Nos. 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, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
ANGELA C. GIVEN, ON BEHALF OF HERSELF 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, JOEL ROSETTE, OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF PLAIN GREEN, TED WHITFORD, OFFICIAL CAPACITY AS A MEMBER OF PLAIN GREEN'S BOARD OF DIRECTORS, TIM MCINERNEY,

Defendants-Appellants.

On appeal from the United States District Court
for the District of Vermont

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Julie Braman Kane
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W., Suite 200
Washington, DC 20001
(202) 965-3500

Jeffrey R. White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W., Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.com
Attorney for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amicus Curiae* hereby provides the following disclosure statement:

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10 percent or more of this entity's stock.

Date: January 6, 2017

Respectfully submitted,

/s/Jeffrey R. White
Jeffrey R. White
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary association of trial lawyers who represent plaintiffs in personal injury, employment rights, and consumer rights litigation.[1]

AAJ is concerned that Defendants in this case urge this Court to deprive plaintiffs of their constitutional rights of access to the courts and trial by jury on the basis of an arbitration agreement that is clearly so unjust and unfair that it should not be enforced.

SUMMARY OF ARGUMENT

1. The validity of the Arbitration Agreement in this case should be viewed in the context of online payday loans, a relatively recent financial product that offers consumers short-term cash loans at a very high rate of interest. Although they may be marketed as a source of cash to meet unexpected or emergency expenses, payday loans often turn into debt traps. Borrowers must take out ever more onerous loans simply to pay accumulating interest and fees. Online borrowers are also victimized by abusive collection tactics, unauthorized charges to their accounts, and sale or theft

[1] All parties have consented to the filing of this *amicus curiae* brief. The undersigned counsel for *Amicus Curiae* affirms, pursuant to Federal Rule of Appellate Procedure 29(c)(5), that no counsel for a party authored this brief in whole or in part and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

of their personal information. Victims of payday loan abuses deserve access to the courts to hold lenders accountable.

2. Defendants are not entitled to rely on the presumption in favor of arbitration under the Federal Arbitration Act. The FAA by its terms does not apply to commerce with Indian tribes, which are not states, foreign nations or territories. Congress has clearly indicated that it did not intend the FAA to apply to such commerce. Nor does the invocation of the Indian Commerce Clause in defendants' arbitration agreements bring those agreements within the scope of the FAA, which is grounded in the entirely separate Interstate Commerce Clause. Indeed, defendants' Arbitration Agreement itself expressly rejects the application of federal law. It also provides for review of arbitral awards for substantial evidence and compliance with tribal law, a level of judicial scrutiny that the Supreme Court has held is incompatible with the FAA.

3. In addition, the choice-of-law and forum selection provisions render the Arbitration Agreement unenforceable.

The rationale favoring enforcement of such provisions in international trade agreements does not apply to trade with Indian tribes. More importantly, those provisions cannot be enforced where enforcement would be unreasonable and unjust. In this case, the choice-of-law provision making the Arbitration Agreement subject exclusively to tribal law unfairly seeks to prevent borrowers from vindicating

their federal rights. In addition, although the Arbitration Agreement rejects application of any state law, Defendants seek to supplement tribal law with the law of Montana.

The forum selection provision is likewise unfair. The purported "opt-out" provision is illusory. A borrower who opts out must present his claim to the tribal court in Montana, while the borrower who prevails in arbitration is subject to review by the tribal court. In either case, the merits of the case will go to a body that has the appearance of bias, because any award to the borrower will diminish the tribe's share of the lender's profits. Moreover, forcing Vermont borrowers to travel to Montana for their relatively small claims is manifestly unjust and unfair.

ARGUMENT

I. Online Payday Lenders Prey On Financially Vulnerable Consumers, Warranting Greater Accountability.

AAJ addresses this Court with regard to the forced arbitration provision contained in the loan agreement in this case. Examination of this Arbitration Agreement, specifically its choice-of-law and forum selection provisions, supports the district court's conclusion that the arbitration agreement is unenforceable. The context of this agreement highlights the importance of permitting consumers to hold online payday lenders accountable.

A. Online payday loans are expensive and risky debt traps.

The late Nineties saw aggressive marketing of a new consumer financial product. The stated purpose of payday loans was to provide a short-term cash advance for consumers to meet unexpected obligations or emergencies. The Pew Charitable Trusts Report, *Payday Lending in America: Policy Solutions*, at 1 (Oct. 2013) ("Payday Lending in America"), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydayoverviewandrecommendationspdf.pdf.

Terms for these loans typically cost $15 to $25 per $100 of principal, to be repaid in two weeks or 30 days. In APR terms, this amounts to approximately 300 to 500 per cent. Payday borrowers spend "an average of $520 in interest to repeatedly borrow an average of $375. *Id*. *See also* Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings* (Apr. 2013) ("CFPB Findings"), *available at* http://bit.ly/CFPBPaydayPaper (reviewing 15 million payday loan transactions in 33 states). Online payday lenders typically charge significantly higher fees than storefront payday lenders. Consumer Federation of America, *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections*, at 22 (Nov. 2004) ("Internet Payday Lending"), *available at* http://www.consumerfed.org/pdfs/Internet_Payday_Lending1130

04.PDF; *see also* National Consumer Law Center, *Stopping the Payday Loan Trap*, at 4 (June 2010) ("*Stopping the Payday Loan Trap*"), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/reportstopping-payday-trap.pdf. Vermont's Attorney General has found, "Typically, online lenders charge fees and interest that, when annualized, result in interest rates far in excess of legal limits or typical borrowing rates, often exceeding 300%, 500%, or even 1,000%." Vermont Attorney General's Office, *Illegal Lending: Facts and Figures*, at 1 (Apr. 2014) ("Vermont AG Report"), *available at* http://legislature.vermont.gov/assets/Documents/2016/WorkGroups/House%20Commerce/Act%20199/W~Wendy%20Morgan~Vermont%20Attorney%20General's%20Office-%20Illegal%20Lending%C2%A6%20Facts%20and%20Figures~1-14-2015.pdf

Online lenders require borrowers to authorize direct access to the borrower's checking account, using the Automated Clearing House ("ACH"), a nationwide electronic payments system used by financial institutions. When the loan comes due, the lender can debit the account for the outstanding balance (or, often, the interest and service fee, while extending the loan for another term). Consumer Financial Protection Bureau ("CFPB"), *Online Payday Loan Payments*, at 2 (Apr. 2016) ("CFPB Findings"), *available at* http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf; Vermont AG Report, at 1, 6.

In reality, payday loans do not help consumers deal with unexpected or emergency expenses. CFPB found that the median annual income of a payday borrower is $22,476. CFPB Findings at 18. Most receive wages, though nearly one in four identify public assistance or retirement benefits as their primary source of income. *Id*. While not destitute, payday borrowers tend to live paycheck to paycheck. Payday borrowers do not use their loans for emergencies. "Various studies have found that 40 to 60% of consumers take out payday loans to cover routine expenses like utility bills, rent or groceries, or nonessential items." *Stopping the Payday Loan Trap*, at 5; Vermont AG Report, at 3 ("Only 16 percent of first-time payday loans were for an unexpected expense, such as a car repair or emergency medical expense.").

Borrowers very often need payday loans to pay the interest and fees on previous payday loans. The Pew Trusts study determined that "[m]ost small-dollar loan borrowers can afford to put no more than 5 percent of their paycheck toward a loan payment and still be able to cover basic expenses." *Payday Lending in America*, at 4. Yet, due to their high rates of interest and short repayment schedules, repayment of the full amount of a payday loan demands about one-third of the average borrower's paycheck. *Id*. at 1, 4. Borrowers therefore take out a new loan simply to pay off the accrued interest and fees of their prior loan, while the principal remains outstanding. *CFPB Findings*, at 43 (Payday loans "become harmful for consumers

when they are used to make up for chronic cash flow shortages [because consumers] are unable to fully repay the loan and pay other expenses without taking out a new loan shortly thereafter."). Vermont's Attorney General has stated that "75% of all payday loans are the result of 'churning,' where trapped borrowers take out new loans because they cannot afford to repay the original loan." Vermont AG Report, at 3 (quoting Consumer Federation of America, *Survey of Online Payday Loan Websites*, at 9 (Aug. 2011)). The Attorney General has concluded that these loans "are designed to trap individuals in long-term debt" and have a "devastating impact on families" *Id*. (internal quotes omitted).

Lenders aid in building this debt trap because one-time borrowers are not profitable. *Payday Lending in America*, at 5 ("Industry analysts estimate that customers do not become profitable to lenders until they have borrowed four or five times."). "Over 75 percent of payday loan fees are generated by borrowers with 11 or more loans a year." CFPB Findings, at 22. The CFPB found that the median payday borrower spent 199 days of the year in debt, ultimately paying $458 in fees for $392 in credit. *Id*. at 22-23. The heavy usage of payday loans is more the result of unaffordable loan terms than genuine demand for the product. *Payday Lending in America*, at 5.

Online payday borrowers are also exploited by the use of ACH authorization. When the borrower's checking account does not have sufficient funds to cover the

debit demand, the lender charges an added fee. Some lenders submit a demand over and over, perhaps several times in one day, charging a fee for each denial of payment. The borrower's bank may add a fee as well. CFPB Findings, at 3.

For these reasons, CFPB Director Richard Cordray has observed that these loans, "marketed as short-term solutions to an emergency need" are too often "debt traps – products that trigger a cycle of debt whose substantial costs over time can disrupt the precarious balance of people's financial lives." Consumer Financial Protection Bureau, *Prepared Remarks by Richard Cordray at a Consumer Advisory Board Meeting* (Feb. 2013), *available at* http:// www.consumerfinance.gov/ newsroom/prepared-remarks-by-richard-cordray-at-a-consumer-advisory-board-meeting/.

Households with easy access to payday loan stores are more likely to pay bills late, delay medical care, use food stamps, and be delinquent on child support payments than similar low-to-moderate income households without access to payday loans. *See generally,* Brian Melzer, *Spillovers from Costly Credit* (Mar. 2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235766; Brian Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q. J. of Econ. 517 (2011). Vermont's Attorney General warns, "Despite Vermont's strict laws, thousands of Vermont consumers get caught in the confusing and predatory world of illegal lending." Vermont AG Report, at 1. *See also* Nathalie

Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 Sw. L. Rev. 785, 805-06 (2010).

B. Abuses by online payday lenders warrant greater accountability.

Online payday borrowers are also disproportionately victimized by payday lenders and third parties who engage in unfair or illegal collection tactics and information sharing. One important study found "widespread fraud and abuse in the online lending market." Pew Charitable Trusts, *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending*, at 2 (Oct. 2014) ("*Fraud and Abuse Online*") ("[I]ssues that are particularly problematic in the online payday loan market, include consumer harassment, threats, dissemination of personal information, fraud, [and] unauthorized accessing of checking accounts."). For example: "30 percent of online payday loan borrowers report being threatened by a lender or debt collector. Threatened actions include contacting borrowers' family, friends, or employers, and arrest by the police," in violation of federal debt collection laws. *Fraud and Abuse Online*, at 2. In addition, 32 percent report unauthorized withdrawals in connection with an online payday loan" and "39 percent report that their personal or financial information was sold to a third party without their knowledge." *Id.*

Victims of illegal payday lender abuse deserve access to the courts to hold those lenders accountable.

II. The Federal Arbitration Act Provides No Presumption Favoring This Arbitration Agreement.

Both groups of defendants rely heavily on a presumption in favor of arbitration, based on Supreme Court decisions under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. *See* Brief for Appellants Joel Rosette, et al. ("Rosette Br.") 34 ("The FAA establishes a liberal federal policy favoring arbitration agreements.") (internal quotes and citations omitted); Joint Brief and Special Appendix for Defendants-Appellants Think Finance, Inc., et al. ("Think Finance Br.") 27 n.9 ("It is well accepted that the FAA evidences a strong federal public policy in favor of enforcing arbitration agreements like the one at issue here."). *Cf. David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248-49 (2d Cir. 1991) (Vermont law applies a more "rigorous standard" for the validity of arbitration agreements than the "liberal federal arbitration policy" under the FAA.).

However, the FAA does not apply in this case, either by its own terms or by agreement of the parties.[2]

[2] Even if the presumption applied to interpreting the scope of the Agreement, it would not warrant this Court placing its thumb on the scale where the specific dispute is over the validity of the Arbitration Agreement itself.

> [W]hile doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made. . . . Here, because the parties dispute not the scope of an arbitration

A The Federal Arbitration Act does not govern agreements with an Indian tribe.

The "starting point in statutory interpretation is the statute's plain meaning." *Harrison v. Republic of Sudan*, 838 F.3d 86, 90 (2d Cir. 2016); *Green v. City of N.Y.*, 465 F.3d 65, 78 (2d Cir. 2006) ("Statutory analysis begins with the text and its plain meaning."). By its own terms, the FAA does not apply to commercial transactions with Indian tribes.

The Federal Arbitration Act provides:

> A written provision in any maritime transaction or a contract *evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The FAA provides its own definition of "commerce":

> "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

> clause but whether an obligation to arbitrate exists, the presumption in favor of arbitration does not apply.

Applied Energetics, Inc. v. NewOak Capital Markets, LLC, 645 F.3d 522, 526 (2d Cir. 2011).

9 U.S.C. § 1.

Trade with the Chippewa Cree Tribe falls outside this definition of "commerce." First, it is beyond dispute that an Indian tribe is not a State within the meaning of the United States Constitution. *Settler v. Lameer*, 507 F.2d 231, 241 (9th Cir. 1974) (Indian tribes not subject to the constitutional restrictions imposed on states); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) ("Indian tribes are not states. . . . They are subordinate and dependent nations."); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir. 1958) ("The Indian tribes are not, however, states . . .").

Nor is the Chippewa Cree Tribe a "Territory" for purposes of section 1 of the FAA. The court in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), construed 28 U.S.C. § 1738, which provides that authenticated records, "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." The Ninth Circuit held that Indian tribes are not "territories or possessions" within the meaning of the statute. 127 F.3d at 808-809. *See also*, *Ex Parte Morgan*, 20 F. 298, 305 (N.D. Ark. 1883) (Cherokee Nation is not a "territory" under the federal extradition statute).

Nor is the Chippewa Cree Tribe a "foreign nation." *See, e.g.*, *United States v. Kagama*, 118 U.S. 375 (1886) (Indian tribes are not "foreign nations" within the

meaning of the Commerce Clause, Art. I, § 8, cl. 3.). Defendants concur. *See* Rosette Br. 48, referring to the Chippewa Cree Tribe as "a domestic dependent nation."

It is also clear that Congress did not intend that the FAA apply to commerce with Indian tribes. In 2002, Congress amended the statute that authorizes Indian tribes to lease their trust land with the approval of the Secretary of the Interior. Congress added:

> Any lease entered into under the Act of August 9, 1955 . . . or any contract entered into under . . . 25 U.S.C. § 81 . . . affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such lease or contract. Such leases or contracts entered into pursuant to such Acts shall be considered within the meaning of "commerce" as defined and subject to the provisions of section 1 of Title 9.

25 U.S.C. § 415(f).

In his statement, before the House of Representatives in support of the amendment, Senator Hayworth explained that many of the Gila River Indian Community's commercial contracts "provide for arbitration of disputes" and that, without the proposed amendment, "Federal courts would lack jurisdiction over contract disputes between private business entities and Indian tribes." 148 Cong. Rec., No. 32, H 945, 107th Cong., 2nd Sess. (Mar. 19, 2002).

A later legislative act can be regarded as a legislative interpretation of an earlier act and "is therefore entitled to great weight in resolving any ambiguities and

doubts." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). The obvious purpose of § 415(f) was to make certain contracts with Indian tribes subject to the FAA, reflecting congressional intent that such contracts do not otherwise come within the definition of "commerce" in § 1 of the FAA.

B The Arbitration Agreement's invocation of the Indian Commerce Clause does not make the contract subject to the FAA.

Defendants cite heavily to portions of the FAA and to Supreme Court decisions under that statute. *See*, *e.g.*, Think Finance Br. 28-30; Rosette Br. 40-43. But the only federal law the Arbitration Agreement acknowledges is the "Indian Commerce Clause."[3] *See* A263 ("This Agreement and the Agreement to Arbitrate are governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Chippewa Cree Tribe.").

It is difficult to discern the relevance of the Indian Commerce Clause to the case at bar. The clause is a grant of authority to Congress, not to Indian tribes. The Seventh Circuit has dismissed a similar reference in a payday loan agreement as mere "invocation of an irrelevant constitutional provision." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014), cert. denied *sub nom. W. Sky Fin. v. Jackson*, 135 S. Ct. 1894 (2015) (Mem.).

[3] "Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

This reference certainly cannot be construed as an oblique means of making applicable the Federal Arbitration Act, which was enacted under the Interstate Commerce Clause, a completely separate grant of congressional authority. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("The objects to which the power of regulating commerce might be directed, are divided into three distinct classes-foreign nations, the several states, and Indian Tribes. When forming this article, the [constitutional] convention considered them as entirely distinct."); *Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan*, 800 F. Supp. 1484, 1490 (S.D. Mich. 1992) (congressional authority to regulate commerce with Indian tribes is distinct from the authority to regulate interstate commerce).

When Congress enacted the FAA in 1926, it was cognizant of its "broad" power to regulate commerce with Indian tribes. *See, e.g.*, *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). Yet Congress departed from the constitutional phrasing of the commerce power in Article I, Section 8, Clause 3 by omitting any reference to "the Indian Tribes" when defining "commerce" in § 1 of the FAA. Congress clearly intended to exclude trade with Indian tribes from that definition and thereby from the application of the FAA.

C. The Arbitration Agreement in this case expressly rejects application of the FAA.

Not only does the Arbitration Agreement fail to mention any agreement by the parties that the FAA shall apply, the Agreement expressly rejects the FAA. The

Agreement recognizes only the Indian Commerce Clause, which does not include the FAA. A263. It further states that the Lender does not acquiesce in the application of "any federal law unless found expressly applicable to the operations of the Chippewa Cree Tribe." *Id. See also* A258 (Parties "further agree that no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation.").

Moreover, the Arbitration Agreement implicitly rejects the FAA by imposing procedures that are inconsistent with the overarching purpose of FAA arbitrations—notably to foster informal and expeditious resolution of disputes. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-45 (2011).

This streamlined procedure is evident in 9 U.S.C. §§ 9-11, dealing with post-arbitral proceedings. Under § 9, a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, which are strictly limited to (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, (3) where the arbitrators were guilty of misconduct conducting the hearing, or (4) where the arbitrators exceeded their powers. Errors of law or of fact are not authorized grounds for setting aside an award under the FAA. Additionally, "it is the Second Circuit's policy to read very narrowly courts' authority to vacate arbitration awards pursuant to the [FAA]." *Blue Tee Corp. v.*

Koehring Co., 754 F. Supp. 26, 31 (S.D.N.Y. 1990) (citing *John T. Brady & Co. v. Form-Eze Systems, Inc.*, 623 F.2d 261, 263 (2d Cir. 1980), *cert. denied*, 449 U.S. 1062 (1980)). *See also Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960) ("[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated."). For this reason, the FAA preempts state statutes that purport to create alternative grounds for vacating arbitration awards. *C.T. Shipping, Ltd. v. DMI (U.S.A.) Ltd.*, 774 F. Supp. 146 (S.D.N.Y. 1991).

Yet, Defendants' Arbitration Agreement undermines the FAA in precisely this way. On top of the provisions for judicial review in §§ 9-11, the Agreement provides: "The arbitration award shall be supported by substantial evidence and must be consistent with this Agreement and Tribal Law, and if it is not, it may be set aside by a Tribal court upon judicial review." A265.

The Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), held that such choice-of-law provisions in arbitration agreements violate the FAA. In that case, the parties in a real property lease dispute had agreed to arbitration. Their agreement provided that the district court could vacate the arbitrator's award "(i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

Id. at 579. The Supreme Court held that, despite the parties' agreement, the provision for expanded judicial review violated the FAA and was unenforceable. The Court reasoned that the narrow grounds for vacating or modifying and arbitral award in §§ 9-11 of the FAA must necessarily be "exclusive." *Id*. at 586. That view furthers the

> national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post arbitration process.

Id. at 588 (internal quotes and citations omitted). Consequently, the choice-of-law and forum selection provisions authorizing judicial review of arbitral awards must be held unenforceable.

III. The Choice of Law and Forum Selection Provisions of the Arbitration Agreement Are Unenforceable.

A. No presumption favors the choice of law and forum selection provisions in Defendants' Arbitration Agreement.

Defendants are correct that Plaintiffs' arguments focus on the choice-of-law and forum selection provisions in the Arbitration Agreement. *See* Rosette Br. 49; Think Finance Br. 29 & 40. The district court agreed with Plaintiffs, finding the

Arbitration Agreement and the Delegation Clause unconscionable and unenforceable. SPA33-35.[4]

Defendants nevertheless insist that these provisions must be enforced. *See, e.g.*, Think Finance Br. 30 (quoting *Scherk v. Alberto-Culver Co.*, 407 U.S. 506, 516 (1974), and citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (contending that enforcement of choice of law and forum selection contract

[4] Defendants insist that the court should submit the validity of the Arbitration Agreement to the arbitrator. Defendants' own authorities support the district court's decision where, as here, the validity of the agreement is itself in dispute. *See* Rosette Br. 39-40 ("The delegation clause assigns such arguments to the arbitrator, and courts must compel arbitration *unless the delegation clause is itself invalid*.") (emphasis added); Rosette Br. 34-35 ("If a party to a lawsuit so requests, the FAA requires a court to stay the lawsuit . . . and to enter an order compelling the parties to arbitrate 'upon being satisfied that the making of the agreement for arbitration . . . *is not in issue'*" (quoting 9 U.S.C. § 4) (emphasis added)). This is settled law. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("[I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it."). *See also* 21 Samuel Williston, *Williston on Contracts* § 57:32 (4th ed. 2008) ("If this arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question before a stay can issue" (quoting *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2d Cir. 1959)).

In this case, Plaintiffs dispute the validity of both the Arbitration Agreement and the delegation clause within it. Plaintiffs-Appellees Br. 55-67 & 79-96.

provisions is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.")).

These three decisions, however, are international trade cases and inapplicable here. The Court explained its rationale for the presumptive enforceability of choice of law and forum selection contract provisions:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Mitsubishi Motors, 473 U.S. at 629 (quoting *The Bremen*, 407 U.S. at 9).

That is not the case with respect to trade with Indian tribes, where "the Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive' to "legislate in respect to Indian tribes." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)).[5]

[5] The Court also pointedly noted that the arbitration provisions in those cases were carefully negotiated agreements. *See, e.g., The Bremen* at 12 ("The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen."). Accordingly, "*The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of *freely negotiated* contractual choice-of-forum provisions. *Mitsubishi Motors*, 473 U.S. at 631. The Arbitration Agreements in the case at bar were anything but carefully negotiated at arms' length.

More importantly, even those international arbitration provisions were not given blanket enforcement. Rather, as the Court stated,

> The correct approach would have been to enforce the forum clause specifically *unless* Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

The Bremen, 407 U.S. at 15 (emphasis added).

Thus, a forum selection agreement may be set aside by a showing "that the agreement was '[a]ffected by fraud, undue influence, or overweening bargaining power;' that 'enforcement would be unreasonable and unjust,' or that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.'" *Mitsubishi Motors*, 473 U.S. at 632 (quoting *The Bremen*, 407 U.S. at 12 & 15).

Under this standard, both the choice of law and the forum selection provisions of the delegation clause in the Arbitration Agreement in this case must be set aside.

B The Arbitration Agreement's choice of law provision is unfair and unjust.

1. Defendants' rejection of borrowers' federal statutory rights is unjust and unfair.

As Defendants point out, "The Arbitration Agreements at issue here contain a clear choice of law provision specifying that the Agreements are made subject to, and are governed by, Chippewa Cree tribal law." Think Finance Br. 28. *See also*

Rosette Br. 50 (the Agreement's choice-of-law provision makes the Agreement "subject solely to the *exclusive* laws and jurisdiction of the Chippewa Cree Tribe") (emphasis added).

Even more explicitly, the Agreement expressly rejects the application of any federal law, including those protecting consumers and borrowers: "This Consumer Installment Loan Agreement (this Agreement) is subject solely to the exclusive laws and jurisdiction of the Chippewa Cree Tribe" and "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." A258. *See also* A263 (The Chippewa Cree Tribe does not acquiesce "to any federal law unless found expressly applicable to the operations of the Chippewa Cree Tribe."). Section 10-8-101 of the Chippewa Cree Tribe financial law similarly rejects any federal consumer rights: "Loan Agreement between any Creditor authorized by the Tribe to lend money and a Consumer shall be governed by this Code and the laws of the Tribe notwithstanding any federal law or Tribal law to the contrary." A342. This is blatant misrepresentation. Indian tribes, of course are subject to the plenary authority of Congress, particularly in their dealings with non-members or activities occurring off tribal lands. *Michigan*, 134 S. Ct. at 2030.

The Supreme Court has emphasized that an arbitration agreement cannot be enforced if it operates as a "prospective waiver" of a "party's right to pursue statutory remedies." *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (warning that

"we would have little hesitation in condemning" such an agreement). Thus an arbitration agreement that "forbid[s] the assertion of certain statutory rights" cannot be enforced under the FAA. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). *See also 14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld.").

Under these settled precedents, the Fourth Circuit has refused to compel arbitration in favor of a debt collector for a lender owned by the Cheyenne River Sioux Tribe because the arbitration agreement "purport[ed] to renounce wholesale the application of any federal law to the plaintiffs' federal claims." *Hayes v. Delbert Services Corp*., 811 F.3d 666, 673 (4th Cir. 2016). The court reasoned no party to an arbitration agreement may "underhandedly convert a choice of law clause into a choice of no law" and "may not flatly and categorically renounce the authority of the federal statutes to which [the party] is and must remain subject." *Id.* at 675.

The falsity of the choice-of-law provision is demonstrated by Defendants' belated admission that federal law and borrowers' federal rights are indeed enforceable against Defendants. Think Finance Br. 37 (Conceding that federal law applies to this loan and that federal law claims are arbitrable); Rosette Br. 52 (distinguishing *Hayes* on that basis). This misrepresentation renders the choice of law provision too unjust and unfair to apply. Its plain intent was to discourage borrowers from attempting to vindicate their federal statutory rights. At best it so

obfuscates the applicability of Plaintiffs' federal rights that the parties had no agreement at all. As one federal district court recently stated,

> A person who takes out a payday loan would not expect that they may be stripped of all of their applicable federal and state rights, and that the person who will decide whether or not that arrangement is valid will be an arbitrator who will apply only the law of the Cheyenne River Sioux Tribe of South Dakota. . . .[I]t is unenforceable.

Ryan v. Delbert Servs. Corp., No. 5:15-CV-05044, 2016 WL 4702352, at *5 (E.D. Pa. Sept. 8, 2016). Another district court has similarly held:

> This arbitration agreement fails for the fundamental reason that it purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims. . . . The purpose of the arbitration agreement at issue here is not to create a fair and efficient means of adjudicating Plaintiff's claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely.

Smith v. Western Sky Fin., LLC, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016). The Agreement in this case must similarly fail.

2. Defendants' rejection of borrowers' state law rights is unjust and unfair.

Defendants' Arbitration Agreement explicitly states: "We do not have a presence in Montana or any other state of the United States of America. Neither this Agreement nor the Lender is subject to the laws of any state of the United States." A263.

Nevertheless, recognizing that Chippewa Cree law may lack substance, Defendants suggest that "[i]f tribal contract law is insufficiently developed to resolve Plaintiffs' contentions, that law can be supplemented with the state law of Montana and with federal law." Rosette Br. 42 n.7; *see also* Think Finance Br. 43 (similar).

In the end, Defendants do not ask this Court to enforce their Arbitration Agreement "according to [its] terms." *See Concepcion*, 563 U.S. at 339. Instead, Defendants invite this Court to rewrite their Agreement and import Montana state law—precisely the opposite of the terms of the choice-of-law provision they themselves drafted.

C. The Arbitration Agreement's forum selection provision is unfair and unjust.

The Arbitration Agreement has two forum selection provisions. First, as Defendants point out, a borrower is entitled to "opt-out" of arbitration of his or her claim by notifying the lender. Think Finance Br. 36-39; Rosette Br. 7. Exercising this option does not, however, return the borrower to state or federal court applying state and federal law. The Agreement states:

> IN THE EVENT YOU OPT OUT OF THE WAIVER OF JURY TRIAL AND ARBITRATION AGREEMENT, ANY DISPUTES SHALL NONETHELESS BE GOVERNED UNDER THE LAWS OF THE CHIPPEWA CREE TRIBE AND MUST BE BROUGHT WITHIN THE COURT SYSTEM THEREOF.

A263. Thus, the opt-out borrower is required to present his or her claim to a tribal court, applying tribal law, located some 2,000 miles from Vermont, in Montana.

The second choice-of-forum provision applies after the consumer takes his or her case to arbitration and obtains an arbitral award. The lender may then appeal to the tribal court, which can take away plaintiff's award on the ground that it is not "supported by substantial evidence" or is not "consistent with this Agreement and Tribal Law." A265. Because the Agreement reserves tribal immunity, it may be realistically anticipated that an award to a non-member would be set aside on that basis alone, rendering the forum selection illusory. *See* Plaintiffs-Appellees Br. 62.

In *Carnival Cruise Lines, Ltd. v. Shute*, 499 U.S. 585 (1991), the Supreme Court explained that "forum-selection clauses . . . are subject to judicial scrutiny for fundamental fairness," and may be set aside based on a party's bad faith motive, fraud or overreaching. *Id*. at 595. *See also New Moon Shipping Co. v. Man B. & W. Diesel AG*, 121 F.3d 24, 29 (2d Cir.1997) (forum selection clauses are enforceable unless unreasonable or the product of fraud). Similarly, in Vermont, "Enforcement of a forum selection clause is not automatic, and courts may disregard such clauses if enforcement would be unreasonable." *Chase Commercial Corp. v. Barton*, 571 A.2d 682, 684 (Vt. 1990).

1. Selection of the tribal court presents potential for bias against borrowers with claims against a lender owned by the tribe.

The forum choice of the tribal courts of the Chippewa Cree in both provisions is unreasonable. Whether the tribal court is adjudicating a borrower's claim in the first instance or reviewing an arbitral award of damages to a borrower, it cannot be denied that the tribe, as the owner of Plain Green, has a financial interest in the outcome of the case. Any monetary award to the consumer diminishes the proceeds of the payday loan business paid to the tribe. It is no slight to the tribal judiciary to suggest that there is an objective potential for bias.

The Supreme Court has cautioned that "[a]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968). The FAA does not "authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." *Id*. at 150. The Supreme Court has had occasion to reverse decisions of state courts where there was no allegation of subjective actual bias, but an objective and unconstitutional "potential for bias." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

2. Selection of the tribal court located in Montana effectively deprives Vermont borrowers of their day in court to vindicate their rights.

The Arbitration Agreement requires Vermont residents who applied for their loans in Vermont and received their loan proceeds in Vermont to travel to Montana, either to present their claim to the tribal court after opting out of arbitration or to defend an arbitral award on review by the tribal court, applying tribal law.

Courts may set aside forum selection contract provisions where travel to the distant forum would effectively prevent the party from asserting his or her rights. *See, e.g.*, *Pearcy Marine, Inc. v. Seacor Marine, Inc*., 847 F. Supp. 57, 60 (S.D. Tex. 1993) (setting aside forum selection provision as unjust and unreasonable because it would have required the plaintiffs "to litigate this dispute in a forum over six thousand miles away"); *Williams v. Illinois State Scholarship Commission*, 563 N.E.2d 465 (Ill. 1990) (declining to enforce a provision requiring that all suits under a contract between a state agency and student borrowers be brought in a single, Illinois county, because resort to the contractual forum would "effectively deprive [the student borrowers] of their day in court."). *Id*. at 486-87 (quoting *The Bremen*, 407 U.S. at 18).

* * *

The Fourth Circuit has pointedly stated that an arbitration agreement that was not intended to provide "a just and efficient means of dispute resolution" but rather

a means "to avoid state and federal law and to game the entire system," is not worthy of enforcement by the federal courts. *Hayes*, 811 F.3d at 676. Nor should courts step in to save an arbitration agreement designed simply to impose on the weaker party "an inferior forum that works to the [company's] advantage." *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 288 (3d Cir. 2004).

To enforce the flawed Arbitration Agreement in this case would give added impetus to a recent tactic of consumer exploitation, in which,

> [P]ayday lenders team with Indian tribes in order to gain the benefit of tribal sovereign immunity and avoid state usury laws, small loan regulations, and payday loan laws. This practice could conceivably weaken both tribal sovereignty and consumer protection in one fell swoop.

Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 753 (2012).

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Date: January 6, 2017

Respectfully submitted,

/s/Jeffrey R. White
Jeffrey R. White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W., Suite 200
(202) 944-2839
jeffrey.white@justice.com

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because this brief contains 6,825 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

/s/Jeffrey R. White
Jeffrey R. White
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of January, 2017, the foregoing document was filed using the CM/ECF system and served on the parties of record via ECF.

/s/Jeffrey R. White
Jeffrey R. White
Attorney for Amicus Curiae