No.

In the Supreme Court of the United States

SHERRY TREPPA, ET AL.,
PETITIONERS

v.

GEORGE HENGLE, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court can invalidate an agreement to have an arbitrator resolve questions of arbitrability (a "delegation clause") based on the court's interpretation of a separate choice-of-law provision.

2. Whether sovereign immunity bars private plaintiffs from suing tribal government officials, in their official capacities, for alleged violations of state law.

LIST OF ALL PARTIES

Petitioners are Sherry Treppa, Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Tracey Treppa, Vice-Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Kathleen Treppa, Treasurer of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Carol Munoz, Secretary of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Jennifer Burnett, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Aimee Jackson-Penn, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; and Veronica Krohn, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity. Petitioners were defendants-appellants and cross-appellees in the court of appeals.

During the proceedings below, Burnett, Krohn, and Munoz replaced Sam Icay, Amber Jackson, and Iris Picton as parties after a routine Tribal government election.

Two other individuals, Scott Asner and Joshua Landy, were also defendants-appellants and cross-appellees below and are separately petitioning for certiorari.

Respondents, who were plaintiffs-appellees and cross-appellants below, and who seek to represent a putative class of similarly situated individuals, are George Hengle, Sherry Blackburn, Willie Rose, Elwood Bumbray, Tiffani Myers, Steven Pike, Sue Collins, and Lawrence Mwethuku.

The proceedings that are directly related to the case are as follows:

- *Hengle v. Asner*, No. 3:19-cv-00250, United States District Court for the Eastern District of Virginia. Opinion filed January 9, 2020.
- *Hengle v. Treppa*, No. 20-1062, 20-1359, United States Court of Appeals for the Fourth Circuit. Opinion filed November 16, 2021.
- *Hengle v. Asner*, No. 20-1063, 20-1358, United States Court of Appeals for the Fourth Circuit. Opinion filed November 16, 2021.
- *Hengle v. Treppa*, No. 21A237, Supreme Court of the United States. Application for Stay Pending Certiorari denied January 10, 2022.

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PETITION FOR WRIT OF CERTIORARI

Sherry Treppa, Tracey Treppa, Kathleen Treppa, Carol Munoz, Jennifer Burnett, Aimee Jackson-Penn, and Veronica Krohn, all proceeding in their official capacities as elected government officials of the Habematolel Pomo of Upper Lake Tribe, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–67a) is reported at 19 F.4th 324 (4th Cir. 2021). The opinion of the district court denying the motion to compel arbitration and granting in part and denying in part Petitioners' motion to dismiss (Pet. App. 68a–206a) is reported at 433 F. Supp. 3d 825 (E.D. Va. 2020).

JURISDICTION

The court of appeals entered its judgment on November 16, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides that:

> 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy

> arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case is an ideal vehicle for resolving two important legal questions with broad consequences not just for tribal governments, but also businesses and sovereigns throughout the Nation.

The first question is whether a court can invalidate a delegation clause in an arbitration agreement based on its interpretation of a separate choice-of-law provision applicable to the whole agreement. In *Rent-A-Center West, Inc. v. Jackson*, this Court held that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,'" and that these agreements—known as "delegation clauses"—must be enforced unless a litigant "challenge[s] the[m] specifically." 561 U.S. 63, 68–69, 72 (2010). Since then, the circuits have divided over what it means to "specifically challenge" a delegation clause. The Second, Third, and Fourth Circuits have held that a court can invalidate a delegation clause based on a challenge grounded in a separate choice-of-law provision. By contrast, the Sixth and Ninth Circuits have understood *Rent-A-Center* to permit a court to invalidate a delegation clause only if there is a flaw with that specific clause.

The Court should grant review to resolve this square and acknowledged conflict and reverse the opinion below. *Rent-A-Center* makes clear that a court cannot invalidate a delegation clause based on an argument applicable to the arbitration agreement generally. But that is precisely what the Fourth Circuit did. It first invalidated a delegation clause on the theory that the arbitration agreement's choice-of-law provision nullified federal law (a so-called

"prospective waiver"). It then invalidated the whole arbitration agreement on the *exact same reasoning*. Allowing the ruling below to stand would thus nullify *Rent-A-Center* and more recent decisions applying its reasoning.

The Court should also grant review to address whether sovereign immunity bars private plaintiffs from suing tribal government officials in their *official capacities* for alleged violations of *state* law. That theory sounds iconoclastic because it is. This Court has never held that sovereign government officials can be bound by the law of a co-equal sovereign absent clear direction from Congress. The Fourth Circuit took that novel step based on an isolated passage in this Court's opinion in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). But that opinion underscored longstanding principles of tribal sovereign immunity—including that only Congress has the authority to abrogate it. There is no reason to think that *Bay Mills* surreptitiously created a novel pathway around sovereign immunity that would upend decades' worth of precedent.

Both issues are cleanly presented and broadly consequential. The Fourth Circuit's arbitration ruling provides a roadmap for courts to invalidate delegation clauses based on their own views of the merits of arbitrability. The sovereign immunity ruling provides a roadmap for private plaintiffs to bury government officials in a flurry of lawsuits every time they attempt to follow their duly enacted laws in dealing with third parties geographically located outside their borders. Taken together, those rulings dramatically hamper tribes' efforts to become politically and economically self-sufficient, in direct contradiction of Congressional policy.

Certiorari should be granted.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Habematolel Pomo of Upper Lake.

The Habematolel Pomo of Upper Lake ("the Tribe") is a federally recognized Indian tribe. The Tribe's reservation is located in Clear Lake Basin, a rural area in Northern California. The Tribe's Executive Council enacts and administers the Tribe's laws. Petitioners Sherry Treppa, Tracey Treppa, Kathleen Treppa, Carol Munoz, Jennifer Burnett, Aimee Jackson-Penn, and Veronica Krohn are the current members of the Tribe's Executive Council.

Like other Indian tribes, and pursuant to federal policy, the Tribe strives for a self-sustaining economy so that it need not rely on the federal government. *See* Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. § 4301. But the most common tribal economic development business—gaming—proved unsuccessful for the Tribe given its remote location and limited land base. C.A. App. 72–73. The Tribe, like many others, thus turned to e-commerce, specifically the online financial services industry. C.A. App. 73.

As a sovereign government, the Tribe's Executive Council passed its own financial services law ("the Ordinance") to govern its businesses and provide comprehensive protections to consumers who choose to access services from the Tribe's jurisdiction. C.A. App. 86–87. Among other protections, the Ordinance incorporates the substantive standards of numerous federal consumer protection statutes, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Truth in Lending Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts. C.A. App. 87. Like some other sovereigns, including

Utah, the Tribe elected not to include a usury limit in its Ordinance. Pet. App. 11a; C.A. App. 1751–753. As a result, non-deceptive unsecured loans at high interest rates—priced to reflect the credit risk presented by the customers—are generally legal under the Tribe's law, as they are in several states.

Through legislation enacted by the Executive Council, the Tribe then established entities (the "Tribal businesses") that allow customers to enter the Tribe's jurisdiction through the internet to obtain short-term unsecured loans. C.A. App. 90–91. It is undisputed that these businesses are arms of the Tribe and entitled to share in its sovereign immunity. The Executive Council constitutes the Board of Directors of each of these businesses. C.A. App. 118–19.

B. The Arbitration Agreement.

Borrowers who contract with the Tribal businesses must electronically sign a "Consumer Loan and Arbitration Agreement." Pet. App. 208a. The agreement requires arbitration of claims against the Tribal businesses, as well as against "affiliated entities" and other third parties. Pet. App. 224a. The agreement provides that any disputes will be subject to individualized arbitration, without class action proceedings. Pet. App. 225a. Under the agreement, the arbitration is to be administered by either the AAA or JAMS—the nation's two most prominent arbitration organizations. Pet. App. 225a.

For purposes of this petition, two provisions of the arbitration agreement are particularly salient.

First, the agreement provides that all disputes—including disputes over the enforceability of the arbitration agreement and disputes over federal and state law—will be heard by the arbitrator. The agreement states: "We

will follow and you agree to follow Our policy of arbitrating all disputes, *including the scope and validity of this Arbitration Provision*." Pet. App. 222a (emphasis added). Other provisions of the agreement underscore that the arbitrator shall resolve challenges to the arbitration agreement. *See, e.g.*, Pet. App. 223a (defining "dispute" to include "the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision").

Second, the agreement includes a choice-of-law provision establishing that arbitration will be governed by Tribal law, rather than state law. The agreement provides that "[t]he parties to such dispute will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes," unless those rules are contrary to Tribal law. Pet. App. 226a. It allows the consumer to select the location of arbitration but makes clear that the choice of a location other than "Tribal land shall in no way be construed as a waiver of sovereign immunity or allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake." *Ibid.*

The agreement also makes clear that the Federal Arbitration Act applies in arbitration. The agreement establishes that the arbitrator "shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act," and that "any arbitration shall be governed by the FAA and subject to the laws of the Habematolel Pomo of Upper Lake." Pet. App. 227a, 228a. Other provisions of the agreement contemplate the application of other federal laws, and the arbitration of claims arising under them. *See, e.g.*, Pet. App. 223a, 224a, 229a, 232a.

C. District Court Proceedings.

Respondents are a group of Virginia residents who borrowed money from the Tribal businesses subject to the loan agreement described immediately above. In April 2019, Respondents filed a putative class action against the Tribal businesses, seeking damages and equitable relief under RICO and Virginia state law. C.A. App. 31–66. In response, the Tribal businesses moved to compel arbitration and to dismiss on several grounds, including sovereign immunity. In support of their motion to dismiss, the Tribal businesses filed a 91-page affidavit from the Tribe's chairperson, supported by 111 exhibits, conclusively establishing that the Tribal businesses are arms of the Tribe entitled to share in its sovereign immunity. C.A. App. 67–157, 823–27.

In response to that motion, Respondents amended their complaint to drop all claims against the Tribal businesses. C.A. App. 1465–1511. In their place, Respondents sued the members of the Tribe's Executive Council, solely in their official capacities, seeking injunctive relief under RICO and Virginia state law. C.A. App. 1468–469. Petitioners once again moved to compel arbitration and to dismiss.

The district court denied both motions in major part. As to arbitration, the court reasoned that the delegation clause was unenforceable because the choice-of-law provision in the arbitration agreement purportedly nullified federal law and barred the arbitrator from considering federal or state law defenses to arbitrability. Pet. App. 104a–07a. Having set aside that clause, the district court then invalidated the arbitration agreement as a whole "for the same reason," Pet. App. 109a; *see* Pet. App. 110a–16a, and refused to sever the offending provisions from the contract, Pet. App. 115a–16a.

As to sovereign immunity, the court largely followed the Second Circuit's reasoning in *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019). Pet. App. 151a. The district court, like the Second Circuit, read this Court's ruling in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), to permit "*Ex parte Young-style* claims against tribal officials for violations of state law." Pet. App. 151a.[1]

D. The Fourth Circuit's Ruling.

Petitioners and their co-defendants appealed the denial of their motions to compel arbitration and to dismiss. The Fourth Circuit affirmed the judgment in its entirety.

Like the district court, the Fourth Circuit first held that both the delegation clause and the whole arbitration agreement were unenforceable under the "so-called 'prospective waiver' doctrine, under which an agreement that prospectively waives 'a party's right to pursue statutory remedies' is unenforceable as a violation of public policy." Pet. App. 17a.

The Fourth Circuit first rejected Petitioners' contention that under the delegation clause, the arbitrator—not the court—should address the validity of the arbitration agreement. In the Fourth Circuit's view, Respondents

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[1] The district court's opinion also addressed two other issues that are outside the scope of this petition. First, the district court ruled that Virginia law, not Tribal law, applies to the loans, on the theory that enforcing the parties' agreement to apply Tribal law would contravene Virginia public policy. Pet. App. 130a–37a. Second, the district court dismissed Respondents' RICO claim against Petitioners, holding that private parties cannot seek injunctive relief under RICO. Pet. App. 163a–177a. Petitioners sought interlocutory review of the first issue, and the district court elected to certify both issues for appeal. C.A. App. 1851. The Fourth Circuit affirmed the district court's rulings on both grounds. Pet. App. 50a–58a; 58a–66a.

"specifically challenged the validity of the delegation clause" by saying they were challenging it, thus opening the door to judicial review of the delegation clause's validity. Pet. App. 21a.

Next, the court held that the delegation clause was invalid under the prospective waiver doctrine. The court concluded that the outcome of this case was dictated by four prior cases in which the Fourth Circuit had invalidated arbitration agreements involving tribal lending. Pet. App. 22a–26a; *see Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017); *Gibbs v. Haynes Invs., LLC,* 967 F.3d 332 (4th Cir. 2020); *Gibbs v. Sequoia Capital Operations, LLC,* 966 F.3d 286 (4th Cir. 2020). In those cases, the court "assessed arbitration provisions requiring application of tribal law to the practical exclusion of other law and, in each case, has held the arbitration provision (including the delegation clause) invalid as a prospective waiver of federal rights." Pet. App. 21a.

The court saw "no material distinction between the case at hand" and those prior cases. Pet. App. 26a. "As in those cases, the choice-of-law clauses of this arbitration provision, which mandate exclusive application of tribal law during any arbitration, operate as prospective waivers." *Ibid.* Based on this observation about the choice-of-law clause applicable to the arbitration agreement, the court held that "the delegation clause is unenforceable as a violation of public policy." *Ibid.*

The Fourth Circuit noted that the Second and Third Circuits had "reached the same conclusion." Pet. App. 21a n.2. The court acknowledged that the Ninth Circuit had reached a conflicting conclusion when it "upheld a delegation clause in a tribal lending agreement" identical to one the Fourth Circuit had previously invalidated. Pet. App. 21a–22a n.2.

Having invalidated the delegation clause, the Fourth Circuit then turned to Respondents' broader challenge to the arbitration agreement. The court concluded that "the choice-of-law clauses previously discussed operate as a prospective waiver of the borrowers' federal statutory rights and remedies." Pet. App. 35a. "Therefore," in the Fourth Circuit's view, "the entire arbitration provision is unenforceable." *Ibid.*

The panel then addressed the district court's sovereign immunity ruling. Echoing the district court, the panel concluded that Respondents' claims could proceed "by analogy to *Ex parte Young*." Pet. App. 41a. Relying on the same language in this Court's opinion in *Michigan v. Bay Mills Indian Community,* 572 U.S. 782 (2014), the panel held that "substantive state law applies to off-reservation conduct, and although the Tribe itself cannot be sued for its commercial activities, its members and officers can be." Pet. App. 49a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit refused to compel arbitration, notwithstanding a clear and unambiguous delegation clause, based on its interpretation of a separate choice-of-law provision in the agreement. That holding reinforced a circuit split, as the Fourth Circuit explicitly acknowledged. It also is impossible to square with this Court's repeated and emphatic pronouncements that a court may not resolve arbitrability questions where a contract explicitly assigns that power to the arbitrator. The Court should grant certiorari to resolve the circuit split and to reiterate that courts must honor arbitration agreements, as the Federal Arbitration Act requires.

The Fourth Circuit's ruling that private plaintiffs may sue tribal officials, in their official capacities, for injunctive relief under state law, is wrong and independently

worthy of certiorari. Indian tribes are sovereigns entitled to immunity absent Congressional action. Suits against a sovereign's officials in their official capacities are suits against the sovereign and thus barred by sovereign immunity. Although *Ex parte Young*, 209 U.S. 123 (1908), makes an exception to that rule for official-capacity suits seeking injunctive relief against violations of *federal* law, there is no support for extending that exception to official-capacity suits raising claims under *state* law. The Second and Fourth Circuits have erred by reading language in *Michigan v. Bay Mills Indian Community,* 572 U.S. 782 (2014) as changing fundamental principles of sovereign immunity and allowing private plaintiffs to wreak havoc on the operations of both state and tribal governments.

I. THIS COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER A COURT MAY REFUSE TO ENFORCE A DELEGATION CLAUSE BASED ON ITS OWN INTERPRETATION OF A SEPARATE CHOICE-OF-LAW PROVISION.

A. There is a stark and acknowledged circuit split on this question.

In declining to enforce the delegation clause, the Fourth Circuit explicitly recognized the existence of a circuit split, which has grown more pronounced in the intervening months.

1. Start with the Fourth Circuit's ruling below, which relied on a series of precedents invalidating arbitration agreements based on separate choice-of-law provisions that supposedly constituted "prospective waivers" of federal claims. Pet. App. 22a–26a. The analysis in that line of cases reveals the fundamental inconsistency between the Fourth Circuit's approach and *Rent-A-Center*.

The first of those cases—*Hayes*—focused its analysis on the arbitration agreement *as a whole* rather than the delegation clause in particular. 811 F.3d at 675. Indeed, the court's entire analysis of the delegation clause consists of the following sentence, late in the opinion, at the end of a footnote: "We find, however, that Hayes and his co-plaintiffs have challenged the validity of that delegation with sufficient force and specificity to occasion our review." *Id.* at 671 n.1.

The second case—*Dillon*—reached the same conclusion without addressing the delegation clause *at all*. *See* 856 F.3d 330; *see also Brice v. Haynes Invs., LLC*, 13 F.4th 823, 833 n.9 (9th Cir. 2021) (noting that the agreement in *Dillon* contained a delegation clause).

Finally, *Haynes* and *Sequoia*—issued after *Henry Schein*—held that so long as plaintiffs *say* they are challenging the delegation clause, that challenge is justiciable—regardless whether the identical challenge applies to the arbitration agreement. *See Haynes Invs.*, 967 F.3d at 338 ("Specifically, in their opposition to the motion to compel arbitration, the borrowers argued that the 'delegation clause[s] [are] unenforceable for the same reason as the underlying arbitration agreement—the . . . wholesale waiver of the application of federal and state law.'" (alterations in original)); *Sequoia*, 966 F.3d at 291–92 (similar). Those decisions likewise invalidated both the delegation clause and the arbitration agreement based on identical reasoning.

In the opinion below, the Fourth Circuit noted that its approach accorded with that of the Second and Third Circuits. *See* Pet. App. 21a n.2. The Second Circuit addressed the question in *Gingras*, 922 F.3d 112. The plaintiffs had each obtained loans from a tribal lending entity owned by the Chippewa Cree Tribe. The loan agreements included an arbitration provision that specified

that any dispute "'concerning the validity, enforceability, or scope' of the loan agreement itself or the arbitration provision specifically" would be resolved by the arbitrator. *Id.* at 118.

Conceding that "on its face this clause appears to give the arbitrator blanket authority over the parties' disputes," the Second Circuit nonetheless refused to require the plaintiffs to resolve their claims in arbitration. *Id.* at 126. The panel reasoned that "[p]laintiffs mount a convincing challenge to the arbitration clause itself," and pointed to language in the complaint asserting that the delegation provision was "fraudulent." *Ibid.* The court concluded that this "specific attack on the delegation provision is sufficient to make the issue of arbitrability one for a federal court." *Ibid.* The court then invalidated both the delegation clause and the arbitration agreement on prospective-waiver grounds. *Id.* at 126–27.

The Third Circuit took a similar approach in *Williams v. Medley Opportunity Fund II, LLP*, 965 F.3d 229 (3d Cir. 2020). There, the plaintiffs took out loans from an entity owned by the Otoe-Missouria Tribe of Indians. The loan agreement included an arbitration clause assigning to the arbitrator responsibility for disputes about enforceability. *Id.* at 237. Despite the delegation clause, the Third Circuit held that the plaintiffs could challenge the arbitration agreement in federal court. The court held that the plaintiffs had sufficiently challenged the delegation clause by arguing that "any delegation clause here is unenforceable for the same reason the rest of the arbitration contract is unenforceable." *Id.* at 237–38. The court then concluded that "[t]he prospective waiver of statutory rights renders the entire arbitration agreement (delegation clause included) unenforceable." *Id.* at 243.

2. As the Fourth Circuit acknowledged, *see* Pet. App. 21a–22a n.2, the Ninth Circuit has rejected the foregoing

approach. The Ninth Circuit confronted the enforceability of a delegation provision in the face of a prospective-waiver challenge in *Brice v. Haynes*, 13 F.4th 823 (9th Cir. 2021), which involved a substantively identical agreement to the one invalidated by the Fourth Circuit in *Gibbs*. *See Brice*, 13 F.4th 825. The district court in *Brice* had followed the prevailing approach in the circuits, but the Ninth Circuit closely examined the question presented and explained why those courts are wrong.

The Ninth Circuit began by explaining its understanding of how to resolve enforceability questions when the arbitration agreement contains a delegation clause. "Where a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." *Id.* at 827 (citing *Rent-A-Center*, 561 U.S. at 71). That is, the plaintiffs would need to "show that the delegation provision is *itself* unenforceable" before a court could resolve the arbitrability question. *Ibid.* The court could not "merely mention that Borrowers challenge the delegation provision and proceed to analyze the enforceability of the entire arbitration agreement." *Id.* at 828.

Applying that reasoning to the case at hand, the Ninth Circuit concluded it needed to determine whether "the *delegation provision* . . . precludes [plaintiffs] from presenting and having the arbitrator decide whether the arbitration agreement is unenforceable as a prospective waiver under the federal law." *Id.* at 829. The court concluded it did not: "[T]he delegation provision is enforceable because it does not eliminate [plaintiffs'] right *to pursue* in arbitration their prospective-waiver challenge to the arbitration agreement as a whole, even though that challenge arises under federal law." *Id.* at 830.

The Ninth Circuit acknowledged "that the loan contract's selection of tribal law as the governing authority

may mean the arbitrator will ultimately decide she cannot consider an enforceability challenge to the arbitration agreement as a whole based on prospective waiver if tribal law does not recognize this doctrine." *Id.* at 831. But this possibility was insufficient to overcome the agreement to delegate enforceability disputes to the arbitrator, who was entitled to address the parties' arguments in the first instance. *Ibid.*

Mindful that it was creating a circuit split, the Ninth Circuit addressed the decisions by the other circuits and elucidated their flaws. *See id.* at 832–37. In the Ninth Circuit's view, "our sister circuits have conflated the analysis under *Rent-A-Center*." *Id.* at 835. The panel reasoned that the other circuits "view a party's 'specific challenge' to a delegation clause as a purely formal, procedural requirement. . . . [S]o long as a party states the delegation clause is invalid, that is enough." *Id.* at 836. The Ninth Circuit, by contrast, read this Court's precedent as requiring more than a conclusory assertion that a delegation provision was unenforceable. *Ibid.*

More recently, the Sixth Circuit has adopted similar reasoning, albeit in a case that does not involve tribal lending. *See In re StockX Customer Data Security Breach Litigation*, 19 F.4th 873 (6th Cir. 2021). There, the Sixth Circuit enforced a delegation clause in a case where the plaintiffs challenged the arbitration agreement based on the infancy doctrine, *i.e.*, by arguing they were minors and thus unable to contract when they signed it. *Id.* at 878. Plaintiffs directed that challenge both to the delegation clause and the whole arbitration agreement. *Id.* at 883–84. Citing *Rent-A-Center*, the panel majority rejected that argument and sent the case to arbitration because the infancy defense "directly affects the enforceability or validity of the entire agreement." *Id.* at 884. Notably, the dissent cited the Second, Third, and Fourth

Circuits' tribal lending opinions in support of the opposite ruling, *id.* at 889 (Moore, J., dissenting), suggesting the Sixth Circuit would follow the Ninth Circuit if confronted with an identical fact pattern.

B. The majority position conflicts with this Court's arbitration precedent.

This open and acknowledged circuit split merits the Court's attention standing alone. But it is all the more worthy of review because the majority view is wrong.

1. The FAA provides that agreements to arbitrate 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. This provision "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Arbitration agreements must be "generously construed as to issues of arbitrability," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1989), in light of the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U. S. 1, 24–25 (1983).

Delegation clauses are just a subset of arbitration agreements, entitled to the same treatment under the FAA. Where an agreement reveals a clear and unmistakable intent to delegate arbitrability questions to the arbitrator, "the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. "[A] party's challenge to another provision of the contract, or to the contract as a whole" will not preclude enforcement of the agreement to arbitrate arbitrability issues. *Ibid.* "[W]hen the parties' contract delegates the arbitrability question to an arbitrator . . . a court possesses no power to decide the arbitrability issue."

Henry Schein, Inc. v. Archer & White Sales, 139 S. Ct. 524, 529 (2019). That rule applies "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Ibid.*

The only exception to this firm rule is that "[i]f 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." *Rent-A-Center*, 561 U.S. at 71 (emphasis added). The "precise agreement" that the party must challenge is not the arbitration agreement, but the delegation clause. Thus, unless the party seeking to avoid arbitration "challenge[s] the delegation provision specifically" a court "must treat it as valid under [FAA] § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72.

There is no dispute that the arbitration agreements at issue in this case, and in the other cases discussed above, delegated arbitrability questions to the arbitrator. Nor is it disputed that the agreements made that delegation clearly and unmistakably. Under a straightforward application of *Rent-A-Center*, the arbitrator, not the court, should thus have evaluated plaintiffs' challenges to the arbitration agreements in the first instance.

2. The Second, Third, and Fourth Circuits contravened this Court's precedents in concluding otherwise.

a. First, these courts effectively nullified *Rent-A-Center*. As the Ninth Circuit noted, these circuits appear to treat the "specific challenge" requirement as a "purely formal, procedural requirement": So long as "the party claims the delegation clause is unenforceable," a court may ignore the delegation clause "even if the arguments made go only to enforceability of the arbitration agreement as a whole." *Brice*, 13 F.4th at 836.

Under that approach, *Rent-A-Center*'s rule is nothing more than an easily evaded pleading requirement, as this case well illustrates. As in *Rent-A-Center*, Respondents' prospective-waiver challenge applied to the arbitration agreement as a whole. But merely by declaring they were challenging the delegation clause, Respondents invited the courts to construe the validity of the choice-of-law provision, nullifying the parties' agreement to have an arbitrator address that issue. The courts then invalidated the parties' agreement to arbitrate on the same basis. Through artful pleading, plaintiffs obtained the right to pursue class claims in litigation notwithstanding their agreement to resolve claims individually in arbitration.

b. The panel contravened other lines of this Court's precedent in attempting to address this flaw. The panel concluded that Respondents' challenge really was to the delegation clause because the choice-of-law provision would require the arbitrator to "determine whether a valid and enforceable arbitration agreement exists without access to the substantive federal law necessary to make that determination." Pet. App. 29a. Along similar lines, Judge Fletcher in dissent in *Brice* reasoned that the delegation clause there was invalid because "the choice-of-law provisions prospectively waive the application of the FAA's prospective waiver rule." 13 F.4th at 845.

As an initial matter, this theory rests on a wholly implausible interpretation of the arbitration agreement. The delegation clause does not even hint that the arbitrator's authority to decide disputes over the validity of the arbitration agreement somehow excludes the authority to decide disputes based on federal law. *See supra* at 5–6. The choice-of-law provision says nothing about the delegation clause and expressly contemplates application of the FAA, under which prospective waiver is a defense to validity. *See supra* at 6. This Court has cautioned that courts should not "confuse[] an agreement to arbitrate . . .

statutory claims with a prospective waiver of the substantive right." *14 Penn Plaza*, 556 U.S. at 265. By relying on a dubious prospective-waiver theory to preclude arbitrators from resolving arbitrability questions in the first instance, the panel made exactly that mistake.

More importantly, this Court's precedents suggest it is improper to preclude initial enforcement of an arbitration agreement based on the prospective-waiver doctrine, as the Fourth Circuit did here. In *Mitsubishi Motors*, the Court confronted an argument strikingly similar to the one made by Respondents: that "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies." 473 U.S. at 637 n.19. Rather than interpreting the contract and resolving that question itself, the Court concluded that it had "no occasion to speculate on this matter at this stage in the proceedings, *when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award*." *Ibid.* (emphasis added).

The Court later echoed the same point in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). In the Court's view, "mere speculation" that the arbitrators would apply Japanese law to the exclusion of United States law was not a basis for refusing to send the case to arbitration. *Id.* at 541. Citing *Mitsubishi Motors*, the Court suggested that it would "'condemn[] the agreement as against public policy'" and thus refuse to enforce it only "[*w*]*ere there no subsequent opportunity for review*." *Id.* at 540 (emphasis added); *see also Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1267 (11th Cir. 2011) (observing that this Court has consistently "compelled arbitration at the initial arbitration-enforcement stage, noting that this 'prospective waiver' issue is premature and should instead be resolved *at the arbitral award-enforcement stage*").

Green Tree Financial Corp.–Alabama v. Randolph, 531 U.S. 79 (2000), underscores that courts may not refuse to enforce arbitration agreements based on conjecture about what might happen in arbitration. There, the plaintiff argued that large arbitration costs would prevent her "from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. The Court stressed that the "'risk' that Randolph will be saddled with prohibitive costs [was] too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91. Similarly, any perceived risk that the arbitral tribunal would inappropriately handle Respondents' challenges to the arbitration agreement is too speculative to justify a refusal to enforce the agreement as written.[2]

3. The Ninth Circuit's approach has none of the same flaws. It instead allows the parties to arbitrate as they intended while leaving no risk of Respondents losing their federal claims.

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[2] It is far from clear whether the prospective-waiver or effective-vindication rule is *ever* a ground for refusal to enforce an arbitration agreement. In *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013), the Court observed that the rule is a "judge-made exception to the FAA" which "originated as dictum in *Mitsubishi Motors*." And while cases after *Mitsubishi* have suggested that the exception exists, not a one has actually held that it rendered an arbitration agreement unenforceable. *See id.* at 235–36, 235 n.2; *Green Tree,* 531 U.S. at 90-92; *Sky Reefer*, 515 U.S. at 540–41; *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 240–42 (1987); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Given *Henry Schein*'s admonition that courts may not "engraft . . . exceptions onto the statutory text" of the FAA, 139 S. Ct. at 530, there is a strong argument that the judge-made prospective waiver doctrine has no basis in the FAA. The Court need not reach that argument to reverse, but it presents another basis for reversal.

Examining what could happen in arbitration underscores the point.

- The arbitrator could conclude that federal law applies under the loan agreement—the most natural reading. In this scenario, Respondents could effectively vindicate their claims in arbitration.
- The arbitrator could conclude that the FAA applies to questions of validity—as the agreement expressly contemplates—but then conclude that the choice-of-law provision prospectively waives federal law. In this scenario, the arbitrator would invalidate the agreement to arbitrate and the case would return to federal court.[3]
- Even if the arbitrator were to take the implausible steps of (1) deeming the choice-of-law provision to foreclose consideration of federal law and (2) upholding the arbitration agreement anyway because the prospective-waiver doctrine does not apply, Respondents could go to court and advocate that the arbitration result should be set aside. *See*

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[3] Indeed, while it is not the basis on which Petitioners seek certiorari, the Fourth Circuit's dubious reading of the arbitration agreement underscores why a court should not short-circuit the arbitration process when the parties have delegated arbitrability questions to the arbitrator. The Fourth Circuit read the agreements as precluding a prospective-waiver defense even though the agreements reference federal law and federal claims multiple times and the choice-of-law provision states that the arbitrator "shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act (FAA)." Pet. App. 227a. If the FAA applies, as the contract states, Petitioners would be providing the arbitrator the very tool needed to unwind the alleged prospective waiver scheme. More broadly, as the Ninth Circuit noted, it is hard to understand "why an arbitrator . . . would rely on choice-of-law and forum-selection terms to ignore a prospective-waiver challenge to the enforceability of the entire arbitration agreement." *Brice*, 13 F.4th at 836.

> *Brice*, 13 F.4th at 837 ("[T]he worst-case scenario is that an arbitrator *may* prevent Borrowers from presenting their federal claims and, if so, Borrowers *will* have the opportunity to object to a court that the arbitrator exceeded her authority and ask that any award be vacated." (emphasis added)).

In short, no matter what happens in arbitration, the parties will have a chance to assert their federal claims.

C. The issue is important and likely to recur, and this case presents an ideal vehicle for resolving it.

The arbitrability question merits this Court's review because it is important and likely to arise regularly. The precise issue in this case has been the subject of eight published appellate decisions in the last five years. *See supra* at 12–15.[4] There is every reason to think this trend will continue. While the vast majority of the Tribe's customers have no complaints, a small group of plaintiffs' attorneys, often using the same small group of plaintiffs, has been waging a concerted litigation campaign against participants in the industry and other related entities. Often these suits are putative class actions, or seek remedies such as treble damages, punitive damages, and attorney's fees, thus making them financially worthwhile for the lawyers, potentially devastating for the tribes, and ripe candidates for *in terrorem* settlements.

Unless this Court resolves the uncertainty, the split will "encourage and reward forum shopping," *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984), as well as litigation about litigation. Borrowers who seek to undo their loans

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[4] The Sixth Circuit also confronted this question in a slightly different factual context. The plaintiffs in *Swiger v. Rosette* simply forgot to specifically plead a challenge to the delegation requirement, leading the court to compel arbitration. 989 F.3d 501, 507 (6th Cir. 2021). It is unlikely future litigants will commit a similar blunder.

will flock to the Second, Third, and Fourth Circuits to avoid arbitration. Tribal businesses, in turn, will have a powerful incentive to move to transfer to a district court in the Sixth or Ninth Circuits. Ordinarily, the parties might not waste party and court resources on litigation over where to litigate. Yet because of the circuit split, venue will be fiercely litigated in every case because the location of the lawsuit will be outcome-determinative. The procedural wrangling will continue thereafter. Even if the case proceeds to arbitration, the geographic location of the arbitration will have significant consequences on appeal. What happens, for example, if a California court compels arbitration that takes place in Virginia, and the losing party seeks to vacate the award in a district court bound by Fourth Circuit precedent?

The consequences of the majority rule reach well beyond tribal lending. If the mere speculation about how an arbitrator will interpret a foreign choice-of-law in an arbitration agreement is sufficient to defeat a delegation clause, any number of arbitration agreements will be in jeopardy, including international arbitration agreements. This Court has been unwilling to countenance that possibility in the international-arbitration context, but there is no principled way to cabin the Fourth Circuit's approach to Indian tribes. *See Mitsubishi*, 473 U.S. at 637 n.19; *Sky Reefer*, 515 U.S. at 540–41; *see also BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 32 (2014) (explaining that certiorari was granted due to "the importance of the matter for international commercial arbitration"). The Sixth Circuit's opinion in *DataX* shows this is not a purely theoretical possibility. While the court there sent the case to arbitration, it did so over a dissent citing the precedents on the other side of the split here.

This case also presents an excellent vehicle. There is no dispute that the arbitration agreements at issue

clearly and unmistakably delegated arbitrability questions to the arbitrator. And as the Ninth Circuit's ruling makes clear, reversing on the question presented would result in the case being submitted to arbitration. The Court could thus cleanly resolve an outcome-determinative legal question without any concern that case-specific facts would impede its review.

Mindful of the "federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, this Court has granted review in numerous arbitration cases in recent years. The Court should do the same here to ensure that courts do not undermine the goals underlying the FAA.

II. THE COURT SHOULD ALSO GRANT REVIEW TO ADDRESS WHETHER SOVEREIGN IMMUNITY PRECLUDES PRIVATE PLAINTIFFS FROM SUING TRIBAL OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR ALLEGED VIOLATIONS OF STATE LAW.

The judgment below also merits review because the Fourth Circuit erred in permitting private plaintiffs to sue tribal officials in their *official* capacities for an injunction against alleged violations of *state* law. This Court has never held that private plaintiffs can seek to bind one sovereign's officials to the law of a coequal sovereign in this fashion. On the contrary, the Fourth Circuit's ruling is impossible to square with fundamental principles of sovereign immunity and federal jurisdiction.

1. Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Given that sovereign status, "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

That immunity extends to off-reservation commercial activities. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

That immunity also protects the sovereign's officials in actions filed against them in their official capacities. Such suits "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (quotations omitted). The key question in determining whether sovereign immunity extends to officials is "whether the sovereign is the real party in interest." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). If "a suit against state officials . . . is in fact a suit against a State" it "is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1983).

There is one exception to these foundational principles: Under *Ex parte Young*, 209 U. S. 123 (1908), a court may, notwithstanding sovereign immunity, enjoin a government official sued in her official capacity for a violation of *federal* law. The rationale behind this doctrine is that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Off. for Protec. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). This exception applies to federal officials, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015), and an analogous principle applies to tribal officials, *see Santa Clara Pueblo*, 436 U.S. at 59.

But *Ex parte Young*'s exception to sovereign immunity extends only to injunctions based on *federal* law. This Court has made clear that "the doctrine is limited to that precise situation," *Stewart*, 563 U.S. at 255, and has refused to permit federal courts to enjoin state officials for violations of *state* law. *Pennhurst*, 465 U.S. at 103–06.

Because such a suit "does not vindicate the supreme authority of federal law," the justifications for the *Ex parte Young* exception are absent. *Id.* at 106.

There is no dispute about the nature of Respondents' claims here: They are seeking to enjoin the Tribe, acting through its officials, from alleged violations of *state* law. There is also no suggestion that Congress authorized this claim. Under a straightforward application of precedent, sovereign immunity bars Respondents' suit.

2. This Court's decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), does not suggest otherwise.

Bay Mills addressed whether the State of Michigan could sue a tribe for opening a casino outside tribal lands, allegedly in violation of the Indian Gaming Regulatory Act (IGRA) and a compact between the state and the tribe. The Court held that the suit was barred by tribal sovereign immunity. *Id.* at 791. After reaching that holding, the Court observed that Michigan had other avenues for relief:

> Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. *See* § 432.220; *see also* § 600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct. *See Santa Clara Pueblo*, 436 U.S., at 59.

Id. at 796.

This passage is most naturally understood as dicta—it came after the Court had already announced its ruling based on the text of IGRA. But more importantly, it is best read as being completely consistent with this Court's longstanding precedents. Tribal officials can be sued in their official capacity for violations of federal law (hence the citations to *Ex parte Young* and *Santa Clara Pueblo*). Those officials can also be sued in their individual capacities for conduct that does not implicate their official functions (hence the Court's emphasis on word "individuals").

Following this logic, the Utah Supreme Court has held that *Ex parte Young*'s exception to sovereign immunity for official-capacity suits extends only to federal law. In *Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, 416 P.3d 401 (Utah 2017), the plaintiff sued a tribe and its officials, contending that the tribe had exceeded its jurisdiction and had violated state law. The Utah Supreme Court held that because "*Ex parte Young* only applies when bringing a claim under *federal* law," *id.* at 415, sovereign immunity barred claims based on tribal law and state law against the official-capacity defendants. *See id.* at 416 ("[A]ny claim that the tribal officials, in their official capacities, exceeded the authority granted to them by the tribe is not subject to *Ex parte Young* and is barred under sovereign immunity, along with the rest of Harvey's state law claims. . . .").[5]

The Fourth Circuit, like the Second Circuit before it, reached the opposite conclusion by importing great and hidden meaning into the passage excerpted above. Specifically, those courts understood the passage—really,

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[5] *See also Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1181–82 (9th Cir. 2012) (holding that an official-capacity suit against tribal officials could proceed because the plaintiffs alleged violations of federal law).

just its citation to state law—as "bless[ing] *Ex parte Young*-by-analogy suits against tribal officials for violations of state law." Pet. App. 43a (quoting *Gingras*, 922 F.3d at 121).

This case presents an exceptional vehicle to resolve this division. The courts below squarely addressed the issue, and the remaining claims against Petitioners would be barred if the ruling below were reversed.

3. The Court should also grant review because the Second and Fourth Circuit's approaches cannot be squared with this Court's sovereign immunity cases. This Court has expressly held that *Ex parte Young*'s rationale—and thus the rationale for avoiding sovereign immunity—falls away in suits against state officials that do not involve claims under federal law. *Pennhurst*, 465 U.S. at 103–06. None of this Court's precedents suggest a different rule for tribes. On the contrary, the Court has made clear that tribal and state officials should be treated similarly regarding sovereign immunity. *See, e.g.*, *Lewis*, 137 S. Ct. at 1291.

The cases *Bay Mills* cited are to the same effect. As noted above, *Santa Clara Pueblo* involved a straightforward application of *Ex parte Young*. The plaintiff sought to enjoin a tribe's governor for a claimed violation of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303. *Santa Clara Pueblo*, 436 U.S. at 51, 59. All agree that *Ex parte Young* provides an exception to sovereign immunity for alleged violations of federal law.

Bay Mills also cited *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), for the proposition that "'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Bay Mills*, 572 U.S. at 795 (quoting *Wagnon*, 546 U.S. at 113). But that observation has always been understood to apply to *non-official* conduct by tribal members. The facts of

Wagnon confirm the point: That case did not involve any tribal officials, but addressed whether Kansas could apply a state tax to the receipt of fuel by non-tribal distributors who subsequently delivered the fuel to tribal lands. 546 U.S. at 99. Further, the specific line *Bay Mills* quoted addressed whether States can exercise their tax authority outside tribal lands—not whether private plaintiffs can seek to bind tribal governments to the law of co-equal sovereigns. *Id.* at 113.[6]

4. The lack of precedent for the Second and Fourth Circuit's rulings underscores their most remarkable feature. On their account, this Court's citation of Michigan state law in the passage of *Bay Mills* quoted above had the effect of overruling or undermining multiple different lines of precedent, including *Bay Mills* itself (which reaffirmed that only Congress can abrogate tribal sovereign immunity), and *Pennhurst*'s explanation of the limits on *Ex parte Young*. It is impossible to fathom that this Court intended to change sovereign immunity law so dramatically in such an oblique fashion.

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[6] This Court's decision in *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977)—which was cited in *Santa Clara Pueblo*, 436 U.S. at 59—confirms the point. In *Puyallup*, the State of Washington's Department of Game sought to enjoin a tribe, as well as individual tribe members, from violating the state's fishing conservation laws. 433 U.S. at 168. The Court noted that one of the petitioners "appear[ed] in her capacity as chairwoman of the Puyallup Tribal Council" and thus decided to "*treat this case as though the Tribe itself is the only petitioner* in this Court." *Id.* at 170 n.7 (emphasis added). The Court then held that sovereign immunity prohibited the suit. *Id.* at 173. That observation and holding would make no sense if the Court believed that there was a distinction, for sovereign immunity purposes, between suits against a tribe and suits against tribal officials acting in their official capacities.

That is particularly so because the Fourth Circuit's ruling has deeply troubling consequences for all sovereigns. As noted above, *Pennhurst* established that federal courts may not enjoin state officers from violations of state law. The court below cabined that rule to alleged violations of the laws of an officer's *own* state, Pet. App. 46a—a ruling that cannot be limited in any principled fashion to Indian tribes alone. *See Lewis*, 137 S. Ct. at 1291; *Bay Mills*, 572 U.S. at 807 (Sotomayor, J., concurring) ("[D]isparate treatment of these two classes of domestic sovereigns would hardly signal the Federal Government's respect for tribal sovereignty.").

The Fourth Circuit's logic would thus suggest that a federal court could enjoin one state's officials from violating a different state's laws. Could a University of Texas student taking online classes enjoin Texas state officials based on Massachusetts anti-discrimination laws? Could that same student sue under Massachusetts lending laws to enjoin collection on a student loan issued by the Texas Higher Education Coordinating Board? The Fourth Circuit's approach would permit these suits and many others. That result would not respect "[e]ach State's equal dignity and sovereignty under the Constitution." *Fran. Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019).

That result would also severely complicate relationships among sovereigns. Interjurisdictional disputes often arise between sovereigns. Sometimes they result in litigation, but other times, they result in mutual understandings based on the need to account for the interests of all the sovereign's citizens. The Tribe, for example, has entered a Memorandum of Understanding with the government of New Mexico to iron out in advance jurisdictional issues created by the rise of e-commerce, and continually works to negotiate similar arrangements with other co-sovereign states. C.A. App. 141. Private plaintiffs need not consider comity or related interests, and the

lawsuits they bring can impede productive intergovernmental relationships.

Even looking through just the tribal lens, the opinion below has massive adverse consequences. Tribes throughout the country—particularly those in remote locations with limited land bases, like the Habematolel Pomo—have increasingly turned to e-commerce as a lifeline to provide for their people and to reduce reliance on federal aid. The ruling below would preclude tribes from taking this approach by subjecting their officials to injunctions under fifty different states' laws. It also dissuades tribal members from seeking office out of fear of becoming parties to endless litigation. The Fourth Circuit permitted these outcomes not just in the absence of any Congressional authorization, but also in the face of Congress's efforts to encourage tribes to pursue political and economic self-determination. *See* 25 U.S.C. § 4301.

If this Court is willing to sanction such extraordinary outcomes, it should do so by confronting the issue head-on, rather than allowing lower courts to erode sovereign immunity by parsing citations in an opinion that affirmed basic immunity principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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