Nos. 19-2108 (L), 19-2113

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DARLENE GIBBS, ET AL.,

Plaintiffs-Appellees,

v.

MICHAEL STINSON, ET AL.

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia, No. 3:18-cv-00676-MHL (Lauck, J.)

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

PATRICK O. DAUGHERTY
FRANCES MORRIS
VAN NESS FELDMAN LLP
1050 Thomas Jefferson St., NW
Washington, DC 20007
(202) 298-1800
pod@vnf.com
ftb@vnf.com

Counsel for Amicus Curiae *Native American Financial Services Association*

December 3, 2019

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

The Native American Financial Services Association ("NAFSA") is a non-profit trade association advocating for tribal sovereignty, responsible financial services, and better economic opportunities in Indian Country. NAFSA has advocated for these positions in amicus briefs filed in the U.S. Supreme Court, this Court, and other federal courts.

NAFSA's member tribes face several barriers to economic prosperity, including extreme rural isolation, which eliminates their ability to leverage gaming and other brick-and-mortar consumer-based industries as effective tools to stimulate their economies. NAFSA members have found the internet and e-commerce to be great equalizers in overcoming such isolation and providing for their people. For example, 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. 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. And importantly, 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 filled the gap in federal funding that tribes receive for basic social services, while additionally working to alleviate generational reservation poverty.

NAFSA defends tribes' sovereign rights to determine their own economic futures. Tribal governments' sovereign right to self-determination depends, in large part, on tribes' ability to engage in economic-development activities, including the selection of arbitration to resolve disputes arising from such activities. NAFSA member tribes' economic arms (including Great Plains Lending, LLC ("GPL") and Plain Green, LLC ("Plain Green")) often incorporate arbitration provisions into their loan agreements, just as non-Indian lenders do. These provisions permit efficient dispute resolution—allowing NAFSA members to preserve scarce government resources needed to provide for their people. The legal positions taken by plaintiffs and the district court below regarding arbitration have the potential to harm many tribes.

NAFSA has a particular interest in ensuring that language in GPL's arbitration provision (and those of similarly situated NAFSA members) regarding the Indian Commerce Clause is properly interpreted.[1]

---

[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-

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs borrowed money from GPL, Plain Green, and Mobiloans, LLC ("Mobiloans") each of which makes short-term loans online. The three entities are, respectively, arms of the federally recognized Otoe-Missouria Tribe of Indians, Chippewa Cree Indians of the Rocky Boy's Reservation, and Tunica-Biloxi Tribe of Louisiana.[2] 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, however, plaintiffs sought to resolve their disputes by filing this action.

The district court denied defendants' motions to compel arbitration and to stay proceedings pending arbitration as to the GPL and Plain Green loan agreements, concluding that arbitration provisions in those agreements are unenforceable. That was reversible error.

Appellants' opening brief demonstrates that the loan agreements' delegation clause requires that an arbitrator, not a court, resolve challenges to the

---

Missouria Tribe, a NAFSA member), made a monetary contribution to this brief's preparation or submission. All parties consent to the filing of this brief.

[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).

enforceability of the arbitration agreements. NAFSA supports those arguments and will not repeat them here.

If the Court addresses the validity of the arbitration provisions, NAFSA urges the Court to reject the district court's ruling that GPL's arbitration provision is unenforceable because it forces plaintiffs to give up in arbitration federal statutory rights that they would have in litigation, thereby violating the "prospective-waiver" doctrine. The GPL arbitration provision explicitly 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 agreement violated the prospective-waiver doctrine. But the agreements in those cases expressly waived the application of any federal law. Here, as just noted,

[3] Appellants' brief explains why Plain Green's arbitration provision likewise does not effect a prospective waiver. *See* Dkt. 17 at 39-44. NAFSA agrees with those arguments.

GPL's 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 is required for a court not to enforce an arbitration agreement.

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

Finally, reversal is warranted because unduly restricting the ability of tribes and tribal businesses to access arbitration will stymie needed economic development, infringe on tribal sovereignty, and usurp Congress's 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) (quotations omitted). 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 agreements. JA 208, 219, 229, 240, 249. Nor have they denied that each of their claims is a "[d]ispute" as defined in the loan agreements, i.e., a "claim or controversy of any kind between [the borrower] and [the lender] … involving this Agreement or the Loan," JA 208, 219, 229, 240, or "any controversy or claim between [the borrower] and [Plain Green]," JA 249. The district court likewise did not hold 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 GIVES CONGRESS PLENARY AND EXCLUSIVE POWER TO REGULATE INDIAN AFFAIRS.

Federal law has long recognized that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quotation marks omitted). At the same time,

[4] Because Williams, Edwards, and Inscho executed materially identical loan agreements with GPL, this brief cites only to Williams's agreement when referring to GPL's arbitration provisions. Gibbs's and Mwethuku's agreements with Plain Green differ from the GPL agreements and from each other, and are separately cited. The remaining three plaintiffs (Hengle, Price, and Blackburn) borrowed only from Mobiloans, whose arbitration provision is not before this Court.

Congress has "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's power with respect to Indian tribes has consistently been described as "plenary and exclusive"). That power derives from the Indian Commerce Clause, which provides that "Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. In addition to empowering Congress, and only Congress, this clause "protect[s] tribal self-government from state interference." *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 574 (10th Cir. 2000) (citation omitted).

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

The district court denied defendants' arbitration motions on the ground that the arbitration provisions are unenforceable because they violate the prospective-waiver doctrine. JA 362. Under that doctrine, "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) (citation omitted).

The arbitration provisions here do not violate the prospective-waiver doctrine. GPL's provision expressly states that any arbitration is governed by the same body of federal law that would apply in litigation. That is not a prospective waiver. The provision's language adopting federal law also belies the district court's view that *Hayes* and *Dillon* "control" this case, JA 358, because the arbitration provision in each of those cases expressly disclaimed 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). Parties may "choose to have portions of their contract governed by the law of Tibet [or] the law of pre-revolutionary Russia." *Id* (citation omitted). Consistent with this principle, this Court has enforced a choice-of-law clause calling for the application of English law. *See Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643, 646 (4th Cir. 2010). Other courts of appeals have enforced similar provisions. *See, e.g.*, *Hatfield v. Halifax, PLC*, 564 F.3d 1177, 1182 (9th Cir. 2009) (choice-of-law clause adopting English law); *Barbey v. Unisys Corp.*, 256 F. App'x 532, 533-34 (3d Cir. 2007) (choice-of-law clause adopting Swiss law).

Although the prospective-waiver doctrine limits parties' choice-of-law flexibility, that doctrine applies only when an arbitration provision *unambiguously* prohibits parties from vindicating in arbitration federal statutory rights that they would have in litigation. If, the Supreme Court has said, a 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). Hence, plaintiffs' prospective-waiver argument is (as they recognized below, *see* Dist.Ct.Dkt. 84 at 5) viable only if the arbitration provision unambiguously precludes them from enforcing in arbitration federal statutory rights that they would have in litigation.

1. GPL's Arbitration Provision Adopts Applicable Federal Law.

GPL's arbitration provision does not prohibit the application of federal law, let alone do so unambiguously. To the contrary, the 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." JA 220. 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." JA 218.

This language defeats 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 (citation omitted). Hence, if a federal law does not apply in arbitration to a tribal entity like GPL under the Indian Commerce Clause, it also does not apply to such an entity in litigation. There cannot be a prospective-waiver violation when a party has the same federal statutory rights in arbitration 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 Enters., 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, 807-08 & n.1 (N.D. Ohio 2014). GPL's provision should be enforced as well.

The GPL arbitration provision's adoption of applicable federal law distinguishes this case from *Hayes* and *Dillon*, on which the district court relied, *see* JA 358-62. The agreements in those cases expressly *waived* the application of any federal law. The *Hayes* agreement stated that "no . . . 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 Fin., Inc.*, 922 F.3d 112, 118 (2d Cir. 2019), *pet. for cert. docketed sub nom. Sequoia Capital Operations, LLC v. Gingras*, No. 19-331 (U.S. 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 preclude any reasonable argument that *Hayes* and *Dillon* govern here.

2. Federal Laws Apply To Indian Tribes by Virtue of the Indian Commerce Clause.

Plaintiffs argued below that the Indian Commerce Clause language does not avoid a prospective waiver because Congress's power to regulate commerce with tribes "does not make federal statutes of general applicability, such as RICO, applicable to Indian Tribes." Dist.Ct.Dkt. 84 at 19. The Supreme Court has explained that Congress derives its "broad general powers to legislate in respect to Indian tribes" from the Indian Commerce Clause. *Lara*, 541 U.S. at 200. And this Court has explained "the subject of Indian Commerce is defined … by whether the trade brings United States citizens and tribal Indians together as transacting partners." *Int'l Bancorp, LLC v. Societe des Bains de Mer*, 329 F.3d 359, 366 (4th Cir. 2003). Generally applicable laws that do not affect a tribe's treaty rights or rights to self-governance apply to commercial transactions between a tribally owned company and non-Indian consumers under the Indian Commerce Clause. *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 551 (6th Cir. 2015) (adopting presumption that generally applicable federal statutes also apply to Indian tribes, but noting that tribes may show that an exception exists if application of the law would implicate a tribe's treaty rights or right to self-governance).

Plaintiffs imply, however, that to apply in a GPL arbitration, a statute must be plainly identifiable as "passed by Congress under the Indian Commerce Clause." Dist.Ct.Dkt. 84 at 18. But whether a law invokes Congress's power under the Indian Commerce Clause is irrelevant, because the choice-of-law provision adopts "federal law *applicable* under the Indian Commerce Clause." JA 218 (emphasis added). Congress need not expressly enact a law under a particular power for the law to apply under that power. *Usery v. Charleston Cty. Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *see also United States v. Mitchell*, 502 F.3d 931, 947 (9th Cir. 2007) (a statute applies to Indians even if Congress is "silen[t]" as to the Indian Commerce Clause).

3. Reference to the Indian Commerce Clause Does Not Prospectively Waive Federal Rights.

The district court held that the agreement's language regarding the Indian Commerce Clause did not prevent a prospective-waiver violation because the clause is an "irrelevant constitutional provision." JA 367 n.48. But the case on which the court relied for that assertion, *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014), involved materially different contract language. In *Jackson*, "[t]he loan agreements recite[d] that they [were] 'governed by the Indian Commerce Clause.'" *Id.* at 769. Here, GPL's contracts reference "such federal law as is applicable under the Indian Commerce Clause." This is a body of law that a court or an arbitrator can apply.

The district court gave two other reasons for its conclusion. First, it noted, without elaboration, that the Indian Commerce Clause makes Indian relations the "exclusive province of federal law." JA 367 n.48 (quoting *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985)). That statement says nothing about what federal law is "applicable under the Indian Commerce Clause." It therefore provides no support for the court's decision.

Second, the court stated that the Indian Commerce Clause "does not provide a basis for tribal jurisdiction over non-Indians." JA 367 n.48 (citation omitted). But appellants do not base any "tribal jurisdiction over non-Indians" on the Indian Commerce Clause. The clause instead, as discussed, helps refute plaintiffs' claims of a prospective waiver. To the extent the court was referring to the jurisdiction that tribal courts have under the arbitration provision to review arbitral awards, that jurisdiction stems not from the Indian Commerce Clause but from plaintiffs' choice to consent to it.

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

To buttress its conclusion that the GPL agreement impermissibly precludes an arbitrator from applying federal law, the district court pointed to various sentences in the arbitration provision. Those sentences do not work as a

prospective waiver—particularly when read, as they must be, together with the Indian Commerce Clause language discussed above.

Most fundamentally, the court's reading of the provision fails to give *any* effect to the Indian Commerce Clause language, the key language in the agreement regarding what law governs. 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 Va., 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.

In any event, 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 effects a prospective waiver. *See supra* pp. 5, 9.

The district court first looked to language providing that the arbitrator may "award all remedies available under [Tribal law]"; the court asserted 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." JA 364. That reasoning 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 made clear that mere *silence* as to the applicability of federal remedies does not constitute a prospective-waiver violation. In *Vimar Seguros*, for example, 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. 473 U.S. at 637 n.19. And in *Aggarao v. MOL Shipping Co.*, 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. 675 F.3d 355, 361, 373 & n.16 (4th Cir. 2012). Under those cases, the district court erred in relying on silence as to the applicability of federal remedies to find a prospective-waiver violation. Here, moreover, there is not even silence; as explained, the agreement elsewhere expressly adopts applicable federal law.

The court also 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]." JA 364. This language means what it says: The fact of where arbitration is conducted does not *by itself* provide a basis for applying federal law. As explained, however, the agreement's governing-law provision does provide such a basis.

The district court similarly 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. JA 366. 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." JA 367. 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.'" JA 366. Like the provision about arbitration occurring within 30 miles of a borrower's home, these provisions mean just what they say. A federal law does not apply in arbitration solely 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 eliminates any risk that federal law that is *not*

"applicable under the Indian Commerce Clause" will somehow be deemed applicable because of GPL's voluntary compliance with or use as guidelines of certain federal laws.

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." JA 366. That is irrelevant. The prospective-waiver doctrine 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 thus entirely proper. 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 state's law). That cannot suffice to invalidate an arbitration agreement.

The district court next 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 under Otoe-Missouria law within the Tribe's court system. JA 367-68. That reliance is likewise misplaced, because a provision regarding the law that governs *outside* arbitration (i.e., if the plaintiff opts out of arbitration and then sues in tribal

court) does nothing to establish what law governs *in* arbitration. In any event, that provision does not disclaim the application of federal law even for borrowers who opt out; it is merely silent on that point, which as explained is insufficient to effect a prospective waiver. *See supra* pp. 8-9.

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 … evaluated pursuant to Tribal law." JA 368. But the judicial-review provision merely supplements the grounds for judicial review of arbitral awards under 9 U.S.C. §§ 9-11. *Hall Street 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-review provision cannot affect or limit the baseline judicial review the FAA provides. *See id.*

Finally, the district court claimed that under the arbitration provision, "Tribal law controls" in "any conflict . . . between federal rules and Tribal law." JA 368. It is not clear which portion or portions of the arbitration provision the court was basing this assertion on, 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 Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). In *Volt*, for example, the Supreme Court upheld an arbitration agreement that adopted state procedural rules, even though those state rules conflicted with procedures otherwise applicable under the FAA. *Id.* The same result is warranted here.

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 OF THE 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, and the product of "overreach" (by which plaintiffs meant "taking unfair commercial advantage of another"). Dist.Ct.Dkt. 84 at 27-28. These arguments are meritless, but this Court should reach none of them, because the GPL and Plain Green provisions delegate them all to the arbitrator.

Plaintiffs argued in the district court that the arbitration provisions were procedurally unconscionable for two reasons: 1) they are "'boilerplate' contracts of adhesion," and 2) 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. Dist.Ct.Dkt. 84 at 25-26. None of that is correct.

Plaintiffs' argument as to the adhesive nature of the arbitration provision can 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). Plaintiffs' tribal-court-jurisdiction argument likewise fails with regard to both the Chippewa Cree and the Otoe-Missouria. The claim that the Chippewa Cree tribal court does not exist ignores Article XII of the Chippewa Cree Constitution, which establishes a "Judicial Branch." Chippewa Cree Tribe, Constitution and Bylaws, http://www.chippewacree-nsn.gov/index.php/about/constitution-and-bylaws. As for GPL, plaintiffs consented in their loan agreements to the jurisdiction of the CIO (i.e., the Otoe-Missouria tribal court, as designated in the tribal constitution). JA 212, 220. 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 the agreements are substantively unconscionable and the product of "overreach"—are equally infirm. The former rests the purported lack of judicial review, which has already been addressed. Dist.Ct.Dkt. 84 at 27. The "overreach" argument, meanwhile, boils down to the assertion that the entire loan agreement is unfair and the product of "blatant misrepresentations." *Id.* at. 27-30. Those characterizations are wrong, but regardless they are foreclosed by *Rent-A-Center, W., Inc. v. Jackson*, which requires arbitration of disputes when an arbitration agreement is challenged on the basis of an "alleged fraud that induced the whole contract," even if that alleged fraud "equally induced the agreement to arbitrate which was part of that contract." 561 U.S. 63, 71 (2010).

V. THE DECISION BELOW WILL CONSTRAIN CRITICAL TRIBAL ECONOMIC DEVELOPMENT.

The district court's decision improperly limits the ability of tribes and tribal businesses to employ arbitration, thereby impeding desperately needed economic development.

The Supreme Court recently reaffirmed the "liberal federal policy favoring

arbitration agreements." *Epic*, 138 S. Ct. at 1621 (quotations omitted). That policy recognizes that all commercial activity, even when conducted with scrupulous adherence to the law, involves the risk of litigation, and that arbitration is often more cost-effective than litigation in resolving disputes. *Id.* Tribal governments, just like other governments and private parties throughout this country, are entitled to benefit from Congress's instruction to the "federal courts to enforce arbitration agreements according to their terms," *id.* at 1619.

Reliable access to cost-effective dispute resolution is especially important to tribes, which often rely on economic-development projects to supplement their governmental budgets. Revenue generated from these projects allows tribes to provide basic social services to their members and enhances tribes' ability to exercise their right to self-determination. By limiting a tribe's ability to use arbitration, the district court's decision, if upheld, could directly impact tribal members' access to the many critical services offered by tribal governments.

CONCLUSION

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

Respectfully submitted,

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY
FRANCES MORRIS
VAN NESS FELDMAN LLP
1050 Thomas Jefferson St., NW
Washington, DC 20007
(202) 298-1800
pod@vnf.com
ftb@vnf.com

Attorneys for Amicus Curiae *Native American Financial Services Association*

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 5,130 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY

CERTIFICATE OF SERVICE

On this 3rd day of December, 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
PATRICK O. DAUGHERTY

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 19-2108 (L) and 19-2113 as

☑ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☐ Pro Bono ☐ Government

COUNSEL FOR: Native American Financial Services Association

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

_____
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Patrick O. Daugherty Name (printed or typed)	202-298-1810 Voice Phone
Van Ness Feldman LLP Firm Name (if applicable)	202-338-2361 Fax Number
1050 Thomas Jefferson Street, NW Washington, DC 20007 Address	pod@vnf.com E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 12/03/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

_____ 12/3/19
Signature Date

11/14/2019 SCC