "obligated '"to accord great deference to Supreme Court *dicta*" absent a change in the legal landscape.'" *United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) (quoting *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014)). Pointing to no such doctrinal change in the three years since *Bay Mills*, the tribal defendants instead argue that *Bay Mills*' approval of prospective suits against *tribal* officers for violations of state law committed *outside* the territorial ambit of the officers' sovereign authority is inconsistent with precedent barring federal courts from entertaining prospective-relief suits against *state* officers for violations of state law committed *within* the territorial ambit of the officers' sovereign authority. But the tribal defendants' assertion

that *Bay Mills* is in tension with inapplicable Eleventh Amendment precedents is not only incorrect, but irrelevant given *Bay Mills*' consistency with *Puyallup* and other cases arising squarely within the tribal immunity context. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 516 (1991) (Stevens, J., concurring) ("[T]he Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to [state-law] actions seeking equitable relief.").

For these reasons, the only federal appeals court to directly address the availability of state-law injunctive actions against tribal officers following *Bay Mills* determined that *Bay Mills* meant just what it said: "[T]ribal officers may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015).

The longstanding line of Supreme Court precedent that controls here comports with common sense. Tribal officers cannot claim immunity when they act beyond the scope of their authority. *See Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe*

of Indians of Fla., 177 F.3d 1212, 1225 (11th Cir. 1999). And because a tribe is powerless to authorize its officers to commit off-reservation violations of state law, such violations can justify a state's resort even to criminal law. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006) (en banc). If states may prosecute tribal officers for state-law violations within the state's territorial jurisdiction, *see, e.g.*, *State v. Velky*, 821 A.2d 752, 758–59 (Conn. 2003), holding that states may not subject tribal officers to less burdensome *injunctions* against committing such violations in the first place would be illogical.

The tribal defendants contend that the Supreme Court tacitly overruled *Puyallup* in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89—and then presumably forgot it had done so in *Bay Mills*. Even if *Pennhurst* "raised doubts about [*Puyallup*'s] continuing vitality," *Puyallup* would nevertheless "remain binding precedent until" the Supreme Court saw fit to overrule it directly. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998); *accord, Agostini v. Felton*, 521 U.S. 203, 237 (1997); *United States v. Gomez*, 580 F.3d 94, 104 (2d Cir. 2009). In any event, not only is *Pennhurst* wholly consistent with *Puyallup*, its

reasoning supports the availability of prospective relief against tribal officers who violate state law in state territory.

Pennhurst held that Eleventh Amendment sovereign immunity bars a prospective-relief suit in federal court against state officers for violating their own state's laws. *Pennhurst*, 465 U.S. at 104–06. The Court explained that the prospective-relief exception to Eleventh Amendment immunity was crafted to "reconcile [the] competing interests" of respecting state sovereignty while vindicating federal law that the state is bound to obey. *Id.* at 106. Where a plaintiff's claim against state officers sounds only in the law of the officers' own state, no federal interest justifies the "great[] intrusion on state sovereignty" that results "when a federal court instructs state officials on how to conform their conduct" to their own laws. *Id.*

The considerations justifying *Pennhurst*'s narrow limitation on *Ex parte Young* actions would not appear to support barring prospective-relief suits brought to require officers of one state to comply with the laws of *another* state while in that other state. First, such suits impose only a minimal intrusion on the sovereignty of the officer's state because the officer's state lacks power to authorize the violation of another

state's laws. *See Ex parte Young*, 209 U.S. at 159. Second, the federal courts have an interest in protecting victim states' efforts to effectively implement their own laws in their own territory. *Cf. Nevada v. Hicks*, 533 U.S. 353, 370 (2001). The tribal defendants' broad reading of *Pennhurst* to apply to suits based on violation of another sovereign's laws within its territory would undermine state-law protections against other states' *ultra vires* intrusions into victim states' sovereign territory.

Moreover, even if *Pennhurst* swept as broadly in the *state-officer* context as the tribal defendants urge, the tribal-officer context is meaningfully different. Where a *state* officer enters another state and violates its laws, the victim state may protect its interests by authorizing a state-law suit in its own courts even if the offender would receive Eleventh Amendment immunity in federal court. *See Nevada v. Hall*, 440 U.S. 410, 426–27 (1979). By contrast, states are powerless to authorize state-court suits that would be barred in federal court by *tribal* immunity. *See Kiowa*, 523 U.S. at 756. Thus, extending *Pennhurst*'s holding to bar the suit here would give tribal officers greater scope to flout state laws than state officers enjoy. Given *Pennhurst*'s solicitude for

legitimate exercises of state sovereignty and the Supreme Court's unease with tribal immunity, such an expansive reading cannot be correct.

2. Other Limitations the Tribal Defendants Seek to Impose on State-Law Prospective-Relief Suits Against Tribal Officers Have No Basis in Precedent or Principle.

Beyond their misplaced reliance on *Pennhurst*, the tribal defendants suggest that state-law prospective-relief suits may be brought against tribal officers only in their *individual* capacity. Alternatively, they suggest that *Bay Mills* allows only states themselves to bring state-law prospective-relief suits against tribal officers.[3]

The tribal defendants point to no court that has adopted either distinction, and they offer no policy reason to support either one. Rather than explaining why state-law suits are uniquely subject to the specific limitations they propose, the tribal defendants assert only that no authoritative precedent holds they are not. Given the Supreme Court's own "doubt" about "the wisdom of perpetuating the doctrine" of tribal immunity, *Kiowa*, 523 U.S. at 758, this Court should reject the tribal

[3] The tribal defendants nowhere suggest that these limits apply to actions brought under *federal* law. This Court's precedent forecloses any such suggestion. *See, e.g.*, *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87 (2d Cir. 2001).

defendants' efforts to parse the case law for a technical workaround to the precedent that forecloses immunity.

Bay Mills observed without qualification that "tribal immunity does not bar … a [state-law] suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 134 S. Ct. at 2035 (emphasis omitted). Plaintiffs have brought precisely such a suit. No authority supports the tribal defendants' argument that immunity in a prospective-relief suit turns on whether defendants are named in their official or individual capacity.

Where a plaintiff seeks *damages*, sovereign immunity bars official-capacity suits because an officer sued in an official capacity pays an adverse judgment from state coffers, while an officer sued in an individual capacity is personally liable. *See Kentucky v. Graham*, 473 U.S. 159, 165–68, 170 (1985). But where a plaintiff seeks only the cessation of a defendant's unlawful conduct, it falls to the defendant officer to comply with an adverse judgment regardless of how the case is captioned. Consequently, in prospective-relief suits brought against state officers under *Ex parte Young*, sovereign immunity bars neither individual-capacity nor official-capacity suits. *Compare, e.g.*, *Verizon Md., Inc. v.*

Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (*Ex parte Young* allows a plaintiff to "proceed against the individual [defendants] in their official capacities"), *with, e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (*Ex parte Young* makes available "certain suits seeking declaratory and injunctive relief against state officers in their individual capacities"). No precedent suggests a different rule in the tribal context.

Disallowing an official-capacity prospective-relief suit that could exist as an individual-capacity suit would be nonsensical. Where plaintiffs seek only prospective relief, the critical difference between an official-capacity and an individual-capacity suit is that an official-capacity judgment applies to future officeholders. *See Vann v. U.S. Dep't of the Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012). Requiring injunctive actions to proceed as individual-capacity suits would offer no lasting benefit to tribes, because tribal officers could still be enjoined, but would impose unnecessary costs on plaintiffs *and* tribes because litigation would have to begin anew every time an officer position changed hands, contrary to *Bay Mills*'s assurance that an injunctive action offers a "permanent[]" remedy against unlawful tribal activity. 134 S. Ct. at 2035. No court

requires this Whack-A-Mole approach to prospective-relief suits against either state or tribal officers. This Court should not be the first.

The tribal defendants' suggestion that only states may bring state-law prospective-relief suits against tribal officers is equally meritless. They cite no relevant authority to justify this view. They merely note that *Bay Mills* emphasized a state's interest in ensuring compliance with its own laws. That *Bay Mills*, in which a state was the party adverse to the tribe, suggested that the state could bring an action for prospective-relief against tribal officers hardly implies that private litigants may not do the same. In a prospective-relief suit against a *state* officer, "the validity of … [the] action [does not] turn on the identity of the plaintiff." *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 256 (2011). There is no basis for a different rule here.

Bay Mills mentioned injunctive actions as one of many "tools [a state] can use to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. *Bay Mills* did not purport to provide a comprehensive enumeration of these tools. States often rely on private enforcement of their consumer protection laws. *See, e.g.*, *Hall v. Walter*, 969 P.2d 224, 232 (Colo. 1998) (en banc); *Plath v. Schonrock*, 64 P.3d 984, 990 (Mont.

2003); *United Labs., Inc. v. Kuykendall*, 437 S.E.2d 374, 378–79 (N.C. 1993); *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 584 (Va. 2003); *First Wis. Nat'l Bank v. Nicolaou*, 335 N.W.2d 390, 395 (Wis. 1983). *Bay Mills* does not foreclose states from relying on private litigation to enforce compliance with their laws.

B. Tribal Officers May Be Enjoined from Engaging in Debt Collection and Racketeering Activities that Violate Federal Law.

In addition to their state-law claims, plaintiffs seek prospective relief under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). The tribal defendants concede that prospective-relief suits against tribal officers claiming violations of federal law are not generally barred by tribal immunity. They nevertheless argue that RICO does not create a cause of action for injunctive relief against tribal officers acting in an official capacity. Specifically, the tribal defendants argue that tribal entities are not subject to RICO liability because governments are "incapable of forming the mens rea necessary to commit a predicate act"—in particular, the specific intent to defraud that is an element of the predicate acts of mail and wire fraud. Tribal Def. Br. 29.

The tribal defendants rely principally on the Ninth Circuit's statement that municipalities are not subject to RICO liability because "government entities are incapable of forming a malicious intent."[4] *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991). This statement is highly dubious. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (suggesting that Congress was "motivated by an improper animus or purpose" in enacting the Defense of Marriage Act); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (enjoining a voting provision enacted due to a state legislature's "intentional racial discrimination"). The Ninth Circuit based its observation on *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). *See Lancaster*, 940 F.2d at 404. But *City of Newport* did not hold municipalities incapable of malicious intent; it held only that such intent should not be imputed to them for purposes of imposing punitive

[4] This Court has stated in a summary order that "there is no municipal liability under RICO," *Rogers v. City of N.Y.*, 359 F. App'x 201, 204 (2d Cir. 2009), citing a district court opinion adopting the Ninth Circuit's rationale, *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 457 (S.D.N.Y. 1998). Summary orders have no precedential effect in this Court. *See* 2d Cir. R. 32.1.1.

damages that will ultimately be borne by innocent taxpayers absent express congressional authorization. *See* 453 U.S. at 259–66.

Whether a government entity, municipal or tribal, can form the requisite intent to justify RICO treble damages liability is not the issue here. The question is whether a tribal *official* can form the requisite intent to justify an *injunction* against ongoing, unlawful conduct undertaken in his official capacity. Official-capacity injunctions under *Ex parte Young* are regularly issued against government officials based on violations that require a showing of unlawful intent. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *State Emp'ees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 98 (2d Cir. 2007).

Allowing such injunctive relief under RICO is particularly unproblematic here, where the RICO claim does not necessarily depend on malice or fraudulent intent. The RICO claim is predicated in part on the tribal defendants' unlawful collection of debt. Malicious intent is not an element of such a claim. *See Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 (9th Cir. 1988) (listing elements). The tribal defendants offer no reason why this claim should not proceed.

II. The Plaintiffs Are Not Required to Arbitrate the Question Whether the Arbitration Clause is Enforceable.

Only the tribal defendants seek tribal immunity, but all defendants invoke another means of avoiding accountability in court: arbitration. Although the district court held that plaintiffs had presented well-supported allegations that, if proved, would render the arbitration agreements accompanying their loans unconscionable, defendants argue that the court should not even have considered those arguments, but should have left the determination whether the arbitration agreements are unconscionable to the flawed arbitration process itself.

The Federal Arbitration Act (FAA) provides that agreements to arbitrate are as enforceable as other contracts, subject to state-law defenses to the enforcement of contracts generally, such as unconscionability. *See* 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Whether an arbitration agreement is enforceable, however, is usually an issue for a court. Only if an agreement "clearly and unmistakably" delegates arbitrability issues to an arbitrator may a court compel parties to arbitrate the question of an arbitration clause's enforceability. *Howsam v. Dean Witter Reynolds,*

Inc., 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995).

Even when an arbitration agreement purports to delegate questions of its own enforceability to the arbitrator, a party may challenge the delegation provision's enforceability. Such challenges are limited in one respect: If the arbitration agreement contains a separate delegation clause providing an arbitrator with exclusive authority to determine the question of arbitrability, that clause is treated as a distinct, severable agreement to arbitrate that must be enforced unless its own enforceability is "specifically" challenged. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010).

Here, defendants argue that the arbitration agreement contains a severable delegation provision and that the plaintiffs have failed to mount a specific challenge to it. That argument fails for three principal reasons: First, the arbitration agreement does not "clearly and unmistakably" assign the issue of enforceability exclusively to the arbitrator; second, the agreement does not contain a separate, severable agreement to arbitrate arbitrability; third, and most importantly, plaintiffs have raised specific challenges to the claimed delegation.

A. The Agreement Does Not Clearly Give the Arbitrator Binding Authority to Decide Enforceability Issues.

Defendants' argument is based on two provisions of the arbitration agreement. The first is the agreement's basic provision that "any Dispute (defined below) will be resolved by arbitration." *E.g.*, A-264. The second is a subsequent paragraph headed "**WHAT ARBITRATION IS**," which states that "[a] 'Dispute' is any claim or controversy of any kind between you and us" and goes on to state that "[a] Dispute includes, by way of example and without limitation, any claim based upon a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." *Id*. Defendants assert that the definition of dispute, read together with the agreement to resolve disputes by arbitration, is a delegation provision within the meaning of *Rent-A-Center*, *Howsam*, and *First Options*.

Read in the context of the arbitration agreement as a whole, these provisions do not "clearly and unmistakably" divest courts of their default authority to determine questions of whether the arbitration agreement as a whole is enforceable, as the Supreme Court's decisions require. *Howsam*, 537 U.S. at 591; *accord*, *Rent-A-Center*, 561 U.S. at 78;

First Options, 514 U.S. at 944. Unlike the provision in *Rent-A-Center*, which explicitly provided that the arbitrator had exclusive authority to decide questions concerning the enforceability of the arbitration agreement, the provisions defendants cite do not draw attention to the claimed delegation to the arbitrator. Rather, defendants' argument requires reading a general statement—that disputes are subject to arbitration—together with a separate paragraph containing a broad description of disputes that "includ[es]" issues of the validity, enforceability, or scope of the arbitration agreement. That reading, defendants argue, supports an inference that the parties intended to grant the arbitrator exclusive power to resolve arbitrability disputes, contrary to the general presumption that such issues are for courts.

Given the "arcane" nature of the question of "who (primarily) should decide arbitrability," such an inference does not demonstrate that a party to the agreement would have "focus[ed] upon that question or upon the significance of having arbitrator decide the scope of their own powers." *First Options*, 514 U.S. at 945. The language thus is not sufficiently clear and unmistakable to require "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge,

not an arbitrator, would decide." *Id*. A reasonable person reading the agreement could have concluded that it merely provided that an arbitrator could address issues of enforceability in resolving a dispute otherwise before him, without displacing the conventional power of a court to do so before ordering arbitration. A recognition that an arbitrator may address an issue of arbitrability in resolving a dispute is not the equivalent of "willingness to be effectively bound by the arbitrator's decision on that point." *Id*. at 946.

Other features of the agreement underscore the absence of a clear and unmistakable grant of exclusive authority to consider the arbitration agreement's enforceability. First, while the agreement contains a description of rights that arbitration "replaces," and a bold-faced listing of rights a borrower is "giving up," A-264–A-265, those lists do not inform a borrower that he is giving up the normal right to have a court determine the enforceability of the arbitration agreement before compelling arbitration. Second, the agreement explicitly provides that the arbitrators may not consider even in the first instance one key issue respecting the arbitration agreement's enforceability—the "validity, effect, and enforceability" of its provisions concerning class actions. Even

if defendants were correct that this *anti*-delegation provision does not apply to the enforceability issues in this class action (*but see* App'ee. Br. 53–54), at a minimum it contributes uncertainty about the extent to which the agreement genuinely delegates any authority to the arbitrator with respect to enforceability questions.

Third, and most importantly, the arbitration agreement contradicts any assertion that it actually delegates authority to the arbitrator to decide enforceability issues by providing that all decisions of the arbitrator on questions of law—including with respect to arbitrability—are subject to de novo review by a tribal court. A-265. Far from granting the arbitrator exclusive authority to make enforceability determinations, the agreement assigns that authority to the tribal court. Any ruling an arbitrator attempted to make on the enforceability of the arbitration clause would be advisory, comparable to a magistrate judge's recommended ruling on a dispositive motion.

The agreement is completely unlike the one in *Rent-A-Center*, which "gave the arbitrator '*exclusive* authority to resolve any dispute relating to the … enforceability of this Agreement.'" 561 U.S. at 71 (emphasis added), subject only to the extremely limited judicial review

available under the FAA, which does not extend to errors of law and fact. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The arbitration agreement here, by contrast, attempts to give tribal courts ultimate decisionmaking authority concerning its enforceability, and thus does not clearly and unmistakably indicate "a willingness to be effectively bound by the arbitrator's decision on that point." *First Options*, 514 U.S. at 946. Although the FAA may require the enforcement of an agreement that clearly and unmistakably indicates willingness to be bound by an *arbitrator*'s decision on enforceability, it does not require enforcement of agreements delegating authority to *tribal courts*.

B. The Arbitration Agreement Is Not Severable Under *Rent-A-Center*.

Even if the arbitration agreement could be read as clearly and unmistakably delegating authority to the arbitrator to decide questions concerning its own enforceability, it would not be entitled to the benefit of *Rent-A-Center*'s "severability" holding because it involves a unitary, non-severable arbitration agreement.

In *Rent-A-Center*, the Supreme Court held that a *distinct* written agreement to delegate arbitrability issues to an arbitrator (that is, to

arbitrate arbitrability) is enforceable regardless of the enforceability of the broader arbitration agreement of which it is a part, unless there is a specific challenge to the validity or enforceability of the delegation provision itself. *Rent-A-Center* was based on the reasoning of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 403–404 (1967), which held that section 2 of the FAA requires the enforcement of a "written provision" providing for arbitration of a controversy regardless of the enforceability or validity of the "contract in which it is contained." *See Rent-A-Center*, 561 U.S. at 70. Thus, under the FAA, "an arbitration provision is severable from the remainder of the contract," *id*. at 71 (quoting *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445, (2006)), and must be enforced unless there is a challenge "directed specifically to the agreement to arbitrate." *Id*.

In *Rent-A-Center*, the Court held this principle applicable to situations where there is more than one written agreement to arbitrate. As the Court explained, the agreement before it "contain[ed] multiple 'written provision[s]' to 'settle by arbitration a controversy,'" including one agreement to arbitrate disputes, and a separate section providing for arbitration of issues "relating to the … enforceability … of this

Agreement." *Id*. at 68. The "written provision" that the defendant asked the Court to enforce was the latter—the "delegation provision." *Id*. at 71. Because the FAA's command that arbitration agreements be enforced "operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce," *id*. at 72, an opposing party seeking to contest a motion to compel arbitration must "challeng[e] the validity … of the precise agreement to arbitrate at issue," *id*. at 71. In *Rent-A-Center*, the plaintiff made no such specific challenge to the written provision the defendant sought to enforce, and thus was required to arbitrate the question of the enforceability of the remainder of the agreement.

Here, by contrast, there are no multiple written agreements to arbitrate. Defendants' delegation argument depends on a unitary provision purporting to require arbitration of disputes and on the single provision that defines disputes. Those paragraphs can in no way be viewed as a written agreement to arbitrate arbitrability separate from the written provision for arbitration of other disputes. Thus, *all* of plaintiffs' unconscionability challenges to the arbitration agreement are directed at "the precise agreement at issue," "the specific 'written

provision' to 'settle by arbitration a controversy' that the party seeks to enforce." *Id*. at 71, 72.[5]

C. Plaintiffs Specifically Challenged Any Delegation of Authority to Decide Arbitrability.

Finally, even if the agreement here clearly and unmistakably delegated the enforceability of the arbitration clause to the arbitrator, and did so in a manner that called into play *Rent-A-Center*'s severability analysis, the district court correctly refused to enforce it. As *Rent-A-Center* recognizes, "that agreements to arbitrate are severable does not mean that they are unassailable." 561 U.S. at 71. Plaintiffs here have amply satisfied *Rent-A-Center*'s requirement that they "specifically" challenge the agreement's delegation of authority to determine its own enforceability: They have advanced arguments that go directly to the unconscionability of the way the agreement seeks to provide for arbitration of issues of arbitrability.

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[5] We recognize that in *Parnell v. Cashcall, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015), the Eleventh Circuit held that similar language did constitute a severable delegation clause, but the court reached that result only by disregarding *Rent-A-Center*'s focus on the existence of *multiple written provisions* for arbitration. In any event, the same court later held, correctly, that the plaintiff had successfully mounted a specific attack on the so-called delegation provision by demonstrating that it was unenforceable because the purported arbitral forum was illusory. *See Parnell v. Western Sky*, 2016 WL 2832933, at *2.

A "specific" basis for challenging a delegation provision need not be entirely distinct from a basis for challenging the agreement as a whole. If a challenge is aimed directly at the validity or enforceability of the delegation provision, *Rent-A-Center* allows it to be considered as a reason to deny arbitration, even if it would also provide a basis for challenging other parts of the arbitration agreement or the agreement as a whole. *See*, *e.g.*, *Parm*, 835 F.3d at 1335-38 (holding a delegation clause unenforceable on grounds that would also apply to the arbitration agreement as a whole). Only challenges to the agreement that would *not* affect the delegation provision if it stood alone are insufficient.

An example illustrates the point. Suppose a defendant required plaintiffs to arbitrate all disputes against it, with the defendant itself acting as arbitrator. A court would find such an agreement unconscionable because it is "crafted to ensure a biased decisionmaker." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). Now suppose the defendant added a separate provision stating that the arbitrator (i.e., the defendant) had exclusive authority to decide challenges to the enforcement of the arbitration agreement. A challenge to that delegation provision based on the manifest unfairness of allowing

a party to decide the enforceability of its own arbitration procedures would surely constitute a "specific" challenge under *Rent-A-Center*: Such a challenge would be aimed at the specific agreement the defendant sought to enforce, and it would be based on features of that agreement that would render it unenforceable in itself. That the same arguments would also support the plaintiff's broader challenge to the enforceability of the arbitration agreement as a whole once the delegation clause was set aside would not prevent consideration of those arguments as applied specifically to the delegation clause. Any other result would enable a defendant to insulate an unconscionable arbitration agreement from review by tacking on a delegation clause that was equally unconscionable.

Understanding of this point reveals why the challenges plaintiffs have made here are "specific" to the claimed delegation of authority to decide arbitrability, although they may also serve as bases for the broader challenge to the arbitration agreement. Plaintiffs point to a host of features of the arbitration agreement that render unconscionable any delegation to the arbitrator of authority to decide the arbitration agreement's enforceability. That many of these same features also

contribute to the unconscionability of the arbitration agreement as a whole makes them no less pertinent to the manifest unfairness of the claimed delegation of authority.

Of particular note, the agreement requires the arbitrator to apply Chippewa Cree tribal law in deciding the enforceability of the arbitration agreement and purports to subject any decision on unconscionability to unfettered review exclusively by the tribal courts. These features of the agreement quite specifically render its application to issues of enforceability manifestly unfair and unconscionable in several ways.

First, as the district court held, the tribal law that the agreement requires the arbitrator to apply in determining enforceability of the arbitration clause appears to be nonexistent, or at least unascertainable: "[N]o court has ever been able to determine what that law is or where it can be found." SPA-27. In purporting to require plaintiffs to arbitrate the enforceability of the arbitration agreement under legal standards that neither they nor the arbitrator can discern, the claimed delegation of authority to decide arbitrability is unfair and oppressive, and hence unconscionable.

Second, even assuming that the arbitrator and the parties could find some basis for determining plaintiffs' challenge to the enforceability of the arbitration agreement, the arbitrator's decision on the point would count for nothing: Under the agreement, the tribal court would have the ultimate say, applying its own view of tribal law. As the district court explained, SPA-31–SPA-32, and plaintiffs have elaborated in their brief, plaintiffs presented substantial allegations that defendants had corrupted both the tribal court system and the content of tribal law to protect their predatory lending. Assuming those allegations are ultimately proved, the unconscionability of making plaintiffs arbitrate the issue of enforceability of the arbitration agreement through such an inherently flawed process is as great as the unconscionability of forcing them to adjudicate their substantive claims through those procedures.

Third, the very premise of the purported delegation of authority to the arbitrator (and ultimately to the tribal court)—that arbitrability issues are determined by tribal law because Plain Green's predatory lending activities in Vermont and other states are not subject to state and federal laws, but only to tribal law—is fundamentally wrong. Even if tribal law on arbitrability were ascertainable and the tribal courts and

code were entirely untainted, it would be unconscionable to subject plaintiffs to decision of the question of arbitrability on the basis of laws to which they are not subject.

Finally, although plaintiffs theoretically had the ability to opt out of arbitration, and thus avoid the delegation of arbitrability issues to the arbitrator altogether, the alternative would have been to subject themselves to the same tribal courts and tribal law that, under the arbitration agreement, ultimately determine the arbitration agreement's enforceability. These "alternatives" presented a true Hobson's choice—that is, no choice at all. Plaintiffs' challenge to the claimed delegation of authority to the arbitrator thus incorporates a claim of procedural unconscionability that is "specific" to the delegation.

All of these features go directly and specifically to the fairness of requiring plaintiffs' to arbitrate the question of the arbitration agreement's enforceability under the procedures the agreement establishes. Thus, as the district court correctly held, plaintiffs' "separate attack on the arbitration clause satisfies the majority's test in *Rent-A-Center*"; they "have attacked the arbitration clause directly and the [claimed] delegation clause specifically" in a "focused claim that the

delegation clause itself is unconscionable." SPA-32. Accordingly, the question of enforceability of the arbitration clause is for the court to decide. Plaintiffs deserve the opportunity to prove in court their claims that the arbitration agreement as a whole reflects an unenforceable attempt to insulate defendants from state and federal lending laws.

CONCLUSION

This Court should affirm the orders of the district court.

Respectfully submitted,

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January 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on January 17, 2016. 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.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF COMPLIANCE

The brief complies with Fed. R. App. P. 32(a)(5)and (6); it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook BT (except for the cover, which uses 14-point Times New Roman). This brief contains 6,476 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and therefore complies with the word limitation of Fed. R. App. P. 29 and Second Circuit R. 29-1.

/s/ Scott L. Nelson
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