RECORD NO. 19-1434

In The
United States Court of Appeals
For The Fourth Circuit

DARLENE GIBBS; STEPHANIE EDWARDS; LULA WILLIAMS; PATRICK INSCHO; LAWRENCE MWETHUKU, on behalf of themselves and all individuals similarly situated,

Plaintiffs – Appellees,

v.

HAYNES INVESTMENTS, LLC; L. STEPHEN HAYNES; SOVEREIGN BUSINESS SOLUTIONS, LLC,

Defendants – Appellants,

and

VICTORY PARK CAPITAL ADVISORS, LLC; VICTORY PARK MANAGEMENT, LLC; SCOTT ZEMNICK; JEFFREY SCHNEIDER; THOMAS WELCH,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

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CORPORATE DISCLOSURE STATEMENT

Appellants Haynes Investments, LLC, and Sovereign Business Solutions, LLC, each have no parent corporation or stock, and no publicly held corporation owns more than 10% of any Appellant's stock. No publicly traded entity has a direct financial interest in the outcome of this litigation.

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Haynes Investments, LLC, L. Stephen Haynes, and Sovereign Business Solutions, LLC (collectively, "Appellants" or the "Haynes Defendants"), appeal from the decision below denying their motion to compel arbitration.

INTRODUCTION

This case represents the latest attempt to enshrine in the law of this Circuit the paternalistic and legally-indefensible idea that an arbitration agreement containing a choice-of-law provision selecting the laws of a sovereign Native American tribe is to be treated differently than standard and routinely enforceable arbitration agreements containing choice-of-law provisions selecting the laws of the United Kingdom, Switzerland, Japan, Tibet, or pre-revolutionary Russia—all of which the Supreme Court have said parties are free to contract for in their agreements to arbitrate. In all such circumstances, the arbitral choice-of-law provision selects, at least as a default, the law of a foreign forum—either Native American or international—to apply in an arbitration to the exclusion of state and federal laws. Yet while the Supreme Court, the Fourth Circuit, and numerous courts around the country consistently uphold arbitration agreements selecting international law to the exclusion of state and federal law, the district court here refused to reach the same outcome as to Native American law. Such a distinction, however, finds no support in the law, and is, in fact, contrary to Supreme Court jurisprudence favoring arbitration.

The gravamen of this appeal is that Plaintiffs each agreed to arbitrate all disputes—including any dispute regarding the validity, enforceability, or scope of their arbitration agreement. No party below disputed Plaintiffs' voluntary and knowing acceptance of this arbitration agreement; its application to the disputes between Plaintiffs and Appellants; the presence of a delegation clause within the agreement; the availability of an arbitral forum in front of one the American Arbitration Association, JAMS, or International Institute for Conflict Prevention and Resolution; or the ability of Appellants to enforce the arbitration agreement against Plaintiffs. Those facts should have been enough for the district court to compel arbitration of Plaintiffs' claims, as well as any disputes as to threshold issues of arbitrability. That did not happen here.

Instead, the district court refused to enforce the arbitration agreements—as a whole—because it accepted the argument that a choice-of-Native American-law clause will always prospectively waive a litigant's rights. Worse still, the district court completely ignored the presence of a delegation provision that required an arbitrator determine all threshold issues of arbitrability. Had the district court acknowledged and enforced the delegation provision according to its terms, an arbitrator (not the court) would have determined the enforceability challenge—as the parties intended.

Finally, in reaching its conclusion, the district court failed to cite, and Plaintiffs failed to offer, any evidence that an arbitration conducted by one of three respected, independent, neutral organizations under the laws of the Chippewa Cree Tribe or the Otoe-Missouria Tribe would leave Plaintiffs unable to effectively vindicate their claims. In place of any *evidence*, Plaintiffs offered only conclusory argument and inappropriate speculation as to the ultimate effect of the choice-of-Native American-law provisions. That is plainly not enough to meet Plaintiffs' substantial burden to show that they will not be able to effectively vindicate their rights through the arbitration proceedings to which they agreed.

All in all, the district court's opinion fails to provide a legitimate reason for refusing to enforce the arbitration agreement and delegation provision that each Plaintiff agreed to in their loan agreement. There was no reason for the district court to ignore and refuse to enforce the delegation provision. Similarly, there was no legitimate basis to treat the arbitration agreement and its choice-of-law provision differently than other similar provisions. Given these clear errors, this Court should reverse the decision of the district court and remand the case back to that court with instructions to stay the case pending the arbitration of all disputes between Plaintiffs and the Haynes Defendants.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Though contested below, the district court had federal-question jurisdiction under 28 U.S.C. § 1331, because Plaintiffs' Complaint seeks relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, a federal statute. The district court also exercised jurisdiction over plaintiffs' state-law claims under 28 U.S.C. § 1367.

This Court has jurisdiction over this interlocutory appeal under 9 U.S.C. § 16. The Order from which this appeal is taken was entered March 22, 2019. JA479. Appellants timely filed their notice of appeal on April 19, 2019. JA480.

ISSUES PRESENTED

1. Did the district court err by failing to consider and enforce a delegation provision—requiring arbitration of "any issue concerning the validity, enforceability, or scope" of the arbitration agreements—contained in each of the loan agreements?

2. Notwithstanding the presence of the delegation provision, did the district court err in denying Appellants' Motion to Compel Arbitration based upon the presence of a choice-of-Native American-law provision in the Loan Agreement without evidence that proves Plaintiffs will be unable to effectively vindicate their claims in arbitration?

STATEMENT OF THE CASE

This appeal arises from the latest of several lawsuits brought by five individuals against Appellants, and against other defendants not parties to this appeal, asserting claims arising from loan agreements between the individuals and two sovereign Native American lenders. The suit against Appellants was filed in January 2018, in the U.S. District Court for the Eastern District of Virginia. JA13. While the nature of the underlying lawsuit—and its lack of merit—are not relevant to the issues on appeal, a brief discussion of those topics may provide helpful background for the Court.

A. Background

Plaintiffs are Virginia consumers who borrowed money from one of two lenders that, as the district court recognized, are both wholly owned by a Native American tribe. JA16; JA335–386. The first, Plain Green, LLC, is a company owned and operated by the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana, and which is operated for the benefit of that tribe. JA 329; JA433. The second, Great Plains Lending, LLC, is owned and operated by the Otoe-Missouria Tribe of Indians, and is operated for the benefit of that tribe. JA329; JA433. Appellants are two businesses alleged to have served as a lender to Plain Green in 2011 and 2013, as well as the managing member of those companies, who is also alleged to have assisted in identifying potential banks that were willing to provide

banking and ACH processing services to Plain Green and Great Plains. JA16–17; JA23–27.

Plaintiffs Gibbs and Mwethuku[1] obtained loans from Plain Green in 2016 and 2013, respectively. JA336 (Gibbs Loan Agreement); JA379 (Mwethuku Loan Agreement). Plaintiffs Williams, Edwards, and Inscho obtained loans from Great Plains in 2016, 2015, and 2016, respectively. JA346 (Williams Loan Agreement); JA357 (Edwards Loan Agreement); JA367 (Inscho Loan Agreement). Both Plain Green and Great Plains Lending made to Plaintiffs and other consumers over the internet. JA330.

Each of Plaintiffs' loans were made pursuant to the laws of the lenders' respective tribes—a choice-of-law provision selecting the laws of the lenders' respective tribe is included in each loan agreement, and consumers are given multiple notifications that they are agreeing to a contract that applies the laws of the Native American lender. JA336; JA346; JA357; JA367; JA379. Prior to signing their loan agreements, Plaintiffs were required to affirmatively check a box acknowledging that they "understand, acknowledge and agree that this Loan is governed by the laws of the Chippewa Cree Tribe." JA343; JA355 (identical language in Great Plains loan agreement requiring acknowledgement of Otoe-Missouria law).

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[1] Plaintiff Mwethuku obtained two loans from Plain Green in 2013. JA332. Only Mwethuku's first loan agreement is produced, as he failed to pay any interest or principal on his second loan with Plain Green. *Id.*

The laws of both the Chippewa Cree Tribe and the Otoe-Missouria Tribe permit interest rates higher than would be allowed if state laws limiting interest rates were applicable. *See, e.g.*, Section 10-3-201, Title 10 Chippewa Cree Tribal Code – Chippewa Cree Tribal Lending and Regulatory Code, available at https://www.plaingreenloans.com/content/assets/Uploads/title10.pdf (last visited September 6, 2019) (Chippewa Cree usury law providing that unless otherwise stated, "there is no maximum Interest rate or charge, or usury rate restriction between or among Persons if they establish the Interest rate or charge by written agreement."); Otoe Missouria Tribal Consumer Financial Services Ordinance, § 6.4(b)(1), available at https://www.omtribe.org/useruploads/files/approved_ordinance_2018_pdf.pdf (last visited September 6, 2019) (Otoe-Missouria Tribe law providing "[e]xcept as otherwise specified in this Ordinance, a Loan Agreement may provide for the interest rate or the fee equivalent as agreed upon by the parties.").[2]

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[2] The laws of both the Chippewa Cree Tribe and Otoe-Missouria Tribe are not materially dissimilar from the laws of many states. *See, e.g.*, Utah Code 15-1-1 (Utah statute providing "[t]he parties to a lawful written, verbal, or implied contract may agree upon any rate of interest for the contract, including a contract for services, a loan or forbearance of any money, goods, or services, or a claim for breach of contract."); NRS 99.050 (Nevada statute providing that unless otherwise provided for, "parties may agree for the payment of any rate of interest on money due or to become due on any contract, for the compounding of interest if they choose, and for any other charges or fees").

B. Plaintiffs' Agreements to Arbitrate

As part of the loan application process, Plaintiffs entered into loan agreements with their sovereign Native American lender. JA336; JA346; JA357; JA367; JA379. Each loan agreement contained an arbitration provision, under which the Plaintiffs agreed that "***ANY DISPUTE YOU HAVE RELATED TO THIS AGREEMENT WILL BE RESOLVED THROUGH BINDING ARBITRATION***." JA342; *see also* JA353 (same with minor alteration); JA363 (same with minor alteration); JA374 (same with minor alteration); JA383 (similar).

Plaintiffs have never disputed that Appellants are covered by the arbitration agreement or that their claims fall within the arbitration agreement's definition of dispute, nor could they plausibly do so given the scope of the provisions detailed above and the nature of this suit challenging the validity and enforceability of the Loan Agreements themselves. Even so, the Loan Agreements further make clear that the term "Dispute" is "to be given its broadest possible meaning," and explicitly includes within its definition "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." JA342; *see also* JA353 (same); JA363 (same); JA374 (same); JA383 (same). Thus, even if there was such a dispute regarding scope, it would be covered by the delegation clause.

Central to this action, the arbitration provision further includes a clearly-disclosed and prominent choice-of-law clause. The Plain Green arbitration provision signed by Gibbs states that the arbitration agreement is to be "governed by tribal law," and that "the parties additionally agree to look to the Federal Arbitration Act and judicial interpretations thereof for guidance in any arbitration that may be conducted hereunder." JA343.[3] The Great Plains arbitration provision states that the arbitration agreement is to be "governed by tribal law and such federal law as is applicable under the Indian Commerce Clause of the Constitution of the United States of America." JA352; *see also* JA363 (same); JA373 (same).

Plaintiffs were presented with a prominent disclosure concerning their agreement to arbitrate—and instructed to read it "**CAREFULLY**" before signing their loan agreements. Specifically, the arbitration agreements include the following disclosure in all caps and bold lettering in the Agreements to Arbitrate:

> **PLEASE CAREFULLY READ THIS AGREEMENT TO ARBITRATE. UNLESS YOU EXERCISE YOUR RIGHT TO OPT-OUT OF ARBITRATION AS DESCRIBED ABOVE, YOU AGREE THAT ANY DISPUTE YOU HAVE RELATED TO THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO HAVE A JURY, TO ENGAGE IN DISCOVERY (EXCEPT AS MAY BE**

[3] The Gibbs Loan Agreement also contains a governing law section that states "[t]his Agreement and the Agreement to Arbitrate are governed by Tribal Law. The Agreement to Arbitrate also comprehends the application of the Federal Arbitration Act, as provided below." JA341.

> **PROVIDED IN THE ARBITRATION RULES), AND TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS OR IN ANY CONSOLIDATED ARBITRATION PROCEEDING OR AS A PRIVATE ATTORNEY GENERAL. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO BE UNAVAILABLE IN ARBITRATION.**

JA342; *see also* JA353; JA363; JA374; JA383 (similar). Further still, Plaintiffs were provided with the following notice, also in bold lettering and all caps, concerning the rights they would be waiving by entering into the Arbitration Agreements:

> **WAIVER OF RIGHTS: BY ENTERING INTO THIS AGREEMENT, YOU ACKNOWLEDGE AND AGREE THAT YOU ARE WAIVING YOUR RIGHT TO (A) HAVE A JURY TRIAL TO RESOLVE DISPUTES, (B) HAVE A COURT RESOLVE DISPUTES, (C) PARTICIPATE IN A CLASS ACTION LAWSUIT, AND (D) HAVE ACCESS TO DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT.**

JA342–43; *see also* JA354; JA364; JA375; JA383 (similar).

The Arbitration Agreements include many provisions for Plaintiffs' benefit. Plaintiffs were given their choice of conducting arbitration before one of two nationally recognized and well-respected arbitration service providers: the American Arbitration Association ("AAA") or the International Institute for Conflict Prevention and Resolution ("CPR") in the Great Plains Agreements, and AAA or JAMS in the Plain Green Agreements. JA342; JA353; JA363-64; JA374–

75; JA384. The Agreements further call for the arbitration to proceed pursuant to the policies, procedures, and consumer rules[4] of the selected arbitral organization, and provide Plaintiffs with contact information, including websites, for the arbitration providers. *Id.* Regardless of which organization is selected by a consumer, the Arbitration Agreements provide for a choice to have the arbitration conducted "either on Tribal land or within thirty (30) miles of [Plaintiffs'] residence." JA342; JA354; JA364; JA375; JA384. The Agreements also require the Lender to pay for all filing fees and any costs or fees charged by the arbitrator regardless of who initiates the arbitration or ultimately prevails. *Id.*

If Plaintiffs did not wish to have all disputes relating to their loan agreements resolved via arbitration, they were able to opt-out of the arbitration agreement within sixty days of signing the loan agreement by sending written notice to their lender via mail or email. JA332–33; JA341–42; JA352–53; JA363; JA373–74. This opt-out provision was used by consumers who did not wish to arbitrate their claims. For instance, Plaintiff Mwethuku exercised this opt-out option in connection with his second loan agreement, on which he received his loan principal, but made no repayments. JA332–33.

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[4] *See* JAMS, JAMS Comprehensive Arbitration Rules & Procedures (July 1, 2014), available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf ("JAMS Rules"); American Arbitration Association, Consumer Arbitration Rules (Sept. 1, 2018), available at https://www.adr.org/sites/default/files/Consumer _Rules _Web_0.pdf ("AAA Rules").

The scope of the arbitration agreements require Plaintiffs to arbitrate disputes arising out of their loan agreements, and includes disputes with their lender, the lender's "affiliated companies," each of the respective tribes, as well as the lender's "servicing and collection representatives and agents, and each of their respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns." JA342; *see also* JA353 (similar, and also including "lender's servicers, assigns, vendors or any third-party"); JA363 (similar, and also including "lender's servicers, assigns, vendors or any third-party"); JA374 (similar, and also including "lender's servicers, assigns, vendors or any third-party"); JA383 (any "controversy or claim between you and Lender, its marketing agent, collection agent, any subsequent holder of this Note, or any of their respective agents, affiliates, assigns, employees, officers, managers, members or shareholders"). The scope of arbitrable disputes in each agreement "is to be given its broadest possible meaning." *Id.*

C. Procedural History

Ignoring their clear contractual agreements to arbitrate disputes arising out of their loan agreements, throughout 2017, 2018, and 2019, Plaintiffs filed five separate complaints in the Eastern District of Virginia against more than twenty defendants, all of which are grounded in disputes over the legality of their loan agreements.

Relevant to this appeal, Plaintiffs' suit against the Haynes Defendants was filed in January 2018. JA13. Like their other complaints, Plaintiffs' alleged that Plain Green's and Great Plains' loans were unlawful under Virginia's usury laws and that Appellants' conduct in serving as a lender to Plain Green (but not Great Plains) violated RICO. *Id.*

The claims of several other defendants were transferred pursuant to 28 U.S.C. § 1412 to the Northern District of Texas for referral to the bankruptcy court in that district, which was hearing a related bankruptcy matter. JA10. Appellants then moved to compel arbitration and, in the alternative, to dismiss the complaint. JA298. After the motions to dismiss and to compel arbitration were fully briefed, the district court issued a memorandum opinion denying both motions. JA432. The district court's memorandum focused all of its analysis of the arbitration issue on a single topic: the prospective waiver doctrine. JA453–63. In turn, the entirety of the district court's analysis of the prospective waiver doctrine turned on a single factor: whether "the Arbitration Agreements purport to apply Tribal law exclusively." *Id.* Because, according to the district court, the Arbitration Agreements and the contracts in whole evinced an attempt to apply Tribal law rather than state and federal law, it was required to deny the motion to compel arbitration. *Id.*

STANDARD OF REVIEW

The Fourth Circuit "reviews de novo a district court's order denying a motion to compel arbitration under the Federal Arbitration Act." *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 453 (4th Cir. 2017), *cert. denied sub nom. Applied Underwriters Captive Risk Assur. Co. v. Minnieland Private Day Sch., Inc.*, 138 S. Ct. 926 (2018). Notwithstanding this *de novo* standard, this Court's review must "give due regard to the federal policy favoring arbitration and resolve 'any doubts concerning the scope of arbitrable issues . . . in favor of arbitration.'" *Noohi v. Toll Bros.*, 708 F.3d 599, 605–06 (4th Cir. 2013) (quoting *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005)).

SUMMARY OF ARGUMENT

The district court's refusal to compel arbitration pursuant to Section 2 of the FAA is contrary to a litany of binding authority, which require that this Court reverse the district court's decision and send this case to arbitration.

As an initial matter, the district court clearly erred in its refusal to consider the effect of the arbitration agreements' delegation provision. The arbitration agreements each contain an agreement to arbitrate "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to

Arbitrate." The Supreme Court has repeatedly reinforced that courts must respect and rigorously apply delegation provisions according to their terms. Just this year, for instance, the Supreme Court confirmed that a district court lacks the authority to decide threshold issues of arbitrability where the arbitration agreement delegates that issue to an arbitrator. A district court, the Supreme Court confirmed, cannot refuse to compel arbitration based on its view of whether a defense to arbitrability has merit, or if it believes the outcome of the parties' arbitrability arguments is "obvious."

In light of this authority, the delegation clause present in each of the Plaintiffs' loan agreements are valid, enforceable, and require that an arbitrator—not a court—determine any threshold issues of arbitrability, including Plaintiffs' prospective waiver arguments.

Yet, notwithstanding repeated directives from the Supreme Court, the district court failed to consider (let alone apply) the arbitration agreements' clear and conspicuous delegation clause. The district court's memorandum opinion offers no explanation for its failure to meaningfully engage with the enforceable delegation clause, which is itself reversible error. This Court must enforce that clause according to its terms, and compel this case to arbitration for the arbitrator to consider any dispute over the enforceability of the arbitration agreement.

Beyond the court's failure to consider and enforce the delegation provision, the district court also misinterpreted and misapplied the prospective waiver doctrine to deny the motion to compel arbitration. The district court incorrectly believed that the prospective waiver doctrine applied to prevent enforcement of the arbitration agreement solely because it contains a choice-of-law provision selecting the laws of the Native American lender, rather than one that embraced state and federal law. That fact alone, the district court held, rendered the arbitration agreements to be unenforceable under the prospective waiver doctrine.

In reaching this conclusion, the district court exclusively relied upon two Fourth Circuit cases, *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016) and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), to the exclusion of any other authority, including numerous Supreme Court cases interpreting the prospective waiver doctrine. Moreover, *Dillon* and *Hayes* are simply inapplicable because they are contrary to earlier-decided Circuit precedent.

But the Supreme Court has repeatedly required enforcement of choice-of-law and choice of forum clauses that require application of the laws of foreign nations to the exclusion of state and federal law. That is because the Supreme Court has held that the prospective waiver doctrine applies only where a choice clause prevents a plaintiff from effectively vindicating his or her claims. But the district court made no analysis of whether the plaintiffs could effectively vindicate

their rights under Chippewa Cree or Otoe-Missouria law. Similarly, Plaintiffs failed to provide any evidence that they would be unable to effectively vindicate their rights under Tribal law. As such, there was no basis for the district court to apply the prospective-waiver doctrine to invalidate the arbitration agreement.

ARGUMENT

The face of the arbitration agreements Plaintiffs freely entered confirms that the parties agreed to arbitrate Plaintiffs' claims against Appellants. Plaintiffs' claims against Appellants all arise out of the same loan agreements that contain the arbitration agreements and delegation clauses. No party below challenged the presence of the otherwise facially valid arbitration agreements or delegation clauses, their applicability to cover Plaintiffs' legal claims, or the Appellants' ability to arbitrate pursuant to the agreements. The district court accepted these facts, but refused to compel Plaintiffs to arbitration because it determined that the arbitration agreements to be unenforceable under the prospective waiver doctrine. That decision was in error.

LEGAL STANDARD

Arbitration agreements are subject to clear and well-understood rules. The Federal Arbitration Act ("FAA") provides that a written arbitration provision contained in a "contract evidencing a transaction involving commerce . . . 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. Courts are required to "rigorously enforce arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (internal quotation marks and citation omitted), without regard to policy judgments about the nature of the underlying business. The FAA, therefore, reflects a strong national policy in favor of arbitration. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019); *Santoro v. Accenture Fed. Servs., LLC*, 748 F.3d 217, 221 (4th Cir. 2014).

Where a court is satisfied that the parties agreed to arbitrate a dispute, a district court must grant a motion to compel arbitration and stay the proceedings pending the outcome of that arbitration. 9 U.S.C. §§ 3, 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (noting that the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed"). If there exists "[a]ny uncertainty regarding the scope of arbitrable issues agreed to by the parties," that uncertainty, as a matter of federal law, "must be resolved in favor of arbitration." *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 179 (4th Cir. 2013) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24–25 (1983)).

As the Supreme Court has repeatedly reaffirmed, "[n]ot only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures."

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018). It is beyond question that parties to arbitration agreements can "specify by contract the rules under which the arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). This includes "considerable latitude to choose what law governs" an arbitration. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Such latitude means that parties are free to have their arbitration agreement "governed by the law of Tibet, [or] the law of pre-revolutionary Russia." *Id.*

To this end, the Supreme Court, the Fourth Circuit, and numerous other courts of appeal have routinely enforced choice-of-law clauses selecting the laws of any number of foreign countries—to the exclusion of state and federal law. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Japanese law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Swiss law); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*") (English law); *Aggarao v. MOL Ship Management Company, Ltd.*, 675 F.3d 355 (4th Cir. 2012) (Philippine law); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011) (Bahamian law); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (*en banc*) (British law). This is true "even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors*, 473 U.S. at 629. There is no legitimate difference

between the laws of a foreign country, and the laws of a sovereign Native American tribe.

A party resisting an otherwise facially valid arbitration agreement "bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000). As the Fourth Circuit has noted, "[t]his burden is a substantial one and cannot be satisfied by a mere listing of ways that the arbitration proceeding will differ from a court proceeding, or by speculation about difficulties that *might* arise in arbitration." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286–87 (4th Cir. 2007). Rather "firm proof," in the form of specific and pertinent evidence, is required to meet this substantial burden. *Muriithi*, 712 F.3d at 182–83.

I. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE DELEGATION PROVISION IN THE LOAN AGREEMENTS WHICH REQUIRES AN ARBITRATOR TO RESOLVE ARBITRABILITY DISPUTES.

The Supreme Court has routinely rebuked courts for doing precisely what the district court did here: deciding threshold issues of arbitrability notwithstanding the presence of a clear and conspicuous delegation clause. The delegation clause Plaintiffs agreed to clearly and conspicuously required them to arbitrate "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." JA342; *see also* JA353 (same); JA363 (same); JA374

(same); JA383 (same). But the district court ignored that delegation provision, and decided Plaintiffs' challenge to the enforceability of the arbitration agreements. JA453–63. That decision was both contrary to Supreme Court authority, and wholly unsupported. In short, the district court erred.

A. Plaintiffs' Arbitration Agreements Each Clearly and Unmistakably Delegated All Arbitrability Issues to an Arbitrator.

Given that "arbitration is a matter of contract," the Supreme Court has repeatedly reaffirmed that parties "may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability." *Henry Schein v. Archer & Whites Sales, Inc.*, 586 U.S. ----, 139 S. Ct. 524, 529 (2019). Such a provision is referred to as a "delegation provision," and is evaluated as "an additional, antecedent agreement," which is "valid under § 2 [of the FAA] 'save upon such grounds as exist at law or in equity…." *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (noting that parties can agree for arbitrators to decide arbitrability).

The arbitration agreements Plaintiffs voluntarily agreed to all contain a delegation provision requiring arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." JA342; JA353; JA363; JA374; JA383; *see also See Rent-A-Center*, 561 U.S. at 68–69

(holding that similar language constitutes a clear and unmistakable intent to delegation provision requiring arbitration of threshold issues of arbitrability); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199–2000 (2d Cir. 1996) (ruling that where an arbitration provision indicates an intent to arbitrate "any and all" claims, it reflects a "broad grant of power to the arbitrators" that evidences the parties' clear "inten[t] to arbitrate issues of arbitrability"). Similarly, where an arbitration agreement incorporates or references the arbitration rules from AAA or JAMS, such incorporation is evidence of an intent to delegate arbitrability questions to an arbitrator. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015) (collecting cases and noting that "the vast majority" of circuits have determined that reference to AAA or JAMS rules evinces an intent to arbitrate arbitrability, and have reached that conclusion "without explicitly limited that holding to sophisticated parties or to commercial contracts."); *see also Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F.3d 522, 528 (4th Cir. 2017) *abrogated on other grounds by Henry Schein*, 139 S. Ct. 524 (same, but limited to context of commercial contract).

Given all these facts, no party has contested the presence and applicability of the delegation provision in the Loan Agreements.

B. The Delegation Provision is Enforceable and Requires Arbitration of Plaintiffs' Challenges to the Arbitration Agreement.

Where, as here, the parties have expressly delegated initial gateway questions of arbitrability to an arbitrator, a district court's task under the FAA is exceedingly clear: it is required to "respect the parties' decision as embodied in the contract," and send the matter to arbitration for an arbitrator to determine whether the agreement is enforceable. *Henry Schein*, 139 S. Ct. at 528, 531. In *Henry Schein*, the Supreme Court made clear, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, **a court may not decide the arbitrability issue**." *Id.* at 530 (emphasis added). This is so, even where a district court believes that the resolution of arbitrability issues will not be meritorious. *Id.* In other words, where, as here, the parties express a clear and unmistakable intent to arbitrate issues of arbitrability, it is the obligation of a court to enforce the delegation provision even where the court believes the answers to arbitrability questions are free from doubt. *Id.*

Here, the district court offered no rationale for its decision refusing to enforce the delegation provision. In fact, the district court failed to even mention the delegation provision in its decision. That failure comes notwithstanding that the parties dedicated significant briefing to the effect of the clause in their briefing. Instead, the district court skipped the delegation clause entirely, and proceeded

directly to a discussion of the prospective waiver doctrine under *Hayes* and *Dillon*. But the mere presence of a delegation clause required that an arbitrator, not the court, resolve any prospective waiver argument. The plain language of *Henry Schein* requires such an outcome, even where the district court believes that *Haynes* and *Dillon* should render the arbitration agreements are unenforceable.

C. Plaintiffs failed to meet their heavy burden of proof needed to sustain a challenge to the delegation clause.

Even if the district court had analyzed the delegation provision, there is no reason to not enforce that provision. There is nothing unusual or unlawful about the delegation provision found in Plaintiffs' loan agreements. The provision does nothing other than require than a neutral arbitrator at AAA, JAMS, or CPR, rather than the district court, evaluate any dispute over arbitrability. There is nothing unfair about that. Nor is that a basis to set aside the provision pursuant to Section 2 of the FAA. But, in an effort to avoid having to arbitrate even the most basic threshold issues of arbitrability, Plaintiffs advanced three challenges to the delegation provision in their briefing below. None are meritorious.

First, Plaintiffs argued that the prospective waiver doctrine would render the delegation clause unenforceable because the choice-of-law clause would leave an arbitrator without the ability to apply state and federal law in ruling on arbitrability. JA404. But that argument, which Plaintiffs support solely by

reference to out-of-circuit case law from three district courts, holds no water in this Circuit. *Id.* The Fourth Circuit, in contrast to Plaintiffs' argument, considers it "[u]nquestionab[e]" that "a contract's general choice-of-law provision does not displace federal arbitration law if the contract involves interstate commerce," as this one does. *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 n.7 (4th Cir. 2012); *accord Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd.*, 432 F. Supp. 2d 1305, 1312 (S.D. Fla. 2006) (noting that numerous courts have "concluded that federal law governs the question of arbitrability regardless of choice-of-law and arbitration clauses referencing foreign law"). Given that it is *unquestionable* that federal arbitration law must guide the arbitrator, Plaintiffs' first challenge lacks any merit.

Second, Plaintiffs argued that "the delegation clause is unenforceable under Virginia law" because the loan contracts made pursuant to Virginia law are considered void if made without a consumer finance license. JA404–05. That argument, too, lacks merit.

As an initial matter, Plaintiffs' put the cart before the horse by presuming that Virginia law applies to the arbitration agreements notwithstanding the choice-of-law provisions they agreed to. Indeed, such a proposition ignores that Virginia will typically enforce choice-of-law clauses, even in consumer loan agreements.

Settlement Funding, LLC v. Von Neumann-Lillie, 645 S.E.2d 436, 438 (Va. 2007).[5] Plaintiffs' argument also ignores that such a challenge is not a basis to set aside the delegation provision. In fact, the Supreme Court has already determined that identical merits arguments fail to challenge a delegation provision itself, but rather to the agreement as a whole. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (compelling arbitration where consumer argued that state usury law rendered the entire contract—including the agreement to arbitrate—

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[5] As the Supreme Court of Virginia and the Fourth Circuit have both recognized, Virginia law will enforce choice-of-law clauses in consumer loan agreements even where the clause results in a Virginia consumer paying interest that would otherwise be usurious under Virginia law. In *Settlement Funding*, the Supreme Court of Virginia held "[i]f a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied." *Id.* at 438.

This is the core holding of *Settlement Funding*, and it contains **no exceptions**. The Court must enforce the holding from the Supreme Court of Virginia, as other courts have done. *McPike v. Zero-Gravity Holdings, Inc.*, 280 F. Supp. 3d 800, 806 n.5 (E.D. Va. 2017) (citing *Settlement Funding* for the proposition that "[u]nder Virginia law, contractual choice-of-law provisions are dispositive on the question of what substantive law applies to a given cause of action."); *Klein v. Verizon Commc'ns, Inc.*, 674 Fed. App'x 304, 308 (4th Cir. 2017) (*per curiam*), (citing *Settlement Funding* to require enforcement of a contractual choice-of-law provision without further analysis).

The district court examined *Settlement Funding*, and attempted to limit its holding by asserting that the Supreme Court of Virginia's decision was limited to a finding that "the trial court erred in concluding that parties failed to present Utah law for the trial court's consideration." JA469. That conclusion by the district court is incorrect, as the Supreme Court of Virginia expressly noted that the defendants had "provided the circuit court with sufficient information regarding the substance of Utah law," and that the error that the Supreme Court corrected was the trial courts refusal "to apply Utah law." *Settlement Funding*, 645 S.E.2d at 439.

void, because such an argument rests on a challenge to the contract as a whole and not the agreement to arbitrate); *see also Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 103 (1st Cir. 2007) ("As a matter of federal law, the arbitration clause is unaffected even if the substance of the contract is otherwise void or voidable.").

Simply put, a challenge to the validity of the agreement as a whole, such as the one advanced in Plaintiffs' second argument, rather than the delegation clause specifically, does not at all affect the settled conclusion that a district court must enforce the delegation clause and compel the case to arbitration. *Rent-a-Center*, 561 U.S. at 71–73.

Third, Plaintiffs advanced prospective waiver arguments to argue that "regardless of the delegation provision" the prospective wavier argument should be determined by the court because there would be no subsequent ability of the trial court to review the arbitration award. JA405–06. But as is discussed further herein at Section II.C, that argument ignores the settled principle that this court *will* have the opportunity to perform a "back-end review," of any arbitration it compels pursuant to Section 10 of the FAA. *See Henry Schein*, 139 S. Ct. at 530 (acknowledging that Section 10 of the FAA "provides for back-end judicial review of an arbitrator's decision."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (under the FAA, a court should stay case and retain jurisdiction

pending conclusion of arbitration). As such, it is clear that Plaintiffs failed to advance a meritorious basis to avoid their delegation provision.

Beyond this lack of merit, Plaintiffs also failed to support their arguments against the delegation provision with any evidence. Instead, Plaintiffs offered nothing more than conclusory arguments of counsel in support of their attempts to avoid the operation of the delegation provision. JA404–06. But it does not suffice to simply *allege* that a delegation provision is unenforceable. Rather, a party seeking to avoid it must meet a high evidentiary burden to *prove* that the delegation provision is unenforceable and to thus avoid sending the case (at least initially) to arbitration. *Minnieland*, 867 F.3d at 455 (holding that even where a party specifically raises a challenge to a delegation provision, the provision may only be set aside pursuant to the typical evidentiary burdens under Section 2 of the FAA); *see also Green Tree Fin.*, 531 U.S. at 91 (party resisting arbitration has burden of proof to demonstrate evidentiary basis for avoiding arbitration).

The record on this point, however, is barren. Plaintiffs offer nothing by way of **evidence** that confirms they will be prevented from effectively vindicating their rights by operation of the choice-of-law clause and delegation provision. That absence is unsurprising because **nothing** prevents Plaintiffs from pressing their prospective waiver arguments to an arbitrator, just as they would a court. *Vimar Seguros*, 515 U.S. at 541 (compelling arbitration pursuant to Japanese law but

noting that a "choice-of-law question [. . .] must be decided in the first instance by the arbitrator"); *Aggarao*, 675 F.3d at 373 n.16 (compelling arbitration pursuant to Philippines law because "[i]t is possible that the Philippine arbitrator(s) will apply United States law," and that the plaintiff might nevertheless "be able to effectively vindicate the substance of those claims under Philippine law and obtain an adequate remedy"); *Kemph v. Reddam*, No. 13-CV-6785, 2015 WL 1510797, at *4 (N.D. Ill. Mar. 27, 2015) (compelling arbitration pursuant to Native American law and noting that arbitrator is capable and free to "find the choice-of-law provision is unenforceable, and determine what default law should apply"); *Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1064–65 (E.D. Ky. 2015) (compelling arbitration pursuant to Native American law, noting "the final decision about which law to apply would be left to the arbitrator," and highlighting the failure to provide evidence of a deficiency in the arbitral forum sufficient to refuse to apply the prospective waiver doctrine).

Similarly, Plaintiffs provide no evidence that they will be unable to effectively vindicate federal statutory claims in arbitration. Nor could they do so, as Tribal law will often expressly incorporate or require compliance with federal law. *See, e.g.*, Otoe Missouria Tribal Consumer Financial Services Ordinance, § 5.2(a) (requiring Great Plains to comply with "all applicable federal and Tribal consumer protection law" and specifically requiring compliance with listing more

than 15[6] separate federal laws). Consumers are also able to pursue standard remedies under the selected Native American laws. *See, e.g.*, Section 10-6-201, Chippewa Cree Tribal Lending and Regulatory Code, available at

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[6] The Otoe Missouria Consumer Finance Services Regulatory Commission requires licensees such as Great Plains Lending, LLC to comply with:

> all applicable federal and Tribal consumer protection law, including, but not limited to: The Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq*., including the Consumer Financial Protection Act, 12 U.S.C. § 5481 *et seq*., and, the restrictions on Unfair, Deceptive, or Abusive Acts or practices, 12 U.S.C. § 5531, *et seq*.; the Consumer Credit Protection Act, 15 U.S.C. Chapter 41, including the Truth in Lending Act, 15 U.S.C. § 1601 *et seq*., 12 C.F.R. § 226; the Fair Credit Billing Act, 15 U.S.C. § 1666a; the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq*.; 12 CFR § 213 *et seq*.; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*., 12 C.F.R. § 222; the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq., 15 C.F.R. § 202; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*., 16 C.F.R. § 901; and, the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq*., 12 C.F.R. § 205. Also, the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq*., 16 C.F.R. §§ 313 and 314; the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq*.; the Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. § 7701 *et seq*.; the Military Lending Act, 10 U.S.C § 987, 32 C.F.R. § 232; the Servicemembers' Civil Relief Act, 50 U.S.C. App. § 501 *et seq*.; the Telephone Consumer Protection Act, 47 U.S.C. § 227, 47 CFR § 64.1200 *et seq*.; the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq*., 12 U.S.C. §§ 1829b, 1951–1959; the Anti-Money Laundering Act, 18 U.S.C. § 1960; and, the Telemarketing Sales Rule, 16 C.F.R. § 310.

Otoe Missouria Tribal Consumer Financial Services Ordinance, § 5.2(a), available online at https://www.omtribe.org/useruploads/files/approved_ordinance_2018_pdf.pdf) (last visited September 6, 2019).

https://www.plaingreenloans.com/content/ assets/Uploads/title10.pdf (last visited September 6, 2019) (permitting actions by consumers for actual damages, injunctive relief, and equitable relief).

In sum, Plaintiffs offer no basis in law or evidence sufficient to satisfy their heavy burden of demonstrating the delegation provision is unenforceable under Section 2 of the FAA. The Court should therefore enforce Plaintiffs' agreement to arbitrate as written, and send Plaintiffs' claims, including all disputes as to the arbitrability of those claims, to an arbitration conducted by AAA, JAMS, or CPR.

II. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE.

The presence of a valid and enforceable delegation provision in Plaintiffs' loan agreements should be the end of this matter. There is no reason for the Court to look beyond the delegation provision in deciding to compel arbitration. *Schein*, 139 S. Ct. at 529. The Court can and should end its analysis, reverse the district court, and remand with instructions to send the case to arbitration. But, to the extent the Court looks beyond the delegation provision, the Court should still reverse the district court and enforce the arbitration agreements according to their terms.

The parties below, as well as the district court in its memorandum opinion, did not contest that the Plaintiffs' loan agreements each contain broad agreements to arbitrate all disputes arising out of their loan agreements. Instead, the district

court and Plaintiffs focused on various theories to avoid application of the arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Chief among these theories seeking invalidation of the arbitration agreements was the prospective waiver doctrine. Indeed, it was the prospective waiver doctrine that formed the lone basis for the district court's refusal to compel arbitration. JA453–63

But the district court erred in its application of the prospective waiver doctrine by failing to consider mandatory authority from the Supreme Court that would require enforcement of the arbitration agreements absent evidence (none of which was provided) proving Plaintiffs would be unable to effectively vindicate their rights in arbitration. In refusing to enforce the arbitration agreements, the district court effectively skipped to the end of its prospective waiver analysis based upon a flawed understanding of the law. The mere fact that the arbitration agreements select Native American law to the exclusion of state and federal law—which was the district court's sole justification for refusing to enforce the arbitration agreements—does nothing to demonstrate that Plaintiffs would be unable to effectively vindicate their claims in arbitration. The district court, accordingly, erred in refusing to enforce the arbitration agreements.

A. Courts routinely enforce arbitration agreements requiring application of foreign law to the exclusion of state and federal law without running afoul of the prospective waiver doctrine.

The Supreme Court, this Circuit, and numerous other courts around the country have repeatedly confirmed that arbitration agreements are enforceable even where they contain choice-of-law provisions selecting the laws of a foreign jurisdiction to the exclusion of state[7] and federal law. Such a combination of forum selection and choice-of-law clause simply does not run afoul of the prospective waiver doctrine. Indeed, the Supreme Court has made clear that parties are free to "choose to have portions of their contract governed by the law of Tiber [or] the law of pre-revolutionary Russia." *DirecTV*, 136 S. Ct. at 468. Such freedom, as several examples make clear, is not constrained by the fact that the selection of foreign (or historical) law will apply to the exclusion of state and federal law. Rather, the prospective waiver doctrine will apply only to the extent that the party resisting arbitration demonstrates that the choice-of-law will

[7] While the district court continually noted that the effect of the choice of law provision in the arbitration agreement was to prospectively waive both state and federal law, the prospective waiver doctrine has no applicability to state law claims that may be lost. Rather, "the effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting). To this end, the district court's statement that "the Contracts expressly disavow and sometimes contain purported waivers of the application of any state law," is entirely meaningless.

unambiguously prevent them from effectively vindicating their rights. Several examples make this conclusion plain.

In *Mitsubishi Motors*, for example, the Supreme Court permitted an arbitration to be conducted under a choice of Swiss law provision, even where it was alleged that "a contrary result would be forthcoming in a domestic context" in litigation conducted pursuant to federal law. 473 U.S. at 629–30. In *Vimar Seguros*, the Supreme Court likewise permitted a foreign arbitration to go forward under Japanese law,[8] notwithstanding that Japanese law provided for complete defenses to liability that were unavailable under federal law and which might be outcome determinative. *Id.*, 515 U.S. at 540–41. In *The Bremen*, the Supreme Court required enforcement of a choice of English forum and English law clause, notwithstanding that English law was likely to limit a plaintiff's maximum recovery to approximately $80,000, rather than the $3,500,000 recoverable under United States law. 407 U.S. at 3–4, 7–8, 8 n.8, 13 n.15.

These cases make clear that the Supreme Court will not hesitate to require a litigant to press his or her claims pursuant to foreign choice-of-law provisions that

[8] Indeed, the Fourth Circuit has previously recognized that in *Vimar Seguros*, the Supreme Court "determined that an arbitration clause was enforceable even though it provided for arbitration in Japan and expressly stated that it was to be governed by the law of Japan." *Aggarao*, 675 F.3d at 372 n.15. That language is practically identical to the language of the governing law provision in Plaintiffs' loan agreements which the district court found objectionable.

limit remedies available under United States law, or that otherwise can negatively affect the outcome of litigation.

Likewise, in *Aggarao*, this Circuit compelled arbitration of claims containing a choice of Philippines law, even where the defendants argued "that Unites States law should not apply" under the choice clause, and where it was uncertain whether the plaintiff could "obtain an adequate remedy" under Philippines law. 675 F.3d at 372 n.16.

Consistent with the holdings of the Fourth Circuit, in *Richards v. Lloyd's of London*, the *en banc* Ninth Circuit required enforcement of choice of English forum and English law provisions, notwithstanding that enforcement of the choice clauses resulted in plaintiffs' inability to bring claims available under United States securities laws, as well as RICO claims (such as those plead here). 135 F.3d at 1295–96. The Second circuit in *Roby v. Corp. of Lloyd's*, also noted that "[i]t defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement." 996 F.2d 1353, 1360 (2d Cir. 1993). Similarly, the Tenth Circuit has recognized that "the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement," of a forum selection clause. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992).

These are just a selection of the numerous decisions from other courts of appeal that have properly applied the Supreme Court's prospective waiver case law.

In each of these cases, the Supreme Court and others enforced choice-of-law and choice of forum clauses that applied to the exclusion of state and United States federal law. And, in each of these cases, the court required litigation or arbitration to proceed pursuant to the foreign choice-of-law and choice-of-forum provisions without finding a prospective waiver. That is because, as the Supreme Court recently reaffirmed, the prospective waiver doctrine will apply only when a litigant demonstrates that the arbitration and choice-of-law clauses work *eliminates the right to pursue a remedy*. *Italian Colors*, 570 U.S. at 236. Such cases are the extreme exception, and the Supreme Court has never invalidated an arbitration agreement on the basis that a consumer has been unable to effectively vindicate her rights. *Id*. at 235 (confirming the Supreme Court's repeated recognition of the effective vindication exemption but noting that the Court has always "declined to apply [the effective vindication doctrine] to invalidate the arbitration agreement at issue")

The proper question for the Court, therefore, "is whether the application of foreign law presents a danger that the [plaintiff] 'will be deprived of any remedy or treated unfairly.'" *Roby*, 996 F.2d at 1363 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981)); *accord Lindo*, 652 F.3d at 1269 (summarizing

Supreme Court precedent to hold that "choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law").

Furthermore, because Plaintiffs are the parties seeking to avoid their agreement to arbitrate, they have the burden to establish that they cannot effectively vindicate their rights. To that end, speculation and supposition are not enough. *In re Cotton Yarn*, 505 F.3d at 283. Rather, as the Fourth Circuit recognized, Plaintiffs bear a substantial burden to produce evidence demonstrating what specific rights they are unable to effectively vindicate. *Id.* at 286–87; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (requiring arbitration of age discrimination claims notwithstanding argument that severely circumscribed discovery in arbitration would make those civil rights claims more difficult to prove). Evidence—not argument or analogy to other cases—is required.

Such an analysis is, however, wholly absent from the district court's memorandum opinion. Indeed, the district court's opinion is missing any discussion or analysis of the Supreme Court's extensive prospective waiver case law. Such clear deficiencies underscore the district court's wholesale failure to properly applying the prospective waiver doctrine.

B. The district court engaged in a flawed application of the prospective waiver doctrine.

Standing in contrast to the clear line of cases outlined above, are the Fourth Circuit's decisions in *Hayes* and *Dillon*, as well as the district court's memorandum.[9] In those cases, as well as for the district court, any analysis under the prospective waiver doctrine boils down to a determination of whether a choice-of-law provision exclusively selects Native American law or permits application of federal law. That statement of the law is simply wrong, and renders *Hayes* and *Dillon* directly in conflict with this Circuit's earlier decision in *Aggarao*. Given this intra-circuit conflict, this Court is *required* to following the holding of *Aggarao*, rather than the later-decided holdings in *Hayes* and *Dillon*. *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (collecting cases and holding "[w]hen published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court").

[9] In performing its analysis of the prospective waiver issues, the district court relied exclusively on the decisions in *Hayes* and *Dillon*. It failed to cite or rely upon any other case outside of these two. JA453–63. That includes a complete failure to analyze the decisions of *Hayes* and *Dillon* in light of the Supreme Court's extensive and binding prospective waiver doctrine cases. *Id.*

1. There is a direct conflict between the Fourth Circuit's formulation of the prospective waiver doctrine in *Aggarao*, *Hayes* and *Dillon*.

The Fourth Circuit has previously examined the application of the prospective waiver doctrine in the context of an exclusive choice-of-law provision that precluded application of state and federal law. In each of *Aggarao*, *Hayes*, and *Dillon* the Fourth Circuit examined choice-of-law provisions that required arbitration to be governed by laws of a foreign country or a Native American tribe. Yet notwithstanding that each of these choice-of-law provisions were practically identical, most importantly in that all three required exclusive application of foreign or tribal law, the Fourth Circuit reached drastically different conclusions as to whether the arbitration agreements were enforceable.

In *Aggarao*, the arbitration clause at issue included a choice-of-law clause that provided:

> Any unresolved dispute, claim or grievance arising out of or in connection with this Contract . . . **shall be governed by the laws of the Republic of the Philippines**, international conventions, treaties and covenants where the Philippines is a signatory.

675 F.3d at 361 (emphasis added). Given this language, the plaintiff in *Aggarao* argued "pursuant to the Choice of Law clause, the arbitrator would apply the law of the Philippines to the exclusion of otherwise applicable American law, thereby denying his right to pursue his federal statutory claims." *Id.*

Similarly, in *Hayes*, the loan agreement included a choice of law provided:

> This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.

Hayes, 811 F.3d at 669. And, in *Dillon* the loan agreement provided, "any dispute . . . will be resolved by arbitration in accordance with the law of the Otoe-Missouria Tribe of Indians." *Dillon*, 856 F.3d at 332.

The choice-of-law clauses across these three cases are practically identical in text and identical in application. Each choice-of-law clause seeks to have an arbitrator apply either the law of a foreign country or a Native American tribe, to the exclusion of any other law. Indeed, the only real difference between the choice clauses in *Aggarao*, *Hayes*, and *Dillon*, is the fact that *Aggarao* required exclusive application of Philippines law, while *Hayes* and *Dillon* selected the laws of the Cheyenne River Sioux tribe and Otoe-Missouria Tribe, respectively.[10] Given the practically identical effect of these choice-of-law clauses, as well as the lack of any rationale for treating Native American law differently than the laws of the

[10] In many respects, Native American laws provide more potential for the application of federal law than the laws of the Philippines. This is because it is beyond cavil that tribes and tribal laws are subject to federal laws of general applicability. *See, e.g.*, *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989) ("Statutes of general application are already applied to Indian Tribes. . . ."); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) ("Nobody questions that an Indian tribe may, in the absence of a federal statute, act on its inherent sovereign power to adopt regulations for its tribe. It is quite different to hold, however, that this broad sovereign power essentially preempts the application of a federal regulatory scheme which is silent on its application to Indians").

Philippines, the outcome should have been identical, and dictated by the analysis in the earlier-decided *Aggarao*. That did not occur.

Decided almost four years before *Hayes*, in *Aggarao* the Fourth Circuit examined, and refused to apply, the prospective waiver doctrine in the context of a choice of Philippines law. *Aggarao*, 675 F.3d at 371–73. In so holding the Fourth Circuit noted that the prospective waiver doctrine did prohibit compelling arbitration notwithstanding the choice of Philippines law clause because, "[i]t is possible that the Philippine arbitrator(s) will apply United States law . . . or that Aggarao will be able to effectively vindicate the substance of those claims under Philippine law and obtain an adequate remedy." *Id*. at 373 n.16. This was the case even where the defendants indicated that "they intend[ed] to argue, even under the Supreme Court's choice of law principles, **that United States law should not apply**." *Id.* (emphasis added). In other words, notwithstanding a choice-of-law provision requiring exclusive application of foreign law, and a defendant that intended to argue that federal law did not apply, the Fourth Circuit nevertheless still compelled arbitration.

Standing in stark contrast to the analysis in *Aggarao* are the decisions in *Hayes* and *Dillon*, both of which refused to compel arbitration solely based upon the presence of a choice-of-law clause that required exclusive application of Native American law. *Hayes*, 811 F.3d at 675; *Dillon*, 856 F.3d at 336. Indeed, for these

courts, it applied the prospective waiver doctrine to prevent arbitration for no other reason that it seeks "to apply tribal law to the exclusion of federal and state law." *Dillon*, 856 F.3d at 336 (citing *Hayes*, 811 F.3d at 675); *see also id*. ("[b]ecause the effect of the arbitration agreement is unambiguous in the context of the whole contract, we conclude that the arbitration agreement functions as a prospective waiver of federal statutory rights and, therefore, is unenforceable as a matter of law.") (citing *Hayes*, 811 F.3d at 676). But, as set forth above, the only appreciable difference between the choice-of-law provision in *Aggarao*, and those in *Hayes* and *Dillon*, is that Native American law was selected as opposed to Philippine law. That difference, however, does not require a different result, and the later-decided decisions in *Hayes* and *Dillon* are in direct conflict with the earlier-decided *Aggarao*.

To the extent there is a conflict between the appropriate analysis called for by prospective waiver doctrine under *Hayes* and *Dillon*, and the decision in *Aggarao*, the earlier-decided *Aggarao* controls. *McMellon*, 387 F.3d at 333. Similarly, to the extent that *Hayes* and *Dillon* are in conflict with the formulation of the prospective waiver doctrine as formulated by the Supreme Court, the Supreme Court's precedents must control. The choice-of-law provision here is, again, not materially different than the one in *Aggarao*. Because *Aggarao* and the

relevant Supreme Court decisions would compel arbitration on these facts, so too must this Court—notwithstanding the decisions in *Hayes* and *Dillon*.[11]

2. The district court's application of the prospective waiver doctrine was in error.

In refusing to enforce the arbitration agreements, the district court relied exclusively on its analysis of the prospective waiver doctrine. JA453–63. Applying the prospective waiver doctrine, the district court focused entirely on a single factor to guide its analysis: whether a loan agreement's choice-of-law provision "purport[s] to apply Tribal law exclusively," to the exclusion of state and federal law. JA458. For the district court, no analysis of whether a litigant could effectively vindicate his or her rights under Tribal law is necessary. *Id.* Rather unless the choice-of-law provision explicitly requires enforcement of federal law (including the FAA), the arbitration agreement must be set aside entirely. *Id.* The district court goes so far as to suggest that the arbitration agreement' failure to contain "any reference to awarding remedies under state or federal law supports the inference that the Arbitration Agreements sought to exclude any state or federal remedy," and must therefore be deemed unenforceable. JA460. But the district

[11] While Plaintiffs are free to seek *en banc* determination of this issue to the extent they disagree with the holding of *Aggarao*, this panel is without ability to refuse to apply that earlier decided precedent. *McMellon*, 387 F.3d at 333 (rejecting an approach where panels faced with conflicting precedents are free to choose which prior precedent controls).

court's singular focus on explicit incorporation of federal law, however, misses the mark entirely.

As was discussed, both *Aggarao* and applicable Supreme Court precedents require a different result. The Supreme Court has repeatedly made clear that the prospective waiver doctrine does not apply merely because an agreement selects the laws of a foreign country to the exclusion of state and federal law. The district court's prospective waiver analysis, however, focused on nothing else. It is therefore impossible to square the district court's memorandum opinion, with the mandatory Supreme Court authority of *The Bremen*, *Vimar Seguros*, *Mitsubishi Motors*, and *Italian Colors*, amongst others. So too, as described above, is it impossible to harmonize the district court's decision with the Fourth Circuit's earlier decision in *Aggarao*. *Hayes* and *Dillon* can do nothing to alter or resolve this error. The district court's refusal to consider or properly apply the proper precedents was in error and requires this Court to reverse the district court's decision.

C. The district court's decision to engage in the prospective waiver doctrine analysis was also premature.

Finally, notwithstanding the failure of the district court to conduct the proper analysis of the arbitration agreements, the court's flawed analysis was also entirely premature, as the prospective waiver issue can (and should) be considered post-arbitration.

As recognized by the Supreme Court, where a court retains jurisdiction over a case pending resolution of arbitration, application of the prospective waiver doctrine is "particularly inappropriate" where there is any uncertainty as to whether a litigant will be able to effectively vindicate their claims in the arbitral forum. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–74 (2009).

Section 10 of the FAA permits a court to retain jurisdiction to resolve any issues with the enforcement of the arbitral award. *See Henry Schein*, 139 S. Ct. at 530 (acknowledging that Section 10 of the FAA "provides for back-end judicial review of an arbitrator's decision."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (a court retains jurisdiction over a case sent to arbitration because "[w]hen a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings and to compel arbitration."); *U-Save Auto Rental of Am. Inc. v. Furlo*, 368 Fed. App'x 601, 602 (5th Cir. 2010) (noting that "[o]nce the district court determined its jurisdiction for the purpose of ordering arbitration, it properly could retain jurisdiction to resolve any issues stemming from its order, including the enforcement of the award").

This "back-end judicial review" clearly undercuts the rationale in the district court's decision to immediately consider the prospective waiver issues. Instead, the fact that the district court will retain jurisdiction over the case pending

completion of arbitration places this case squarely within the Fourth Circuit's earlier holding in *Aggarao*, as well as the Supreme Court's decision in *14 Penn Plaza*.

As such, the proper course of action was to send the claims to arbitration—just as the parties arbitration agreements contemplated—and definitively determine whether Plaintiffs were able to effectively vindicate their claims in arbitration. The district court's decision to advance immediately to application of the prospective waiver doctrine, therefore, was inappropriate and premature.

CONCLUSION

The district court's decision to deny Appellants' Motion to Compel arbitration was flawed. The district court ignored the presence of a clear and unmistakable delegation clause that required the parties to threshold issues of arbitrability, including enforceability, in arbitration conducted by a third-party neutral at AAA, JAMS, or CPR. But the district court failed to analyze or enforce the delegation clause. The decision in *Henry Schein* counsels that such a failure is reversible error. Compounding this error, the district court refused to enforce the arbitration agreements based upon an unsound and overly-constrained interpretation of the prospective waiver doctrine. In so holding, the district court fialed properly apply, or even look to, mandatory Supreme Court case law that compels a different result. That too was in error. These errors require this Court to

reverse the district court and remand with instruction to stay the case and send Plaintiffs claims to arbitration. The FAA requires no less.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Oral argument is warranted and respectfully requested in this case. The Court may benefit from the opportunity to pose questions to counsel regarding the issues raised in this appeal, which raises significant issues of importance in a case involving the Federal Arbitration Act.

CERTIFICATE OF COMPLIANCE

This brief complies with complies with type-volume limits because it contains 10,868 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments). The brief also complies with the typeface and type style requirements because it was prepared in a proportionally-spaced typeface, Times New Roman, in 14pt font.

/s/ Richard L. Scheff
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CERTIFICATE OF SERVICE

On this 9th day of September, 2019, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Richard L. Scheff
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