No. 19-1434

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.

On Appeal from the United States District Court for the Eastern District of Virginia, No. 3:18-cv-00048-MHL (Lauck, J.)

BRIEF OF THE NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Native American Financial Services Association ("NAFSA") is a non-profit trade association formed under section 501(c)(6) of the Internal Revenue Code. NAFSA has no parent corporation and issues no stock.

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INTEREST OF AMICUS CURIAE

NAFSA is a non-profit trade association advocating for tribal sovereignty, responsible financial services, and better economic opportunities in Indian Country. NAFSA opposes discriminatory practices against tribal government-owned businesses operating in compliance with applicable federal and tribal laws. NAFSA has advocated for these positions in amicus briefs filed at the U.S. Supreme Court and in other federal courts.

NAFSA members face comprehensive barriers impeding their economic prosperity, including extreme rural isolation, which eliminates the capacity to leverage gaming and other brick-and-mortar consumer-based industries as effective tools to stimulate their economies. NAFSA member tribes have found the internet and e-commerce to be great equalizers in providing for their people. Tribes have formed businesses, acting as arms of their tribal governments, to provide financial services to consumers that traditional banking interests are unwilling to serve. These tribes have promulgated and actively enforced sophisticated financial services laws and regulations for many years, hiring nationally respected attorneys and banking professionals to assure regulatory compliance.

By creating tribal businesses, tribal leaders have championed their self-determination and sovereignty to supplement the deficit in federal funding to tribes

for basic social services, while additionally working to alleviate generational reservation poverty. Increased tribal self-sufficiency reduces the burden on American taxpayers and the federal government. NAFSA defends the sovereign rights of tribal governments to determine their own economic futures. The legal positions taken by plaintiffs and the district court below have the potential to harm many tribes.

Tribal governments' sovereign right to self-determination depends, in large part, on the ability of tribes to engage in revenue-generating economic development activities, which necessarily includes the selection of arbitration for dispute resolution arising from such activities. Tribal governments face many challenges when seeking to promote economic development, but e-commerce offers new opportunities for consumers across the nation and across the world to access on-reservation goods and services. Harnessing the potential of e-commerce is vital to ensuring that American Indian tribes have not only the right, but also the ability, to exercise self-determination.

Like non-Indian lenders, the member tribes' economic arms (including Great Plains Lending, LLC ("GPL") and Plain Green, LLC ("Plain Green")) incorporate arbitration provisions into their loan agreements. Those provisions permit efficient dispute resolution—allowing NAFSA members to preserve scarce government resources needed to provide for their people.

NAFSA has a particular interest in ensuring that language in GPL's arbitration provision regarding the Indian Commerce Clause is properly interpreted. Several economic arms operated by NAFSA member tribes are facing challenges to arbitration language that includes similar language.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs borrowed money from GPL and Plain Green, arms of the Otoe-Missouria Tribe of Indians and the Chippewa Cree Indians of the Rocky Boy's Reservation,[2] respectively, that make short-term loans online. Each plaintiff's loan agreement included an arbitration provision mandating that "any dispute" arising from the agreement be resolved through arbitration. Rather than follow the agreed-upon dispute-resolution mechanism, plaintiffs sought to resolve their disputes by filing this action.

The district court denied defendants' motion to compel arbitration, concluding that the GPL and Plain Green arbitration provisions are unenforceable. That was reversible error.

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus, its counsel, and AWL, Inc. (a lending company owned by the Otoe-Missouria Tribe, a NAFSA member), made a monetary contribution to this brief's preparation or submission.

[2] Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).

Appellants' Opening Brief persuasively argues that the loan agreements' delegation clause requires that an arbitrator, not a court, resolve challenges to the enforceability of the arbitration agreements. NAFSA supports, but will not repeat here those arguments.

If the Court reaches the second issue raised by Appellants, NAFSA urges the Court to reject the district court's finding that GPL's arbitration provision is unenforceable because it violates the "prospective waiver" doctrine by forcing plaintiffs to give up in arbitration federal statutory rights that they would have in litigation. In language the district court ignored, the provision adopts for arbitration the same body of federal law that would apply in litigation, namely the federal laws applicable to tribal entities under the Indian Commerce Clause. Adopting the same federal law for arbitration that would apply in litigation is by definition not a prospective waiver violation.[3]

The district court's prospective waiver ruling rested principally on *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), which each held that an arbitration

[3] Appellants' brief explains why Plain Green's arbitration provision likewise does not work a prospective waiver. *See* Appellants' Br. at 43-46. NAFSA agrees with those arguments.

agreement violated the prospective waiver doctrine. But the agreements in those cases expressly waived the application of any federal law. Here, as just noted, the agreement expressly adopts federal law. The decision below also relied on various other provisions in the arbitration agreement. None of those provisions waives federal law—certainly not unambiguously, as required for a court not to enforce an arbitration agreement.

Plaintiffs also offered various other enforceability arguments. All lack merit.

Finally, NAFSA describes how unduly restricting the ability of Tribes and tribal businesses to access arbitration will stymie needed economic development, impinge on tribal sovereignty, and usurp Congress' role in regulating commerce with Tribes.

ARGUMENT

I. PLAINTIFFS AGREED TO RESOLVE THEIR CLAIMS THROUGH BINDING ARBITRATION

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, was enacted to combat widespread "judicial hostility to arbitration." *New Prime Inc. v. Olivera*, 139 S. Ct. 532, 543 (2019). It, therefore, adopted a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Under the FAA, arbitration agreements are "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 is a straightforward case for compelling arbitration under the FAA. Plaintiffs have never disputed that they each agreed to arbitrate "any dispute" under their loan agreement. JA342, 353, 383. Nor have they denied that each of their claims is a "[d]ispute," as defined in the agreement, i.e. a "claim or controversy of any kind between [the borrower] and [the lender] … involving this Agreement or the Loan," JA342, 353, or "any controversy or claim between you and [Plain Green]." JA383. The district court likewise never found that plaintiffs' claims fall outside the agreement. There is thus no question that plaintiffs agreed to arbitrate the claims they now seek to litigate. The only question is whether the arbitration agreements are enforceable. For the reasons explained in the balance of this brief, they are.[4]

II. THE INDIAN COMMERCE CLAUSE SUPPORTS THE SOVEREIGN AUTHORITY OF TRIBES TO EXERCISE SELF-DETERMINATION

Federal law has long recognized that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian*

[4] Because Williams, Edwards, and Inscho executed materially identical loan agreements, this brief cites only to Williams's. Gibbs's and Mwethuku's agreements with Plain Green differ from those three and from each other, and so are separately cited.

Cmty., 572 U.S. 782, 788 (2014) (quotation marks and citation omitted). The Indian Commerce Clause provides that "Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3. Its primary purpose is to "provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that Congress' power with respect to Indian tribes has consistently been described as "plenary and exclusive"). The Indian Commerce Clause serves an equally vital function of "protect[ing] tribal self-government from state interference." *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 574 (10th Cir. 2000) (citations omitted). The Indian Commerce Clause establishes the plenary authority of Congress over the external affairs of tribal nations to the exclusion of state law.

III. THE ARBITRATION PROVISIONS DO NOT CONTAIN AN UNAMBIGUOUS PROSPECTIVE WAIVER OF BORROWERS' FEDERAL STATUTORY RIGHTS

The district court denied defendants' motion to compel arbitration on the ground that the arbitration provisions are unenforceable because they violate the prospective waiver doctrine. JA461. That doctrine provides that "a prospective waiver of a party's right to pursue statutory remedies" under federal law is "unenforceable as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). This "judge-made

exception to the FAA … serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the 'effective vindication' of a federal statutory right." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

The arbitration provisions do not violate the prospective waiver doctrine. In language the district court ignored, GPL's provision expressly states that any arbitration is governed by the same body of federal law that would apply in litigation. That, by definition, is not a prospective waiver. The provision's language adopting federal law, moreover, belies the district court's view that *Hayes* and *Dillon* "control this case," JA454, because the provision in each of those cases expressly disclaims the application of any federal law.

A. GPL's Arbitration Provision Is Governed by the Same Federal Law Applicable in Litigation.

The FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Indeed, parties may "choose to have portions of their contract governed by the law of Tibet [or] the law of pre-revolutionary Russia." *Id.* Although the prospective waiver doctrine limits this flexibility, that doctrine applies only when an arbitration provision *unambiguously* prohibits parties from vindicating federal statutory rights that they would have in litigation. If the provision is instead "ambiguous," then a prospective waiver

challenge is not ripe until the arbitrator decides whether the choice-of-law provision disclaims federal law. *Pac. Healthcare Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003). In other words, "[w]hen there is uncertainty whether the foreign choice of law would preclude otherwise applicable federal substantive statutory remedies, the arbitrator should determine in the first instance whether the choice-of-law provision would deprive a party of those remedies." *Dillon*, 856 F.3d at 334 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995)). That approach is consistent with the broader principle that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *accord Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019). Therefore, plaintiffs' prospective waiver argument is (as they recognized below, *see* JA398-99) viable only if the arbitration provision unambiguously precludes them from enforcing federal statutory rights that they would have in litigation.

GPL's arbitration provision does not waive the application of federal law, let alone do so unambiguously. To the contrary, the arbitration provision expressly *requires* the application of federal law in arbitration: It provides that "[t]he arbitrator shall apply Tribal Law and the terms of this Agreement." JA354. And those "terms" include the "Governing Law" provision, which adopts Otoe-

Missouria tribal law and "such federal law as is applicable under the Indian Commerce Clause of the Constitution of the United States of America." JA352.

This language defeats the plaintiffs' prospective waiver argument. As discussed, the prospective waiver doctrine bars an arbitration provision from waiving in arbitration any federal statutory right that a party to the arbitration would have in litigation. But in litigation, the only federal laws applicable to a tribal entity like GPL are those applicable under the Indian Commerce Clause. That is because Congress's authority for applying federal law to Indians is that clause, which "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200. Hence, if federal law does not apply in litigation to a tribal entity like GPL under the Indian Commerce Clause, it does not apply to such an entity in litigation at all. By definition, there cannot be a prospective waiver violation when a party has the same federal statutory rights in arbitration that it would have in litigation.

Put another way, saying "such federal law as is applicable under the Indian Commerce Clause" is equivalent to saying "applicable federal law." And provisions adopting "applicable federal law" are regularly enforced. *See In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1200 (10th Cir. 2016); *Collins v. Discover Fin. Servs.*, No. PX-17-3011, 2018 WL 2087392, at *1 (D. Md. May 4, 2018); *Keena v. Groupon, Inc.*, 192 F. Supp. 3d

630, 635 (W.D.N.C. 2016); *Dwyer v. Discover Fin. Servs.*, No. WMN-15-2322, 2015 WL 7754369, at *2 (D. Md. Dec. 2, 2015); *Lee v. Deng*, 72 F. Supp. 3d 806, 807-808 & n.1 (N.D. Ohio 2014). Although the issue of *which* federal laws apply to Indian tribes is not settled among the Circuits,[5] this case does not require a determination of which specific federal laws apply. The legal question presented is whether the loan agreement's provisions, taken in their entirety, prospectively waive Plaintiffs' federal statutory rights. Because the contractual language preserves, rather than waives, applicable federal law, the prospective waiver doctrine simply does not apply in this instance and the arbitration provisions should, therefore, be enforced.

The arbitration provision's adoption of applicable federal law distinguishes this case from *Hayes* and *Dillon*, because the agreements in those cases expressly *waived* the application of any federal law. The *Hayes* agreement stated that "no

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[5] *See, e.g.*, *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-17 (1960); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 551 (6th Cir. 2015) (collecting cases and adopting "presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress's power to modify or even extinguish tribal power to regulate the activities of members and non-members alike"). *But see NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (finding inapplicable the presumption that federal statutes of general applicability apply "where an Indian tribe has exercised its authority as a sovereign").

. . . federal law applie[d] to" it. 811 F.3d at 670. And the governing-law provision of each agreement stated that the agreement was "subject solely to the exclusive laws and jurisdiction of the" relevant tribe. *Dillon*, 856 F.3d at 332; *Hayes*, 811 F.3d at 669; *accord Gingras v. Think Finance, Inc.*, 922 F.3d 112, 118 (2d Cir. 2019), *pet. for cert. docketed sub nom. Sequoia Capital Operations, LLC v. Gingras*, No. 19-331 (Sept. 11, 2019) (quoting the materially identical language in the agreement there). GPL's agreement lacks any remotely similar language, and as discussed, its governing-law provision explicitly adopts "applicable" federal law. Those differences—which the district court did not address—preclude any reasonable argument that *Hayes* and *Dillon* govern here.

Plaintiffs also argued below (*see* JA399) that the agreement's language regarding the Indian Commerce Clause does not avoid a prospective waiver violation because (1) the agreements in *Hayes* and *Dillon* also referred to that clause, and (2) the Seventh Circuit called the clause an "irrelevant constitutional provision." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014). Those assertions fail.

The *Hayes* and *Dillon* agreements did not adopt the body of federal law that applies under the Indian Commerce Clause, as GPL's agreement does; they instead stated that they were "made pursuant to a transaction involving the Indian Commerce Clause." *Hayes*, 811 F.3d at 670; *Dillon*, 856 F.3d at 335. That

language says nothing about what law *governs*, and thus it is unsurprising that this Court did not deem the phrase relevant to the prospective waiver issue. The agreement here, by contrast, specifically states that a body of federal law governs any arbitration. In *Jackson*, meanwhile, "[t]he loan agreements recite[d] that they [were] 'governed by the Indian Commerce Clause.'" 764 F.3d at 769. That language *is* meaningless, because the Indian Commerce Clause is not itself a body of law or source of rights that an arbitrator can look to or apply. It is a constitutional source of congressional power to legislate in the field of Indian affairs. *See supra* pages 6-7. But "such federal law as is applicable under the Indian Commerce Clause" is a body of law that a court or an arbitrator can apply. Again, then, the language in *Hayes*, *Dillon*, and *Jackson* is materially different from the language here.

B. Other Language in the Arbitration Provision Does Not Unambiguously Waive Any Federal Statutory Rights that Plaintiffs Would Have in Litigation.

As noted, the district court never addressed the language in the GPL agreement's governing-law provision that expressly adopts the same body of federal law that would apply in litigation. Instead, the court relied on several *other* sentences in the arbitration provision, concluding that they prohibit an arbitrator from applying federal law. JA459. That conclusion is flawed.

Most fundamentally, the court's reliance on those other provisions fails to give *any* effect to the Indian Commerce Clause language—the key language in the agreement regarding what law governs. Plaintiffs likewise failed to offer any explanation below as to what meaning the language has under their reading. That flouts the "cardinal principle of contract construction … that a document should be read to give effect to all its provisions." *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 63 (1995), *quoted in CoreTel Va., LLC v. Verizon Via., LLC*, 752 F.3d 364, 370 (4th Cir. 2014). NAFSA's position, by contrast, is consistent with this principle, giving effect to every term of its arbitration provision—including, as explained in the balance of this section, all the language the district court relied on.

None of that language disclaims federal law. And certainly, none of it does so unambiguously—even standing alone, let alone when considered along with the language affirmatively adopting federal law. That is dispositive because, as explained, courts may decline to enforce an arbitration agreement only if it unambiguously affects a prospective waiver. *See supra* pages 7-8.

The district court first relied on a sentence in the "Location of Arbitration" section stating that if borrowers exercise their right to conduct arbitration within 30 miles of their homes, that "shall not be construed . . . to allow for the application of any law other than Tribal Law." JA460 (quoting JA354). This language means exactly what it says: The fact of where arbitration is conducted does not *by itself*

provide a basis for applying federal law. That does not change the fact that the agreement's governing-law provision does provide such a basis.

The court next looked to language providing that the arbitrator may "award all remedies available under [Tribal law]," asserting that "[t]he absence of any reference to awarding remedies under . . . federal law supports the inference that the Arbitration Agreements sought to exclude any . . . federal remedy." JA460. This argument fails because the agreement does not say that an arbitrator may "only" award remedies under tribal law. This omission is critical, because both the Supreme Court and this Court have upheld choice-of-law provisions specifying that they were governed by foreign law but silent as to the applicability of federal law. In *Vimar Seguros*, the Supreme Court found no unambiguous prospective waiver even though the agreement provided that it was "governed by the Japanese law," with no mention of federal law, 515 U.S. at 531, 543. Similarly, the Court in *Mitsubishi* refused to find a prospective waiver where the agreement provided that it "will be governed by and construed in all respects according to the laws of the Swiss Confederation," again with no mention of federal law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). And in *Aggarao v. MOL Shipping Co.*, 675 F.3d 355 (4th Cir. 2012), this Court held there was no unambiguous prospective waiver where the agreement provided that it "shall be governed by the laws of the Republic of the Philippines, international

conventions, treaties and covenants where the Philippines is a signatory," also with no mention of federal law, *id.* at 361, 373 & n.16. Mere silence as to the applicability of federal remedies, therefore, does not constitute a prospective waiver violation—and here there is not even silence; as explained, the agreement elsewhere expressly adopts applicable federal law.

The district court also noted that the arbitration agreement "expressly disavow[s] and sometimes contain[s] purported waivers of the application of any state law." JA462. The prospective waiver doctrine, however, bars arbitration agreements from "renounc[ing] the authority of the *federal* statutes to which it is . . . subject." *Hayes*, 811 F.3d at 675 (emphasis added). Disavowal of state law is not improper. Were it otherwise, *every* choice-of-law clause would be unlawful, because the adoption of one or more jurisdiction's laws necessarily bars claims under every other jurisdiction's law. For example, if a contract specifies the application of the law of Delaware, it forbids the assertion of claims under Virginia law and under every other states' law. That cannot suffice to invalidate an arbitration agreement.

It does not matter that the local law GPL's agreement adopts is Otoe-Missouria law rather than the law of a different state. Again, the Supreme Court has explained that parties have "considerable latitude" "to choose what law governs"—going so far as to observe that the "the law of Tibet" or "the law of pre-

revolutionary Russia" could be valid selections. *DIRECTV*, 136 S. Ct. at 468. And this Court has enforced a choice-of-law clause calling for the application of English law, which of course would preclude claims under the laws of all 50 states—including Virginia. *See Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643, 646 (4th Cir. 2010). There is no sound basis to hold that parties can preclude state law from their arbitrations by adopting English law but not Otoe-Missouria law.

The district court next relied on a pair of provisions explaining that GPL's voluntary compliance with certain federal laws does not constitute consent to the application of those laws. One provision notes that although GPL "may choose to voluntarily use certain federal laws as guidelines for the provision of services," "[s]uch voluntary use does not represent acquiescence of the [Tribe] to any federal law." JA462. The other clarifies that GPL's inclusion of a Truth in Lending Act disclosure "does not constitute 'consent' to any 'application of state or federal law.'" *Id.* Like the provision about arbitration occurring within 30 miles of a borrower's home, these provisions mean just what they say. Federal law does not apply in arbitration *because of* GPL's voluntary compliance with that law or use of that law as a guideline. But nothing in these provisions undermines the governing-law provision's express adoption of applicable federal law. Rather, the language ensures that federal law that is *not* "applicable under the Indian Commerce Clause"

will not somehow be deemed applicable because of GPL's voluntary compliance with or use as guidelines of certain federal laws.

The district court also cited two provisions referring certain disputes to the Tribe's judicial system. First, the court pointed to the arbitration agreement's provision allowing borrowers to opt-out of arbitration and instead "bring claims within the Tribal court system and under Tribal law." JA462-63. But a provision regarding the law that governs *outside* arbitration (i.e., if the plaintiff opts out of arbitration and then sues in tribal court) has nothing to do with what law governs *in* arbitration. In any event, that provision does not disclaim the application of federal law; it is merely silent on that point, which as explained is insufficient to effect a prospective waiver. *See supra* pages 7-8.

The district court similarly posited that the arbitration provision's judicial-review clause supported a prospective waiver finding because that clause mandates "that any challenge to the arbitration decision . . . be brought within the Tribal court system, and . . . be evaluated pursuant to Tribal law." JA463. But the judicial-review provision merely supplements the grounds for judicial review of arbitral awards under 9 U.S.C. §§ 9-11. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008). It does not replace those grounds. Hence, even if there were shortcomings with this language, that would not help plaintiffs, because

deficiencies in a supplemental provision cannot render an arbitration provision unenforceable.

Finally, the district court claimed that under the arbitration provision, "Tribal law controls" in "any conflict arise between federal rules and Tribal law." JA463. It is not clear which portion or portions of the arbitration provision the court was referring to, but in any event, displacement of federal procedural rules with tribal law is not a prospective waiver. One of the key purposes of an arbitration provision—and a permissible purpose—is to specify "the rules under which that arbitration will be conducted," even if those rules differ from federal procedural rules. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). In *Volt*, for example, the Supreme Court held an arbitration agreement that adopted state procedural rules enforceable, even though those state rules conflicted with procedures otherwise applicable under the FAA. *Id.* The district court's objection was thus misplaced.

In short, plaintiffs' prospective waiver argument fails because the loan and arbitration agreements, read as a whole and giving effect to all of their language, do not disclaim the application of federal law, and certainly do not do so unambiguously, as is required to find a prospective waiver violation.

IV. THE COURT SHOULD NOT REACH ANY OTHER ASSERTED BASES TO HOLD THE ARBITRATION PROVISION UNENFORCEABLE, BASES THAT IN ANY EVENT LACK MERIT

Plaintiffs' briefing below offered arguments other than prospective waiver for holding the arbitration provisions unenforceable. Specifically, plaintiffs contended that the provisions were procedurally and substantively unconscionable, as well as the product of "overreach" (by which plaintiffs meant "taking unfair commercial advantage of another"). JA406-12. These arguments all lack merit, but this Court should not even reach any of them, because the GPL and Plain Green provisions delegate all of them to the arbitrator.

Plaintiffs argued in the district court that the arbitration provisions were procedurally unconscionable for three reasons: 1) they are prospective waivers; 2) they are "'boilerplate' contracts of adhesion"; and 3) judicial review of an arbitrator's award is impossible because the Chippewa Cree lack a tribal court and the federal Court of Indian Offenses ("CIO"), which functions as the Otoe-Missouria's court system, would lack jurisdiction over any borrower's attempt to confirm or challenge an award. JA407-09. None of that is correct.

The prospective waiver issue has been addressed above. Plaintiffs' argument as to the adhesive nature of the arbitration provision can also be disposed of quickly: "The use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual

provision." *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 726 (4th Cir. 1990) (describing Virginia law). Finally, plaintiffs' tribal-court-jurisdiction argument fails with regard to both the Chippewa Cree and the Otoe-Missouria. Plaintiffs say that the Chippewa-Cree tribal court does not exist, ignoring the provisions establishing a "Judicial Branch" in Article XII of the Chippewa Cree Constitution (which are readily available on the Chippewa Cree website). Constitution and Bylaws, *Chippewa Cree Tribe*, http://www.chippewacree-nsn.gov/index.php/about/constitution-and-bylaws. As for GPL, plaintiffs consented to the jurisdiction of the CIO (i.e., the Otoe-Missouria tribal court) in their loan agreements. JA346, 354. While a party cannot consent to Article III subject-matter jurisdiction, tribal-court jurisdiction sounds instead in "personal jurisdiction." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc). And parties can undoubtedly consent to personal jurisdiction by contract. *E.g.*, *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 281 n.11 (4th Cir. 2009). Plaintiffs did so here.

Plaintiffs' last two arguments against enforcing the arbitration agreements—that they are substantively unconscionable, and that they are the product of "overreach"—are likewise flawed. The former rests on two points that have already been addressed: prospective waiver and lack of judicial review. JA409-10.

The "overreach" argument, meanwhile, boils down to the assertion that the

entire loan agreement is unfair and the product of "blatant misrepresentations." JA410-12. Those characterizations are wrong, but regardless, they are flatly foreclosed by *Rent-A-Center*, which requires arbitration of disputes that "the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract." *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 571 (2010). *Supra* page 20.

V. THE DECISION BELOW FORECLOSES ARBITRATION FOR TRIBES AND TRIBAL BUSINESSES

The District Court decision limits the ability of Tribes and tribal businesses to access arbitration, which impedes desperately needed economic development. Not only does this diminish the sovereign authority of Tribes to self-determination, but it also usurps the role of Congress in regulating commerce with Tribes.

A. The District Court's Decision Erects a Barrier to the Tribe's Ability to Conduct Essential Commercial Activity.

Tribes have scarce resources with which to provide for their citizens, and must pursue economic development opportunities to ensure their right to self-determination and provide basic social services to their members. A cost-effective means of resolving disputes is vital to preserving the fruits of tribes' economic development efforts. The district court's decision interferes with the ability of tribes to negotiate for a cost-effective dispute resolution that is widely available to other sovereigns. In effect, the district court decision puts tribes in the untenable

position of choosing to agree to the application of all federal law (even those Congress has not intended to apply to tribes) or foregoing arbitration.

B. Tribal Economic Development, Including the Ability to Arbitrate, Is Vital to Indian Sovereignty and Self-Determination.

All commercial activity, even when conducted with scrupulous adherence to the law, involves the risk of litigation. Tribal governments, like other governments and private parties throughout this country, are entitled to guard against the high costs and uncertainty of litigation by bargaining for arbitration. This is especially true considering the strain on already scarce resources faced by many tribal governments. Indian Tribes stand on equal footing as any other party seeking to enforce the terms of a bargained-for arbitration agreement. Moreover, the U.S. Supreme Court recently reiterated that there is a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1621 (citations and quotations omitted). The Court also recognized that "Congress has instructed federal courts to enforce arbitration agreements according to their terms[.]" *Id.* at 1619. Thus, the district court erred in treating the Tribe differently and refusing to enforce the Loan Agreement's bargained-for arbitration provision.

C. The District Court's Decision Infringes Tribal Sovereignty and Usurps Congress' Exclusive Authority.

The district court's decision in effect requires tribes to explicitly agree to the application of *all* federal law to access arbitration.[6] By rejecting the Agreement's reference to Tribal law as well as "law applicable under the Indian Commerce Clause," the district court essentially held that contracts with Indian tribes must specifically incorporate all federal law so as not to operate as a "prospective waiver." This requirement not only encroaches on longstanding, inherent sovereign authority possessed by tribes, but usurps Congress' plenary authority over the external affairs of Indian nations. However, "[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills*, 572 U.S. at 800 (J. Sotomayor, concurring) (citation omitted).

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[6] Because reference to laws applicable under the Indian Commerce Clause merely identifies Congress' plenary authority over the external affairs of tribes to the exclusion of state law, the district court's decision could also be interpreted to require tribes to agree to the application of state law in addition to all federal law. However, "in the absence of federal authorization . . . tribal sovereignty is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 891 (1986); *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("It must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.").

CONCLUSION

The district court's denial of defendants' motion to compel arbitration should be reversed, and the case remanded with instructions to compel arbitration of plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 37(a)(7)(B) in that, according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word), the brief contains 5,426 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Patrick O. Daugherty
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CERTIFICATE OF SERVICE

On this 18th 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/ Patrick O. Daugherty
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