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

In the United States Court of Appeals for the Fourth Circuit

DARLENE GIBBS, STEPHANIE EDWARDS, LULA WILLIAMS, PATRICK INSCHO, LAWRENCE MWETHUKU, GEORGE HENGLE, TAMARA PRICE, and SHERRY BLACKBURN, on behalf of themselves and all individuals similarly situated,

Plaintiffs-Appellees,

v.

(For Continuation of Caption See Inside Cover)

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

JOINT REPLY BRIEF OF DEFENDANTS-APPELLANTS

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(For Continuation of Appearances See Inside Cover)

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INTRODUCTION

Each of the Plaintiffs in this case signed an agreement to arbitrate any dispute concerning the loans that they obtained and also to arbitrate any dispute about the enforceability or validity of the agreement to arbitrate itself. The district court refused to enforce both of these agreements, on the ground that the arbitration agreement "prospectively waives" Plaintiffs' federal and state statutory claims. Two settled rules require reversal of this order. Plaintiffs do not meaningfully engage with either of those rules, but instead advocate for special exceptions to them that are inconsistent with federal arbitration law and that no federal court of appeals has recognized.

First, the Delegation Provision in the Arbitration Agreements—i.e., Plaintiffs' agreement to arbitrate any threshold dispute about the enforceability of the Agreements—must be enforced absent a valid ground for refusing to enforce that provision, in particular. The district court ruled that potential "prospective waiver" of statutory claims makes the Delegation Provision invalid. *See* JA357. No federal court of appeals has ever so held. Nor does that ruling cohere, because the "prospective waiver" doctrine manifestly goes to the enforceability of an agreement to arbitrate *as a whole*, not an antecedent delegation provision. The doctrine is directed to whether the agreement to arbitrate impairs a party's ability to pursue remedies under federal statutory law in an arbitration on the merits. It has nothing

to do with threshold issues of arbitrability. A dispute concerning whether the prospective waiver doctrine renders the Arbitration Agreements unenforceable is precisely what the Delegation Provision calls upon an arbitrator to address. But the prospective waiver doctrine is not a proper ground for refusing to enforce the Delegation Provision itself.

Plaintiffs insist, in the face of this, that there is a special "settled rule" for applying "prospective waiver," namely, that "a contract that contains an FAA-prohibited prospective waiver is unenforceable in its entirety, delegation clause included." Red Br. at 39. They say that the Second Circuit "confirms" this putative rule, and that this Court, in *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), "specifically rejected" the reasoning that a "prospective-waiver challenge is not a valid basis for invalidating a delegation clause." Red Br. at 39–41. Neither assertion is remotely true. The Second Circuit ruled that the plaintiffs in *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019), had alleged in their complaint that the delegation provision at issue in that case was procured by fraud. *See id.* at 126 ("Their complaint alleges that '[t]he delegation provision of the Purported Arbitration Agreement is also fraudulent.'"). The court went on to invoke prospective waiver as a ground for invalidating the agreement to arbitrate *as a whole*, not the delegation provision. *Id.* at 127.

The decision in *Hayes* did not state any reason for its determination, in a footnote, that the plaintiffs there had "challenged the validity of that delegation provision with sufficient force and specificity to occasion our review." 811 F.3d at 671 n.1. This did not, contrary to Plaintiffs' assertion in their brief, "specifically," or even generally, "reject[]" Defendants' argument.[1] Moreover, since *Hayes* was decided, this Court has now made clear that it is not enough for a party seeking to avoid a delegation provision to simply assert a "challenge" to it; a court must *rule* on the merits of that challenge and determine "whether the delegation provision is unenforceable 'upon such grounds as exist at law or in equity.'" *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017) (quoting 9 U.S.C. § 2); *see also id.* at 456–57 (extended discussion of whether the delegation provision in that case was enforceable). Here, there is no basis for *ruling* that the Delegation Provision is unenforceable on the ground of prospective waiver or on any other ground.

[1] The plaintiffs in *Hayes* also challenged the validity of the delegation provision on a ground that would not apply here: that the designated forum for deciding arbitrability issues did not exist, because the agreement called for an "authorized representative" of the tribe to conduct the arbitration and there was no such person. *See Opp'n Def.'s Mot. Dismiss First Am. Compl.*, ECF No. 30, *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258, at 29 (E.D. Va. Sept. 5, 2014); *see also id.* at 25, 30 (arguing that the nonexistence of a tribal arbitrator means that no "dispute resolution mechanism exists"). Here, the arbitration will be conducted by, at Plaintiffs' choice, AAA, JAMS, or CPR—all of which exist and are well-established. *See* JA208; JA219.

A second ground for why this dispute should be referred to arbitration, and the district court's order reversed, is that prospective waiver is not a ground for invalidating the Arbitration Agreements at this stage. The Supreme Court and this Court have established that prospective waiver is not a ground for invalidating an arbitration agreement at this "arbitration-enforcement" stage, but can be applied only at the "award-enforcement" stage where, as here, a federal court will have the opportunity to review the award. *See Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 371–73 (4th Cir. 2012) ("The [Supreme] Court qualified the doctrine, recognizing that a prospective waiver would contravene public policy only when there is no 'subsequent opportunity for review' in federal court." (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995)). This rule, recognized by the Supreme Court and articulated by this Court prior to the decisions in both *Hayes* and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), is binding on Plaintiffs, the district court, and this Court.

Plaintiffs, however, declare, once again, a special exception for their case on the ground that this rule purportedly "do[es] not control the analysis of tribal-arbitration contracts." Red Br. at 38. Their notion is that *Aggarao* announced an "alternative framework" that applies only to "international contracts" which are subject to Chapter 2 of the Federal Arbitration Act. *See id.* at 37. *Aggarao* did nothing of the sort, and no court has upheld, or even addressed, Plaintiffs' novel

notion that the procedures for applying prospective waiver vary depending upon whether the contract at issue can be characterized as a "domestic" agreement or an "international" one. Indeed, Plaintiffs themselves use the cases interchangeably, and the doctrine of prospective waiver only has applicability where an agreement can be regarded as having a "foreign choice of law provision." *Dillon*, 856 F.3d at 334. There is no basis for Plaintiffs' contrived assertion that prospective waiver can be invoked *ex ante* to invalidate a "domestic" arbitration agreement pursuant to Chapter 1 of the FAA, but can be applied only *ex post* in the context of an "international" agreement subject to Chapter 2 of the FAA.

For these two fundamental reasons, and others addressed below, this Court should enforce the Delegation Provision in these Agreements and refer the matter to arbitration. The Agreements here provide for arbitration of "federal" and "state" claims; Defendants have emphatically and repeatedly stated, consistent with this plain language, that they will *not* seek to preclude Plaintiffs from pursuing their statutory claims in arbitration; and, in any event, the doctrine of prospective waiver is not a ground for refusing to enforce an arbitration agreement at this stage. There is no question on this record that Plaintiffs will be able to arbitrate their claims. If, by some chance, they are able to convince an arbitrator that they should not be permitted to arbitrate their statutory claims, jurisdiction will be returned to the

district court, which can proceed to adjudicate them. But there is no good reason not to refer this dispute to arbitration now, and the law compels that outcome.

ARGUMENT

I. THE DELEGATION PROVISION SHOULD BE ENFORCED

A dispositive, threshold issue on this appeal is whether, pursuant to Section 2 of the FAA, the district court must enforce the Delegation Provisions in the Arbitration Agreements, which provide that any dispute about the enforceability of the Agreements are for the arbitrator to resolve in the first instance. Plaintiffs do not reach this threshold issue until nearly the end of their appeal brief, at page 38. And, when they do, Plaintiffs fail to meaningfully engage with the language of the Delegation Provision or the legal issues concerning its enforcement, as framed by the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010), and this Court in *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455 (4th Cir. 2017).

Importantly, Plaintiffs do not contest that there is a Delegation Provision in the Arbitration Agreements and that it clearly provides for the arbitrator to decide any issues concerning the enforceability of the Arbitration Agreements. The Agreements provide, simply and straightforwardly, for arbitration of any "dispute" regarding the "validity, enforceability, or scope" of the Arbitration Agreements. JA208; JA219. This provision narrows a court's role, to solely whether there is a

valid basis for refusing to enforce *that* delegation provision. *See Rent-A-Center*, 561 U.S. at 72; *Minnieland*, 867 F.3d at 455. If not, the delegation provision must be enforced, without reaching whether the arbitration agreement as a whole is valid or enforceable. *Id*.

Plaintiffs also do not—and cannot—dispute this framework. Instead, they argue for what they declare is a "settled rule" that "a contract that contains an FAA-prohibited prospective waiver is unenforceable in its entirety, delegation clause included." Red Br. at 39. Neither the Supreme Court, this Court, or any other appellate court has ever so held, and for a very good reason.

To avoid enforcement of the Delegation Provision, Plaintiffs must show *that provision* is not enforceable "upon such grounds as exist at law or in equity." 9 U.S.C. § 2; *see also Rent-A-Center*, 561 U.S. at 70. Grounds for refusing to enforce the agreement to arbitrate as a whole, that do not also apply to the delegation provision, are not even "relevant" to the analysis. *See id.*; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006). Instead, the proper inquiry is whether Plaintiffs' prospective waiver arguments "*as applied* to the delegation provision render[] *that provision*" unenforceable. *See Rent-A-Center*, 561 U.S. at 74 (emphasis in original).

The doctrine of "prospective waiver" simply cannot be applied, as Plaintiffs suggest, to invalidate the Delegation Provision. Defendants' principal brief showed

how the doctrine of prospective waiver manifestly concerns the enforceability of an arbitration agreement *as a whole*. *See* Blue Br. at 26–27. Indeed, the doctrine addresses the enforceability of an arbitrate agreement where it operates to waive "federal substantive statutory rights" on the merits of asserted claims. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 334 (4th Cir. 2017). But that is not a valid, or even a coherent, basis for challenging an antecedent delegation provision. There is nothing about having an arbitrator decide whether an arbitration agreement is enforceable that could operate to waive the merits of federal substantive statutory rights.

Plaintiffs do not engage with this argument. Instead, they pretend that this Court, the Second Circuit, and "every court to consider this argument" has "rejected" it. Red Br. at 41. But this Court has never held that the doctrine of prospective waiver is a ground for invalidating a delegation provision. The footnote in *Hayes* that Plaintiffs cite (Red Br. at 41) stated only that the plaintiffs in that case "have challenged the validity of [the] delegation [provision] with sufficient force and specificity to occasion our review." 811 F.3d at 671 n.1. *Hayes* did not even mention the doctrine of prospective waiver as a potential ground for invalidating a delegation provision. Also, after this Court's decision in *Minnieland*, it is not sufficient for a party seeking to avoid a delegation provision to simply assert a challenge to it. Rather, that party must *show*—and a court must *rule*—that the

delegation provision, specifically, is not enforceable. *See Minnieland*, 867 F.3d at 455. Neither Plaintiffs nor the district court did that here.

The Second Circuit, too, did not rule that prospective waiver is a ground for invalidating a delegation provision. Defendants addressed this point in their opening brief (Blue Br. at 29 n.6), but Plaintiffs ignore that discussion. Plaintiffs grossly misstate the Second Circuit's holding in *Gingras* as purportedly "confirm[ing]" Plaintiffs' made-up "settled rule"—which flies in the face of *Rent-A-Center*—that an agreement that prospectively waives arbitration of federal substantive claims is "unenforceable in its entirety, delegation clause included." Red Br. at 39. But the court in *Gingras* ruled only that the plaintiffs there made a "specific attack on the delegation provision" by alleging in their complaint that "'[t]he delegation provision of the Purported Arbitration Agreement is also fraudulent.'" *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 126 (2d Cir. 2019). That, the court stated, "is sufficient to make the issue of arbitrability one for a federal court." *Id.* (In the Fourth Circuit, as discussed above, merely invoking such a complaint allegation is not, under *Minnieland*, sufficient to bypass a delegation provision.) The Second Circuit proceeded to invoke the doctrine of prospective waiver—and also unconscionability under Vermont law—in ruling that the arbitration agreement at issue *as a whole* was not enforceable. *See id.* at 126–28. But the Second Circuit did not rule, hold, state in *dicta*, or even imply that the doctrine of prospective waiver could ever be a ground

for refusing to enforce a *delegation provision*. Nor, contrary to Plaintiffs' string cite in their brief (Red Br. at 41), has any other federal court of appeals.

Finally, Plaintiffs try to address this fatal problem by insisting that they "expressly raised a specific attack on the delegation clause itself." Red Br. at 41. Again, just "raising" the issue is not enough. But there too, like their brief on appeal, Plaintiffs relied on the doctrine of prospective waiver. *See* DE 84 at 20–24; DE 86 at 7–12. Indeed, Plaintiffs tried to address their failure to properly challenge the enforceability of the Delegation Provision by arguing, as they now do on appeal, that "regardless of the delegation provision, the prospective waiver issue is ripe for determination." DE 84 at 22; DE 86 at 9. But, again, there is nothing about the doctrine of prospective waiver that operates to override the rule that a court must enforce a delegation provision—without reaching issues concerning the enforceability of an agreement to arbitrate as a whole—unless there is a valid ground for refusing to enforce that provision, specifically.

Prospective waiver is simply not a ground for refusing to enforce a delegation provision. The Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), illustrates why. Plaintiffs recite the footnote from *Gingras* that *Schein* "has no bearing on this case" because it "dealt with an exception to the threshold arbitrability question—the so-called 'wholly groundless' exception—not a challenge to the validity of the arbitration clause itself." Red Br.

at 40. But this overlooks the overarching principles that *Schein* applied. The *reason* that *Schein* ruled the "wholly groundless" exception is not a valid basis for overriding a delegation provision is that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Schein*, 139 S. Ct. at 529. Just as the party seeking to avoid arbitration in *Schein* invoked a defense to arbitrability, the "wholly groundless" doctrine, to avoid a delegation provision, Plaintiffs here have invoked a different defense to arbitrability, the "prospective waiver" doctrine, to avoid a delegation provision. As *Schein* shows, a court must enforce a clear provision for arbitration of any antecedent disputes about arbitrability before considering the merits of any defense to arbitrability. *See Schein*, 139 S. Ct. at 528; JA 208; JA219. This rule holds regardless of whether the basis for seeking to override the arbitration agreement is the "wholly groundless" doctrine or the "prospective waiver" doctrine. In the presence of an otherwise enforceable delegation provision, a court has no authority to reach any arbitrability defense. *See Schein*, 139 S. Ct. at 529.

Indeed, contrary to the wooden distinction of *Schein* invoked by Plaintiffs, other courts have recognized that, under *Schein*, a party may not rely on the doctrine of prospective waiver (also called "effective vindication") as a putative basis for overriding a delegation provision. As they point out, "an effective vindication

challenge is a challenge to the enforceability of the arbitration agreement," which "[a]fter *Henry Schein,* [ ] are heard by the arbitrator where [ ] the parties' agreement includes a delegation clause." *De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795 (S.D. Ohio 2019); *see also Davis v. TMC Rest. of Charlotte, LLC*, 2019 WL 4491529, at *2 (W.D.N.C. Sept. 18, 2019), *appeal filed*, No. 19-2167 (4th Cir. Oct. 23, 2019) (noting that after *Schein* "when the parties' agreement delegates arbitrability issues to the arbitrator, the Court is without power to decide arbitrability issues—the arbitrator must determine issues regarding the validity, enforceability, or scope of the arbitration agreement, including its delegation provision," but finding an exception where challenge is to formation of arbitration agreement).

* * *

Delegation provisions do nothing more than state, *ex ante*, who has the authority to decide issues of arbitrability—a court or an arbitrator. *Rent–A–Center*, 561 U.S. at 70. Plaintiffs here agreed to have an arbitrator resolve all such threshold issues of arbitrability, and there is no proper basis for refusing to enforce this provision. The district court's ruling improperly bypassed the Delegation Provision. On this ground alone, the district court's order should be reversed, and the parties directed to arbitrate Plaintiffs' threshold challenge to the enforceability of their Arbitration Agreements.

II. ALTERNATIVELY, THE DOCTRINE OF "PROSPECTIVE WAIVER" IS NOT A GROUND FOR REFUSING TO ENFORCE THE ARBITRATION AGREEMENTS

Most of Plaintiffs' brief focuses on the second step of the analysis here: whether the Arbitration Agreements as a whole are unenforceable under the doctrine of "prospective waiver." Red Br. at 19–32. As shown above, that threshold arbitrability issue is for the arbitrator, not a court, to decide. But, even assuming for the sake of argument that there are grounds for bypassing the Delegation Provision, prospective waiver is not a proper ground for refusing to enforce the Arbitration Agreements.

A. The Arbitration Agreements Expressly Provide for Arbitration of Federal and State Statutory Claims

As an initial matter, the Arbitration Agreements do not preclude Plaintiffs from pursuing their statutory claims under federal and state law. To the contrary, they provide that "any Dispute (as defined below) will be resolved by arbitration," and they each expressly define a Dispute as including "all federal, state or Tribal law claims or demands." JA208; JA219.

As Plaintiffs themselves acknowledge (Red Br. at 22), the Supreme Court has made clear that "[b]y agreeing to arbitrate a statutory claim" in this manner, "a party does not forgo the substantive rights afforded by [] statute," but "submits to their resolution in an arbitral, rather than judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The agreement at issue in

Mitsubishi, for example, provided for arbitration of "[a]ll disputes, controversies or differences" that arose under a distributor agreement. *Id.* at 617. Unlike the Arbitration Agreements at issue here, that agreement did not expressly provide for arbitration of federal claims. *Id.* at 625. And yet, the Supreme Court still held that this agreement made a federal antitrust claim arbitrable. *Id.* Here, by *expressly* agreeing to arbitrate all federal and state claims arising under their Loan Agreements, Plaintiffs even more plainly have "submit[ted] to their resolution in an arbitral, rather than judicial, forum." *Id.* at 628.

Plaintiffs address this threshold failure of their argument only in a footnote. *See* Red Br. at 28 n.7. They claim that their express agreement to arbitrate statutory claims is in what they call the "dispute section of these contracts," when, in fact, it is in the "AGREEMENT TO ARBITRATE" and, specifically, the part of it that details "WHAT ARBITRATION IS." JA208; JA219 (all caps style in original). Again, this section of the Agreements provides that "all federal, state or Tribal law claims or demands" "will be resolved by arbitration." *Id.* This is about as plainly as an agreement could provide for arbitration of federal and state claims.

And yet, in their efforts to insist that they should be deemed precluded from arbitrating their claims, Plaintiffs try to dismiss this part of the Arbitration Agreements by contending that it "only defines the scope of arbitration" and purportedly does not "override" the language that they focus on to support their

argument that an arbitrator is purportedly "prohibited" from applying federal and state law. Red Br. at 28 n.7.[2] But by acknowledging, as they must, that federal and state claims are within "the scope of arbitration" under the Agreements, Plaintiffs' make plain that their federal and state claims should be referred to arbitration. Section 2 of the FAA expressly provides for enforcement of any "written provision" "to settle by arbitration a controversy." 9 U.S.C. § 2. The Agreements here provide, in writing, for federal and state claims to be "resolved by Arbitration." JA208; JA219. That should be enforced, under the plain language of the FAA.

Indeed, that federal and state claims are, at a bare minimum, within "the scope of arbitration" provided for in the Agreements means, even as Plaintiffs frame the issue, that the doctrine of prospective waiver cannot invalidate the Arbitration Agreements at this stage of the proceedings. Plaintiffs rely heavily on this Court's decision in *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017). But in

[2] Plaintiffs point to a series of other provisions stating that their lenders and the Loan Agreements are subject to only tribal law. *See* JA207; JA218. The lenders are tribal-affiliated entities that may be protected by tribal sovereign immunity. The provisions Plaintiffs reference in the Agreements reflect that the lenders were not consenting to have what they would maintain was otherwise inapplicable federal law applied to them. But Plaintiffs in this action have sued a series of entities *other than* their lenders. The Defendants are not even investors in their lender, but investors in an entity that provided services to their lenders—who, unlike the lenders, are not tribal entities and cannot assert tribal sovereign immunity. The Arbitration Agreements provide for arbitration of federal and state claims against these non-tribal Defendants, even while the Agreements as a whole include other provisions to protect against the tribe-affiliated lenders waiving any tribal sovereign immunity protections that might be afforded to them.

that case the Court noted that where "there is uncertainty" as to whether an arbitration agreement's choice-of-law clause operates to preclude a party from pursuing federal statutory claims, "*the arbitrator should determine in the first instance* whether the choice of law provision would deprive a party of those remedies." *Id.* at 334 (citations omitted and emphasis added).

This is consistent with the overriding principle of federal law—discussed in Defendants' opening brief (Blue Br. at 39) and ignored by Plaintiffs—that an arbitration agreement should not be interpreted to preclude arbitration of a claim "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)). This principle that any "doubts" "should be resolved in favor of coverage," i.e., in favor of arbitration, has also been expressly extended to "'allegation[s] of *waiver*, delay, or a like defense to arbitrability.'" *Mitsubishi*, 473 U.S. at 626 (emphasis added; quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

Not only do the Arbitration Agreements themselves provide for arbitration of "federal" and "state" claims, but Defendants' emphatic and repeated representations (*see* Blue Br. at 40 & nn.8–9), consistent with this contractual language, that they

will *not* seek to preclude Plaintiffs from pursuing their federal and state claims in arbitration further clarifies that Plaintiffs are not at all at risk of being deemed to have "waived" these claims. The district court wholly ignored Defendants' representations, and Plaintiffs, for their part, mischaracterize the point.

Plaintiffs invoke *Dillon*, *see* Red Br. at 29, where this Court addressed a defendant's attempt to "sever the choice of law provisions from the arbitration agreement" and declined to do so, after analyzing the contract law doctrine of severance. 856 F.3d at 336. But Defendants here are not seeking to sever any provisions of the Arbitration Agreements. They are seeking to *enforce* what is the very core of these Agreements: Plaintiffs' agreement that any "federal" and "state" claims concerning their loans "will be resolved by Arbitration." JA208; JA219.

In light of this language and Defendants' representations that it means what it says—that is, Plaintiffs may arbitrate their federal and state statutory claims—it cannot be said with the requisite "positive assurance" that Plaintiffs will be held to have "prospectively waived" assertion of these claims in an arbitration. *See AT&T Techs., Inc.*, 475 U.S. at 650. To the contrary, on this record, it is crystal clear that Plaintiffs' claims *will* be asserted and resolved in arbitration, unless they continue with and succeed in their efforts to sabotage their own claims in an arbitral forum—in which case, as addressed below, the claims will then be adjudicated in the district court.

B. Prospective Waiver Is Not a Proper Ground for Refusing to Enforce an Arbitration Agreement

As the preceding discussion shows, the Arbitration Agreements are not unenforceable on the ground of "prospective waiver." That doctrine, in any event, is not a basis for refusing to refer this dispute to arbitration at this stage of the case.

1. Binding Authority Provides That Prospective Waiver May Be Applied Only at the "Award Enforcement" Stage

This Court observed, in *Aggarao v. MOL Ship Management Co.*, 675 F.3d 355 (4th Cir. 2012), that the Supreme Court has established that "prospective waiver would contravene public policy only when there is 'no subsequent opportunity for review' in federal court." *Id.* at 371 (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995)). This binding precedent gives rise to a clear rule: the doctrine of prospective waiver may not be applied to invalidate an arbitration agreement at the "arbitration-enforcement" stage, but only after the arbitration has taken place, at the "award-enforcement" stage. *See id.* at 372–73.

Plaintiffs do not even try to argue that they may, at this stage of the proceedings, avoid arbitration under this rule. Nor would any such argument be credible. Instead, Plaintiffs try to interpose a special exception that they have tailored for this case. They assert that the Supreme Court and Fourth Circuit decisions that laid down this rule are "international arbitration decisions" that "are governed by Chapter 2" of the FAA and "do[] not control" here, to these "tribal-

arbitration contracts." Red Br. at 37–38.

Neither the Supreme Court nor this Court—nor any court, to Defendants' knowledge—has ever held that the procedures for applying the doctrine of prospective waiver vary depending upon whether the agreement arises in a domestic or international context. Plaintiffs try to make it appear as if this Court has held that "tribal-arbitration" contracts "are distinguishable from those providing for arbitration 'in foreign countries,'" Red Br. at 38, but *Hayes* did not, in fact, make this distinction.[3] *Dillon* also did not, contrary to Plaintiffs' brief, "explain[]" that *Aggarao* and *Vimar Seguros* "do not control the analysis of tribal-arbitration contracts." Red Br. at 38. *Dillon* did not focus on the binding rule that Defendants are now calling to the Court's attention, but, instead, noted only the background principle (also discussed above) that an arbitrator should determine whether a foreign choice-of-law provision deprives a party of federal statutory remedies if there is any uncertainty on this issue. 856 F.3d at 334.

Plaintiffs' supposed distinction is also undermined by the fact that the Supreme Court has discussed the prospective waiver doctrine cases arising under Chapter 2 of the FAA interchangeably with those that arise under Chapter 1 of the

[3] *Hayes* cited *Vimar Seguros* as part of a string of decisions for the proposition that the Supreme Court has upheld arbitration agreements that contain class-action waivers and other procedural requirements on potential claimants. *See Hayes*, 811 F.3d at 674.

FAA. *See, e.g.*, *Pacific Health Sys., Inc. v. Book*, 538 U.S. 401, 404–05, 407 (2003). Plaintiffs, too, routinely invoke cases applying the prospective waiver doctrine in the international context when it suits them. *See, e.g.*, Red Br. at 43, 44 (invoking *Mitsubishi* and *Vimar Seguros*).

Plaintiffs' brief repeatedly stakes out a notion that "prospective waiver" is a rule that is somehow part of or mandated by the FAA. *See, e.g.*, Red Br. at 20 (declaring that the doctrine is "grounded in both the FAA's text and its policy"). That is not correct. The Supreme Court has clarified that it is a "judge-made exception to the FAA." *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013). It "originated as *dictum* in *Mitsubishi*" and is, at most, a "public policy" ground for refusing to enforce an arbitral award. *Id.*

The Supreme Court has also never invalidated an arbitration agreement on the ground of "prospective waiver." *See id.* Meanwhile, in the context of Chapter 1 of the FAA, the Supreme Court has made clear that courts may not invalidate arbitration agreements on grounds that apply only to arbitration agreements. *See, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (the FAA "was designed to [] place arbitration agreements 'upon the same footing as other contracts'") (quotation omitted). Rather, Section 2 of the FAA mandates that arbitration agreements must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." *Rent-A-Center*, 561 U.S. at 70 (quoting

9 U.S.C. § 2). This statute, which is in Chapter 1 of the FAA, "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal quotation marks and quotation omitted). The doctrine of "prospective waiver," however, is not a ground for "revocation of any contract," but a judge-made exception to the FAA that has been applied (and not by the Supreme Court) only to refuse enforcement of *arbitration* agreements.

Accordingly, if there is any distinction to be made between cases arising under Chapter 1 of the FAA (domestic) and cases arising under Chapter 2 (international), it is not the one that Plaintiffs urge here, but that "prospective waiver" is not a proper ground for avoiding enforcement of an arbitration agreement pursuant to Section 2 of the FAA. While these Arbitration Agreements expressly provide for arbitration of all federal and state claims, parties may, as the Supreme Court has held, exclude statutory claims from the scope of any agreement to arbitrate. *See Mitsubishi*, 473 U.S. at 628 ("Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.").

The important point for present purposes is that there is no basis for Plaintiff's notion that the "prospective waiver" doctrine should be more freely wielded on an *ex ante* basis to invalidate arbitration agreements outside the international context. Under binding Supreme Court and Fourth Circuit precedent, the prospective waiver

doctrine may not be invoked at the "arbitration-enforcement" stage to invalidate an arbitration agreement but only at the "award-enforcement" stage upon review by a federal court. *See Aggarao*, 675 F.3d at 373. There is no basis for distinguishing this rule away here, as Plaintiffs try to do, and this Court, respectfully, is bound by it. Prospective waiver is not, accordingly, a basis for refusing to refer this dispute to arbitration.

2. The District Court Will Retain Jurisdiction to Review the Award

Plaintiffs also try to avoid having to arbitrate their claims under the rule recognized by *Aggarao* by claiming that the Agreements "foreclose any federal court from reviewing an arbitrator's decision" and "require" tribal court review. Red Br. at 44. That is wrong.

Contrary to Plaintiffs' brief, tribal court review of an arbitral award is *permissive*, not mandatory, pursuant to the Agreements. *See* JA 209; JA220. The FAA also provides for review and confirmation of the arbitral "award" in federal court, 9 U.S.C. §§ 9–11, and the stay pending arbitration that Defendants sought in this action in the district court under Section 3 of the FAA will remain in effect only "until such arbitration has been had." 9 U.S.C. § 3. Accordingly, by the plain terms of the Arbitration Agreements and the FAA—which Plaintiffs repeatedly acknowledge governs here (*see, e.g.*, Red Br. at 19–23)—the arbitrator's award will

be subject to review and confirmation in the district court after the arbitration is concluded notwithstanding the provision for permissive tribal court review.

Moreover, even putting to one side the district court's clear authority to review and confirm the *arbitral* award, the provision in the Agreements allowing for permissive tribal court review does not render the Arbitration Agreements "invalid" as Plaintiffs claim. Red Br. at 45. Although the Supreme Court has held that an arbitration contract cannot alter the scope of a *federal court*'s review under Section 10 of the FAA, *see Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), parties remain free to craft the procedures and rules under which that *arbitration* will proceed. *See Epic Sys. Corp.*, 138 S. Ct. at 1621.

In recent years, arbitration associations such as the AAA, JAMS, and others have created options for litigants to have a panel of arbitrators provide a *de novo* appellate review of an arbitrator's decision. Federal courts have not hesitated to review and confirm the decisions of these panels pursuant to Section 10 of the FAA. *See, e.g., Hamilton v. Navient Sols., LLC*, 2019 WL 633066, at *3, *5–*6 (S.D.N.Y. Feb. 14, 2019) (confirming award rendered by appellate arbitration panel, while also engaging in "back-end" review of appellate panel's decision pursuant to 9 U.S.C. § 10). So, insofar as Plaintiffs treat tribal court review as a "require[d]" part of the arbitral process here—which it is not—it would be no different than the appellate options offered by the AAA, JAMS, and others. That does not run afoul of the

Supreme Court's decision in *Hall Street*, and any decision rendered at the end of this process is still ultimately reviewable by the district court under the limited grounds provided by Section 10 of the FAA.

Critically, in this regard, the relief sought in the district court was for a stay of this action pending arbitration, pursuant to Section 3 of the FAA. This Court has made clear that a district court has the authority to issue such a stay and retain jurisdiction over the action, pending completion of the arbitral process. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999); *see also* 9 U.S.C. § 3; *Schein*, 139 S. Ct. at 530 (Section 10 of the FAA "provides for back-end judicial review of an arbitrator's decision"); *Katz v. Cellco P'ship*, 794 F.3d 341, 347 (2d Cir. 2015) (holding that the FAA mandates a stay of proceedings pending resolution of cases sent to arbitration). The district court will thus retain jurisdiction over this case pending the arbitration and, upon completion of those arbitral proceedings, the stay will be lifted and the district court will have the authority to review the award as provided in the FAA.

3. Plaintiff's Policy Arguments Are Not a Ground for Refusing to Follow Binding Precedent

Plaintiffs' final argument (Red Br. at 46–47) is that public policy concerns require the Court (and indeed all courts) to invalidate these Arbitration Agreements because to do otherwise would be to "invite a race to the bottom." This argument is predicated on a bare appeal to the putative merits of their underlying claims, i.e.,

their *allegations* that the loans that they obtained are unlawful. *See* Red Br. at 46–47. But, under well-established law, considerations of the merits of these underlying claims cannot be allowed to impact a federal court's threshold determination of whether to enforce an agreement to arbitrate those claims. *See Rent-A-Center*, 561 U.S. at 70; *see also Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019) ("[A]n entity's entitlement to tribal immunity cannot and does not depend on a court's evaluation of the respectability of the business in which a tribe has chosen to engage.").

Moreover, if Plaintiffs' prospective waiver arguments were to be accepted, notwithstanding all of the bases set out above for why this doctrine does not apply here, this Court would be required to invalidate *all* choice of Native American law clauses and arbitration agreements, regardless of the underlying business. For example, Native American contractors would not be able to arbitrate a construction dispute pursuant to their laws. Native American businesses would not be able to arbitrate claims against their vendors pursuant to their laws. This would defeat the strong federal policy in favor of tribal self-determination, economic development, and cultural autonomy. *See Williams*, 929 F.3d at 185. Indeed, in light of similar concerns for deference to a sovereign, this Court and others have repeatedly allowed for application of another sovereign's laws in an arbitration, even when doing so operates to preclude assertion of claims under U.S. federal law. *See Allen v. Lloyd's*

of London, 94 F.3d 923, 929 (4th Cir. 1996) (inability to assert Securities Act claims in foreign arbitration insufficient to avoid arbitration); *Richards v. Lloyds of London*, 135 F.3d 1289, 1295–96 (9th Cir. 1998) (en banc) (same, with respect to RICO and Securities Act claims).

In short, Plaintiffs' policy arguments—like their arguments as a whole—ask this Court to do what it cannot: treat the laws of Native American tribes differently than the laws of any other sovereign. The Court must apply the federal law of arbitration fairly and with the requisite presumption of arbitrability mandated by the Supreme Court and the FAA—and without consideration of Plaintiffs' unfounded allegations masquerading as "policy" arguments.

CONCLUSION

The district court's denial of Defendants' motions to refer this dispute to arbitration should be reversed. The district court should be directed to enter an order staying the case and referring Plaintiffs' claims to arbitration, including any dispute as to the enforceability or scope of Plaintiffs' Arbitration Agreements.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii), because this brief contains 6,472 words, excluding the parts exempted by Rule 32(f). This brief also complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

On February 13, 2020, I caused the foregoing brief to be filed using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served with the brief through that system.

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