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 OPENING BRIEF OF DEFENDANTS-APPELLANTS

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(For Continuation of Appearances See Inside Cover)

MICHAEL STINSON, LINDA STINSON, THE STINSON 2009 GRANTOR RETAINED ANNUITY TRUST, 7HBF NO. 2 LTD., SEQUOIA CAPITAL OPERATIONS, LLC, SEQUOIA CAPITAL FRANCHISE PARTNERS, L.P., SEQUOIA CAPITAL IX, L.P., SEQUOIA CAPITAL GROWTH FUND III, L.P., SEQUOIA ENTREPRENEURS ANNEX FUND, L.P., SEQUOIA CAPITAL GROWTH III PRINCIPALS FUND, LLC, SEQUOIA CAPITAL FRANCHISE FUND, L.P., SEQUOIA CAPITAL GROWTH PARTNERS III, L.P., STARTUP CAPITAL VENTURES, L.P., STEPHEN J. SHAPER,

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CORPORATE DISCLOSURE STATEMENT

Defendants-Appellants Sequoia Capital Operations, LLC, Sequoia Capital Franchise Partners, L.P., Sequoia Capital IX, L.P., Sequoia Capital Growth Fund III, L.P., Sequoia Entrepreneurs Annex Fund, L.P., Sequoia Capital Growth III Principals Fund, L.P., Sequoia Capital Franchise Fund, L.P, and Sequoia Capital Growth Partners III, L.P. each have no corporate parent and no publicly held corporation owns ten percent or more of its stock.

Defendants-Appellants 7HBF No. 2, Ltd., Startup Capital Ventures, L.P., and The Stinson 2009 Grantor Retained Annuity Trust each have no parent corporation or stock, and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

This is an appeal of a district court order that denied the Defendants' motions to refer this dispute to arbitration. The underlying dispute concerns loans made to Plaintiffs by entities affiliated with Native American tribes—loans that Plaintiffs claim violated RICO and certain provisions of Virginia state law. In a series of other cases, filed in the same district court, these Plaintiffs have sued the lenders, the tribes, and other entities that they alleged were directly involved in the marketing and administration of their loans. The Defendants in this sixth lawsuit brought by Plaintiffs were investors in an entity that provided administrative services to the lenders.

The Loan Agreements that Plaintiffs entered into contain agreements to arbitrate any dispute about the loans, including "without limitation, all federal, state or Tribal Law claims or demands." The Agreements also contain what the Supreme Court has referred to as a "Delegation Provision," which, in the case of these Agreements, reserves for the arbitrator to decide any threshold dispute concerning "the validity, enforceability, or scope" of the Arbitration Agreement. Plaintiffs contend that the Arbitration Agreements are not enforceable, because they purportedly "prospectively waive" their federal and state law claims—notwithstanding the above-quoted provision that all "federal" and "state" law "claims or demands" are arbitrable.

The threshold issue before the district court was who should decide—the district court or the arbitrator—if the Arbitration Agreements are unenforceable on this ground. The district court ruled that it should make that determination and then proceeded to rule that the Arbitration Agreements are not enforceable because they purportedly preclude Plaintiffs from pursuing their federal and state law claims in an arbitration. The U.S. Supreme Court and this Court have established a framework for deciding these issues. Under that framework, a delegation provision is a discrete agreement to arbitrate "arbitrability," including a dispute as to whether an arbitration agreement is enforceable. This provision must be enforced by a court unless the court determines that there is a proper ground for refusing to enforce that delegation provision, specifically; and any challenge to its validity must be considered and decided before a court proceeds to address whether the arbitration agreement as a whole is enforceable. *See Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010); *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455 (4th Cir. 2017).

The district court here did not apply this framework, or even acknowledge it. The court did not address any ground for invalidating the Delegation Provision, specifically. Rather, the court reasoned that the Delegation Provision is not enforceable for the same reason that, according to the court, the Arbitration Agreements as a whole are not enforceable: namely, that the Arbitration

Agreements purportedly "disclaim[] federal law" and thus prospectively waive Plaintiffs' underlying claims under federal law. JA357. But the district court did not rule—and Plaintiffs did not show—that there was any legal basis for refusing to enforce the Delegation Provisions, specifically. The court relied almost exclusively on *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), and *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016). But these decisions also did not rule on the threshold issue of whether there is any proper legal basis for refusing to enforce an antecedent delegation provision, which this Court acknowledged in *Minnieland*, 867 F.3d at 455, is required by the Supreme Court's decision in *Rent-A-Center*.

Not only does the district court's approach violate this Court's and the Supreme Court's jurisprudence on the enforcement of delegation provisions, it makes no sense in the procedural posture of this lawsuit. This Court, following binding Supreme Court precedent, has articulated and applied a firm rule that "prospective waiver" may be applied only at the "award-enforcement" stage—i.e., after an arbitral award has been made—and not at the "arbitration-enforcement" stage—i.e., where a party is seeking to enforce an agreement to arbitrate. *See Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 373 (4th Cir. 2012). This is for a good reason: it is only then that a court can know whether a claimant will, in fact, be precluded from either asserting his or her federal or state statutory claims or

effectively vindicating the substance of those rights under another sovereign's law. *See id.* at 371, 373 n.16 (rejecting argument that claimant will be "den[ied] right to pursue his federal statutory claims" and compelling arbitration because "[i]t is possible that the Philippine arbitrator(s) will apply United States law," and, even if they do not, the claimant may "be able to effectively vindicate the substance of [federal] claims under Philippine law and obtain an adequate remedy"). Here, not only do the Arbitration Agreements expressly provide for the arbitration of "all federal, state or Tribal Law claims or demands," the Sequoia Defendants have made crystal clear—as have the Stinson Defendants—that they *will not seek to preclude Plaintiffs from asserting any of their federal or state law claims in an arbitration*. This addresses the very heart of the doctrine of prospective waiver—whether Plaintiffs will be able to pursue relief for their claims in an arbitration—but the district court made no mention of these representations in its decision.

So, even apart from the legal principles that govern this appeal, there is simply no good reason not to refer this dispute to arbitration. Either the arbitrator determines that the Agreements allow Plaintiffs to pursue remedies for their federal and state law claims, in which case Plaintiffs will be permitted to arbitrate those claims and the district court's stated concerns on this issue will turn out to be entirely unfounded. (And, it is worth noting, the only way this will happen in light of the record in this case is if *Plaintiffs* are able to persuade the arbitrator that they are not

permitted to arbitrate their federal and state law claims.) Or the arbitrator will determine that the Arbitration Agreements are unenforceable on this ground, in which case the matter comes back to federal court—because, if Plaintiffs' claims are not arbitrable, they can be litigated in a civil action.

Why not allow the arbitrator to decide this threshold issue? There is no good reason not to do so. The law requires it, and, regardless of how the arbitrator decides it, Plaintiffs will be permitted to pursue remedies for their federal and state law claims: either in an arbitration, as they agreed, or in a civil action, if they succeed in getting an arbitrator to determine that they cannot pursue their claims in arbitration on the ground of "prospective waiver." The district court's ruling that it, and not the arbitrator, should decide whether Plaintiffs' claims are arbitrable contravenes the Delegation Provisions and binding Supreme Court precedent, makes no sense in the posture of this case, and reflects the old judicial hostility to arbitration that this Court and the Supreme Court have been at pains to displace. That order should be reversed, and this dispute should be referred to arbitration in accordance with Plaintiffs' Arbitration Agreements.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1367 (supplemental jurisdiction over state law claims). This Court has jurisdiction over this appeal

pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 16(a)(1)(A) & (C), allowing for an appeal from an order denying motions for a stay pending arbitration and to compel arbitration. On September 30, 2019, the district court issued its order granting in part and denying in part the Sequoia Defendants'[1] motion for a stay pending arbitration, and denying the Stinson Defendants'[2] motion to compel arbitration. JA400. Defendants timely filed their notices of appeal from this order on October 4, 2019. JA402; JA405.

ISSUES PRESENTED

This appeal presents two issues, both reviewed *de novo*. The district court's order denying Defendants' motions to refer this dispute to arbitration should be reversed if the Court answers either of the following questions affirmatively:

1. The first question on this appeal is whether the district court erred by refusing to enforce the "Delegation Provisions" in Plaintiffs' Loan Agreements. Under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), an agreement to allow an arbitrator to resolve any dispute concerning the enforceability of an

[1] The "Sequoia Defendants" refers to Defendants-Appellants Sequoia Capital Operations, LLC, Sequoia Capital Franchise Partners, L.P., Sequoia Capital IX, L.P., Sequoia Capital Growth Fund III, L.P., Sequoia Entrepreneurs Annex Fund, L.P., Sequoia Capital Growth III Principals Fund, LLC, Sequoia Capital Franchise Fund, L.P., and Sequoia Capital Growth Partners III, LP.

[2] The "Stinson Defendants" refers to Defendants-Appellants Michael Stinson, Linda Stinson, The Stinson 2009 Grantor Retained Annuity Trust, 7HBF No. 2, Ltd., Startup Capital Ventures, L.P., and Stephen J. Shaper.

agreement to arbitrate—a so-called "delegation provision"—must be enforced, "leaving any challenge to the validity of the Agreement as a whole for the arbitrator," unless "a party challenges the validity" of the delegation provision, *id.* at 71–72, in which case a court "then must decide whether the delegation provision is unenforceable 'upon such grounds as exist at law or in equity.'" *Minnieland Private Day Sch. v. Applied Underwriters Captive Risk Ins. Co.*, 867 F.3d 449, 455 (4th Cir. 2017) (quoting 9 U.S.C. § 2). The district court declined to enforce the Delegation Provisions here—which in pertinent part provide for arbitration of any dispute "concerning the validity, enforceability, or scope" of the Arbitration Agreements—on the same ground that, the court ruled, make the Arbitration Agreements as a whole unenforceable: namely, that the Arbitration Agreements "disclaim[] federal law," in violation of the "prospective waiver" doctrine. JA357.

2. The second question on this appeal is whether the district court erred when it proceeded to rule that the Arbitration Agreements as a whole are not enforceable, also under the doctrine of "prospective waiver"—that is, that the choice-of-law and choice-of-forum clauses operate to prevent Plaintiffs from pursuing remedies for their claims under federal law. Under this Court's binding precedent, a federal court may not apply the doctrine of prospective waiver at the "arbitration-enforcement" stage—i.e., in determining whether to enforce an arbitration agreement—but only at the "award-enforcement" stage, i.e., after the

arbitration has concluded and when the court will have an opportunity to review the award. *Aggarao*, 675 F.3d at 373. It also applies only if a court can determine with "positive assurance" that "the arbitration clause is not susceptible of an interpretation" that allows for Plaintiffs to assert their federal law claims. *AT&T Techs. Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986). The Arbitration Agreements here define an arbitrable "Dispute" in pertinent part as including "all federal, state or Tribal law claims." The Sequoia Defendants and the Stinson Defendants have also repeatedly made plain in this action that they will *not* seek to preclude Plaintiffs from arbitrating their federal and state law claims. The district court nevertheless ruled that the doctrine of prospective waiver makes the Arbitration Agreements that Plaintiffs executed unenforceable.

STATEMENT OF THE CASE

This appeal arises from one of what are now seven separate lawsuits brought by a group of individuals who assert claims arising from Loan Agreements that they executed with three sovereign Native American lenders.[3]

A. Background

Plaintiffs are individuals residing in Virginia who borrowed money from one of three lenders that, as the district court recognized, are wholly owned by a Native

[3] The same groups of Plaintiffs filed five prior lawsuits in the Eastern District of Virginia against a series of different defendants, all seeking damages predicated on the same loans and all assigned to the same district court judge (Lauck, J.). *See*

American tribe. JA23–24 ¶¶ 10–17; JA338. The first, Plain Green, LLC, was formed under the laws of the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation. JA195 ¶ 2; JA339. The second, Great Plains Lending, LLC, was formed under the laws of the Otoe-Missouria Tribe of Indians. JA195 ¶ 2; JA339. The third, MobiLoans, LLC, was formed under the laws of the Tunica-Biloxi Tribe of Louisiana. JA339.

Plaintiffs entered into their Loan Agreements by going to the lenders' websites and completing an application online. *See* JA196 ¶¶ 9–10; JA255 ¶¶ 5–6. In the multi-step application process, the Plaintiffs who received loans from Plain Green and Great Plains, for example, completed a loan application form, chose a date of payment and a loan amount, and reviewed and agreed to the terms and

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Gibbs v. Rees, No. 3:17-cv-00386 (E.D. Va.); *Gibbs v. Plain Green, LLC*, No. 3:17-cv-00495 (E.D. Va.); *Gibbs v. Haynes Invs., LLC*, No. 3:18-cv-00048 (E.D. Va.); *Gibbs v. Curry*, No. 3:18-cv-00654 (E.D. Va.); *Price v. MobiLoans*, No. 3:17-cv-00711 (E.D. Va.). After the district court rendered the order on appeal, Plaintiffs then filed a seventh case. *See Gibbs v. TCV V, L.P.*, No. 3:19-cv-00789 (E.D. Va.). As the Sequoia Defendants featured in their motion to dismiss in the district court, the doctrine of claims-splitting precludes Plaintiffs from filing seriatim lawsuits in this resource-wasting manner that, frankly, appeared calculated to prejudice defendants. *See* DE No. 64 at 3–8; DE No. 100 at 2–8. The district court, for example, issued a decision denying motions to compel arbitration and to dismiss in Plaintiffs' *Gibbs v. Haynes Investment* case before Defendants' motions were fully submitted in this *Gibbs* action. *See Gibbs v. Haynes Invs., LLC*, 368 F. Supp. 3d 901, 921–25 (E.D. Va. 2019) (and the order on the arbitration motions in that case is now on a separate appeal in this Court, No. 19-1434). The district court, however, brushed aside the claims-splitting doctrine in a footnote (JA384 at n.61), and that issue is not now on appeal.

conditions of the loans, including the arbitration agreements. *See* JA196 ¶¶11–12. At the end of this process, Plaintiffs were provided with a copy of their loan agreement, which they could print or save. *See* JA197 ¶ 13.

B. Plaintiffs' Agreements to Arbitrate

Plaintiffs' Loan Agreements each contain a detailed and conspicuously disclosed Agreement to Arbitrate (the "Arbitration Agreements"). *See* JA196 ¶ 12; JA255 ¶ 8.[4] Plaintiffs agreed to arbitrate any "claim or controversy of any kind." *See* JA208; JA219; *see also* JA278 ("any controversy or claim"). Plaintiffs also agreed that this provision "is to be given its broadest possible meaning and includes . . . all federal, state or Tribal Law claims or demands (whether past, present, or future)." *See* JA208; JA219; *see also* JA278. In addition, Plaintiffs agreed to arbitrate any dispute "concerning the validity, enforceability, or scope" of the Agreement or the Agreement to Arbitrate. *See* JA208; JA219; JA278. Specifically, the Arbitration Agreements with Great Plains and Plain Green provide:

> **AGREEMENT TO ARBITRATE:** You and we (defined below) agree that any Dispute (defined below) will be resolved by Arbitration.

[4] The district court held that the MobiLoans Agreement proffered by the Sequoia Defendants through the Declaration of Kim Palermo, *see* JA254–332, controls. JA373.

> **WHAT ARBITRATION IS:** "Arbitration" is having an independent third-party resolve a Dispute. A "Dispute" is any claim or controversy of any kind between you and us or otherwise involving this Agreement or the Loan. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all federal, state or Tribal Law claims or demands (whether past, present, or future), based on any legal or equitable theory and regardless of the type of relief sought (i.e., money, injunctive relief, or declaratory relief). A Dispute includes any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate.

JA219; *see also* JA208. The MobiLoans Agreement is materially similar. JA278. The Agreements also provide: "This Agreement and the Agreement to Arbitrate are governed by Tribal Law and such federal law as is applicable under the Indian Commerce Clause of the Constitution of the United States of America."[5] JA218; *see also* JA280.

The Arbitration Agreements include many provisions for Plaintiffs' benefit. For example, the Agreements provide Plaintiffs with their choice of conducting arbitration before one of two nationally recognized and well-respected arbitration service providers: the International Institute for Conflict Prevention and

[5] The Arbitration Agreements in the Plain Green Loan Agreements "comprehends the application of the Federal Arbitration Act" and notes that "THE PARTIES ADDITIONALLY AGREE TO LOOK TO THE FEDERAL ARBITRATION ACT AND JUDICIAL INTERPRETATIONS THEREOF FOR GUIDANCE IN ANY ARBITRATION THAT MAY BE CONDUCTED." *See* JA207; JA209.

Resolution ("CPR") or JAMS, The Resolution Experts ("JAMS") in the Great Plains Agreements, the American Arbitration Association ("AAA") or JAMS in the Plain Green Agreements, and AAA or JAMS or any arbitration organization agreed upon by the parties to the dispute in the MobiLoans Agreements. JA208; JA219; JA278. The Agreements further call for the arbitration to proceed pursuant to the policies and procedures of the selected organization and provide Plaintiffs with contact information, including websites, for the arbitration providers. JA208; JA219; JA278. Regardless of which organization is selected, the Arbitration Agreements provide Plaintiffs with a choice to have the arbitration conducted "either on Tribal land or within thirty (30) miles of [Plaintiffs'] residence." JA208; JA220; *see also* JA279. The Agreements also require the respondent to pay all filing fees and any other arbitration costs regardless of who initiates the arbitration. JA208; JA219–20; JA279.

The Arbitration Agreements contain a conspicuous opt-out provision—set off from other text and in all caps—that allowed Plaintiffs to opt-out of their Arbitration Agreement within sixty days of executing their Loan Agreement simply by "advis[ing] [the Lender] in writing … that [they] reject arbitration," and providing their names and either their account or social security numbers. *See* JA207–08; JA218; JA277. Opting out would have had no impact on the other

terms of Plaintiffs' loans, and they could have opted out with a simple e-mail or letter. *See* JA207–08; JA218; JA277.

Not only were the opt-out provisions laid out in plain language, but Plaintiffs were also presented with the following prominent disclosure—and instructed to read it **"CAREFULLY"**—before they signed their Loan Agreements. For example, the following language appears in all caps and bold lettering in the Agreements to Arbitrate for Great Plains and Plain Green:

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

JA219; *see also* JA208 (similar); JA277 (similar). Further still, Plaintiffs were provided with the following notice, also in bold lettering and all caps, concerning the rights they would be waiving by entering into the Arbitration Agreements:

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

AND (D) HAVE ACCESS TO DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT.

JA208–09; JA220; JA278 (similar disclosure of waivers).

In sum, before agreeing to the terms of their loans and obtaining the loan proceeds, Plaintiffs consented to the Arbitration Agreements and affirmed that:

- the arbitrator, not a court, will make gateway determinations about the arbitrability of any dispute and the enforceability of their arbitration agreement;
- any dispute, including past disputes, concerning their loans or their loan agreements will be arbitrated, unless they exercised their right to opt-out from the arbitration procedure within sixty days;
- any arbitration will be administered, at Plaintiffs' election, by either AAA, JAMS, or the International Institute for Conflict Prevention and Resolution;
- any arbitration will take place, at Plaintiffs' choice, on tribal land or within 30 miles of their residence;
- the respondent will pay the costs of arbitration; and
- each of the Plaintiffs waives their rights to participate in a class action and serve as a class representative.

JA207–09; JA218–20; JA277–79.

These terms of the Arbitration Agreements were conspicuously disclosed to Plaintiffs in their Loan Agreements. Plaintiffs had no barriers to access arbitration to resolve any dispute regarding the Loan Agreements and could have avoided arbitration entirely by opting out. Plaintiffs neither opted out of their Arbitration

Agreements nor pursued their claims in arbitration. Instead, in violation of their Arbitration Agreements, Plaintiffs commenced this and six other putative class actions in federal court.

C. Procedural History

Notwithstanding their clear agreements to arbitrate disputes arising out of their loans or their Loan Agreements, Plaintiffs filed seven separate complaints between 2017 and 2019 in the Eastern District of Virginia against more than thirty defendants, all of which are grounded in disputes over the legality of their loans.

Plaintiffs' suit against the Defendants here was filed in October 2018. JA9 at Docket Entry ("DE") No. 1. Like their other complaints, Plaintiffs' alleged that their loans with Plain Green, Great Plains, and MobiLoans were unlawful under Virginia's usury laws and that Defendants participated in the collection of loans principally through their having been shareholders of Think Finance, LLC or by appointing a member to the Board of Directors for Think Finance. JA21–22 ¶ 4.

The Sequoia Defendants moved the district court for a stay pending arbitration, and the Stinson Defendants moved for an order compelling arbitration. JA13–14 at DE Nos. 59, 65. All Defendants also moved to dismiss Plaintiffs' complaint and, in the alternative, to transfer this action to the Northern District of Texas pursuant to 28 U.S.C. § 1412, where Think Finance filed a petition pursuant to Chapter 11 of the Bankruptcy Code and where several other adversary actions

filed by consumer plaintiffs, including actions filed by these Plaintiffs, are pending. JA13 at DE Nos. 53, 54, 56, 57, 61, 63.

The district court issued a memorandum opinion denying all of Defendants' motions, except to grant the Sequoia Defendants' motion to stay pending arbitration as to claims arising from loans made by Mobiloans. JA334. The district court's memorandum focused all of its analysis of the arbitration issue on a single topic: the prospective waiver doctrine. JA355–83. In turn, the entirety of the district court's analysis of the prospective waiver doctrine turned on whether "the Arbitration Agreements purport to apply Tribal law exclusively." JA362. Because, according to the district court, the Arbitration Agreements and the loan contracts reflected an attempt to preclude Plaintiffs from asserting claims under federal and state law, the court held that both the Delegation Provisions and the Arbitration Agreements as a whole are not enforceable. *Id.*

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order denying a motion to compel arbitration under the Federal Arbitration Act. *See Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 453 (4th Cir. 2017), *cert. denied sub nom. Applied Underwriters Captive Risk Assur. Co. v. Minnieland Private Day Sch., Inc.*, 138 S. Ct. 926 (2018).

SUMMARY OF THE ARGUMENT

This dispute should be referred to arbitration—and the district court's order on appeal should be reversed—on the threshold ground that the Arbitration Agreements reserve for the arbitrator to determine whether they are enforceable and there is no basis for refusing to enforce this antecedent Delegation Provision. The district court's determination that it, and not an arbitrator, should decide whether the Arbitration Agreements are enforceable ignores the plain language of those Agreements stating that an arbitrator is to resolve "any dispute" regarding their validity, enforceability, or scope. Under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), this delegation provision must be enforced, "leaving any challenge to the validity of the Agreement as a whole for the arbitrator," unless "a party challenges the validity" of the delegation provision, *id.* at 71–72, in which case a court must then decide whether this specific provision is unenforceable, *see Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455 (4th Cir. 2017).

The district court refused to enforce the Delegation Provision here, but not because there is any proper legal basis for refusing to enforce it, specifically. Rather, the court reasoned that the Delegation Provision is not enforceable for the same reason that, according to the court, the Arbitration Agreements are purportedly not enforceable: that the Arbitration Agreements, as a whole, prospectively waive

Plaintiffs' federal and state law claims. But the district court did not address, nor did Plaintiffs demonstrate, any ground for invalidating that Delegation Provision "specifically," as was required under binding Supreme Court precedent (*id*. at 72) and this Court's decision in *Minnieland*, 867 F.3d at 455. The district court's stated concern that the Arbitration Agreements prospectively waive claims asserted under federal and state law is not a proper or even coherent basis for refusing to enforce the separate Delegation Provision, which simply and straightforwardly provides that an arbitrator shall decide any dispute concerning the "validity, enforceability, or scope" of the Arbitration Agreements.

A second and independent basis for referring this dispute to arbitration is that, even assuming for the sake of argument that the district court had properly determined that it, and not the arbitrator, has the authority to decide whether Plaintiffs' claims are arbitrable, the district court improperly applied "prospective waiver" here at the "arbitration enforcement" stage—i.e., where a party is seeking to enforce an agreement to arbitrate. This Court has articulated a clear rule that "prospective waiver" may be applied only at the "award-enforcement" stage—i.e., after an arbitral award has been made. *Aggarao*, 675 F.3d at 373. This doctrine may not be applied at the "arbitration-enforcement stage" to preclude arbitration. *See id.* (holding that a claimant "is not entitled to interpose his public policy defense [under 'the prospective waiver doctrine'] until the second stage of the arbitration-related

court proceedings—the award enforcement stage"). In light of the "'strong policy favoring arbitration,'" it is only *after* an arbitral award has made that a court may, upon application of the prospective waiver doctrine, properly determine whether a claimant has been unable to "effectively vindicate the substance" of federal claims. *Id.* at 373 & n.16.

This case is at the "arbitration-enforcement stage." Prospective waiver is therefore not a ground for refusing to refer this dispute to arbitration. Moreover, not only do the Arbitration Agreements expressly provide for the arbitration of "all federal, state or Tribal Law claims or demands," but Defendants have also made clear that they will not seek to preclude Plaintiffs from pursuing remedies for their federal and state statutory claims in arbitration. That record, alone, mandates that this dispute be referred to arbitration under *Aggarao*, where this Court compelled arbitration of claims containing a choice of Philippines law, notwithstanding that the defendants there (unlike Defendants here) argued "that Unites States law should not apply," because any prospect that the claimant might not effectively vindicate his rights under federal law could be addressed by the court *after* the arbitration occurred. 675 F.3d at 372 n.16.

The district court did not address, or even reference, this Court's decision in *Aggarao*. Nor did the court mention Defendants' clear and repeated statements that they will *not* seek to preclude Plaintiffs from asserting their federal and state claims

in arbitration. But under *Aggarao*, in light of the pre-award posture of this dispute, and in light of Defendants' clear representations concerning the arbitrability of Plaintiffs' federal and state claims, the prospective waiver doctrine is not a proper ground for refusing to send this dispute to arbitration in accordance with Plaintiffs' Agreements.

ARGUMENT

I. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE DELEGATION PROVISION IN THE LOAN AGREEMENTS

The language of the parties' Arbitration Agreements is clear that an arbitrator—not a court—is to resolve any "dispute" regarding the validity, enforceability, or scope of the Arbitration Agreements at issue. *See* JA208; JA219. Plaintiffs did not challenge the Delegation Provision specifically or articulate any distinct reason why it—apart from the Arbitration Agreements more generally—is unenforceable. Contrary to the district court's reasoning, the "prospective waiver" doctrine is also not a ground to refuse to enforce the Delegation Provision. That doctrine applies, if at all, only to an agreement to arbitrate *claims*—and, specifically, when a party is effectively prevented from pursuing statutory claims in an arbitration. It thus is addressed to the merits of a dispute and has no applicability to a separate, and separately enforceable, agreement to arbitrate the threshold issue of arbitrability. The district court erred in holding that it, and not an arbitrator, should decide whether the Arbitration Agreements are unenforceable. On this threshold

ground, the Court should reverse the order on appeal and refer this dispute to arbitration.

A. Under the Delegation Provision, It Is For the Arbitrator to Determine Whether the Arbitration Agreement Is Enforceable

The Arbitration Agreements entered into by Plaintiffs have a plain Delegation Provision, stating that an arbitrator is to resolve any "dispute" regarding the "validity, enforceability, or scope" of the Arbitration Agreements. JA208; JA219. In *Rent-A-Center v. Jackson*, the Supreme Court held that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,'" including the validity, enforceability, and scope of an arbitration agreement. 561 U.S. 63, 68–69 (2010); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (noting that parties can agree for arbitrators to decide arbitrability). Under *Rent-A-Center*, "the presence of a delegation provision narrows a court's role to determining whether there is a valid delegation agreement, and if there is such an agreement, a court must then enforce the delegation provision by compelling arbitration and reserving for the arbitrator issues that implicate the agreement to arbitrate as a whole." *U.S. ex rel. Beauchamp v. Academi Training Ctr., Inc.*, No. 1:11-cv-371, 2013 WL 1332028, at *6 (E.D. Va. Mar. 29, 2013) (internal quotations omitted); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, (2006) ("[U]nless the challenge is to the … clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"). A court then has no further role other than to refer

the dispute to arbitration. *See Henry Schein, Inc., v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

The district court did not cite or discuss this framework, as set out by the Supreme Court in *Rent-A-Center* and further developed by this Court in *Minnieland*. Instead, the district court sought to distinguish the Supreme Court's recent decision by quoting it for the proposition that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." JA357 (quoting *Schein*, 139 S. Ct. at 530). Under the district court's apparent reasoning and its reliance on this statement from *Schein*, a court could always decide for itself the enforceability of an arbitration agreement, because a court would need to first decide the validity of the arbitration agreement before enforcing an antecedent delegation provision. This reasoning improperly interprets *Schein* to have implicitly overruled *Rent-A-Center*, which clearly held that, unless there is a "challenge[] [to] the delegation provision specifically, we must treat it as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Center*, 561 U.S. at 72.

Not only does a district court lack the authority to declare that the Supreme Court has implicitly overruled itself. *See Libertarian Nat'l Comm., Inc. v. Fed. Election Comm'n*, 924 F.3d 533, 549 (D.C. Cir. 2019) ("Unless and until" the Supreme Court "expressly abrogates" its precedent, "inferior court[s] lack[]

authority to conclude that the Supreme Court's more recent case has, by implication, overruled an earlier precedent.") (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal alterations and quotations omitted)). But, contrary to the district court's reasoning, the Supreme Court's unanimous decision in *Schein* itself *rejected* the very notion suggested by the district court: that "a court must always resolve questions of arbitrability and that an arbitrator may never do so." *Schein*, 139 S. Ct. at 530. *Schein* declared "that ship has sailed," in light of, among other binding precedents, *Rent-A-Center*. *Id*. *Schein* also reiterated that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id.* at 531. A court's role in such circumstances is solely to determine whether there is a valid delegation provision and, when there is, "a court possesses no power to decide the arbitrability issue." *Id.* at 529.

In *Schein*, the Supreme Court "express[ed] no view about whether the contract at issue in fact delegated the arbitrability question to an arbitrator." *Id.* at 531. Here, however, there can be no dispute that—as the district court itself noted (JA356)—the Arbitration Agreements have a clear Delegation Provision that reserves for the arbitrator to decide any issue about the "validity, enforceability, or scope" of the Arbitration Agreements. This clear and unambiguous delegation provision requires

that an arbitrator, not a court, determine any challenge by Plaintiffs to the enforceability of their Arbitration Agreements.

B. The Doctrine of "Prospective Waiver" Is Not a Ground to Refuse to Enforce the Delegation Provision

1. The Issue Here Is Whether the Delegation Provision Should Be Enforced

The remaining question, then, is whether the Delegation Provision should be enforced. The Supreme Court and this Court have made clear how that inquiry must proceed.

A delegation provision is a separate "'agreement to arbitrate a gateway issue'" concerning arbitrability. *See Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70). A delegation provision is deemed a separate "written provision" "to settle by arbitration a controversy" under § 2 of the FAA. *Rent-A-Center*, 561 U.S. at 71. Just as a party may not challenge the validity of an arbitration agreement by challenging the validity as a whole of the contract of which it is a part, a party also may not challenge the validity of a delegation provision by challenging the validity of the more general agreement to arbitrate of which it is a part. *See Schein*, 139 S. Ct. at 530; *Rent-A-Center*, 561 U.S. at 70–71. The district court failed to address or apply this "severability rule," which is mandated by § 2 of the FAA and the Supreme Court. *See id*. A delegation provision is, as a binding matter of federal law, severable from an agreement to arbitrate a dispute on the merits. *See Rent-A-*

Center, 561 U.S. at 70–71; *see generally Buckeye*, 546 U.S. at 449 (challenge to "validity of the contract as a whole" "must go to the arbitrator" under this rule).

A delegation provision therefore must be treated as valid under § 2 of the FAA—and enforced pursuant to Sections 3 and 4 of the FAA—leaving any challenge to the enforceability of the agreement to arbitrate as a whole to the arbitrator. *See Rent-A-Center*, 561 U.S. at 72. As the Supreme Court held most recently in *Schein*, "[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." 139 S. Ct. at 529. A delegation provision therefore must be enforced, separate and apart from the agreement to arbitrate of which it is a part, "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). That is, a delegation provision must be enforced pursuant to the FAA unless there is a specific ground for refusing to enforce that "precise" delegation provision, such as, for example, that the delegation provision, in particular, was procured by fraud or is unconscionable as a matter of state contract law. *See Rent-A-Center*, 561 U.S. at 71 (any claim of "fraud in the inducement" must be directed to the "precise agreement to arbitrate at issue"); *id.* at 73–74 (unconscionability challenge under state law must be "specific to the delegation provision"). Any doubts on this issue, as with arbitrability generally, must be

"resolved in favor of arbitration." *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

2. "Prospective Waiver" Concerns the Enforceability of the Arbitration Agreements, But that Is for the Arbitrator to Decide

Plaintiffs did not assert a specific challenge to the enforceability of the Delegation Provision. Nor could they. The Delegation Provision simply and straightforwardly states that any dispute concerning "the validity, enforceability, or scope" of "this Agreement to Arbitrate" "will be resolved by arbitration." *See* JA208; JA219. Plaintiffs did not provide any basis—and there is none—for refusing to enforce this severable, antecedent agreement to arbitrate all disputes concerning the validity and enforceability of the Arbitration Agreements.

Plaintiffs focused their opposition to Defendants' arbitration motions on the doctrine of "prospective waiver." But that doctrine is addressed to the enforceability of the Arbitration Agreements or even the Lending Agreements as a whole. *See* DE No. 84 at 5–24; DE No. 86 at 12–16. Under *Schein* and *Rent-A-Center*, this dispute concerning the enforceability of the agreements to arbitrate as a whole is not a basis for refusing to enforce a delegation provision. As *Schein* recently made clear: "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." 139 S. Ct. at 530.

Here, whether prospective waiver makes the Arbitration Agreements unenforceable, as Plaintiffs contend, is an "arbitrability question that the parties have delegated to an arbitrator," *id.*, because the Arbitration Agreements expressly state that disputes concerning their enforceability or scope "will be resolved by arbitration," *see* JA208; JA219. Defendants are seeking to enforce this *Delegation Provision*, so that the arbitrator can decide, in accordance with the plain terms of this provision, Plaintiffs' contention that the Arbitration Agreements are not enforceable, on the ground that they will putatively deprive them of effective relief on their claims under federal and Virginia law.

3. This Court Has Not Addressed the Enforceability of the Antecedent Delegation Provision in the Arbitration Agreements

The district court incorrectly held that the "prospective waiver" doctrine is a ground for refusing to enforce the Delegation Provision in the Arbitration Agreements. *See* JA357. While the district court relied heavily on this Court's decisions in *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), and *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), these cases did not—as required by *Schein* and this Court's decision in *Minnieland*—resolve the threshold, and dispositive, issue presented in this appeal: whether the antecedent Delegation Provision requires referring this dispute to arbitration, for the arbitrators to determine whether the Arbitration Agreements are enforceable on the ground asserted by Plaintiffs.

First, in *Hayes*, this Court discussed the applicable delegation provision in a footnote. It stated that the plaintiffs there had "challenged the validity of that delegation with sufficient force to occasion our review." 811 F.3d at 671 n.1. But the Court did not actually rule on whether the delegation provision was enforceable and, instead, proceeded to address the enforceability of the agreement to arbitrate as a whole. It is not enough for a party seeking to avoid enforcement of a delegation provision to utter words to challenge it. Rather, in such a case, the court must decide whether the party challenging the provision has shown that it is unenforceable. Indeed, after *Hayes* was decided, this Court has held that, when a party challenges the enforceability of a delegation provision, a court "*then must decide* whether the delegation provision is unenforceable 'upon such grounds as exist at law or in equity,'" pursuant to Section 2 of the FAA. *See Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017) (emphasis added; holding that under *Rent-A-Center* the two-step process is to, first, decide whether a party has challenged the delegation provision and, second, decide whether the provision is unenforceable); *see also Rent-A-Center*, 561 U.S. at 71 ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, *the federal court must consider the challenge* before ordering compliance with that agreement.") (emphasis added).

Second, in both *Hayes* and *Dillon*, this Court focused on the enforceability of the agreements to arbitrate as a whole, not the enforceability of the antecedent agreement to delegate to the arbitrator any disputes about arbitrability or the validity of the agreements to arbitrate. In *Hayes* and *Dillon*, this Court stated that the doctrine of prospective waiver looks to whether an arbitration agreement is unenforceable because it operates to waive "federal substantive statutory rights." *Dillon*, 856 F.3d at 334; *see also Hayes*, 811 F.3d at 674 (under the prospective waiver doctrine, parties may not effect a "'substantive waiver of federally protected civil rights' in an arbitration agreement") (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009)). That is, this Court addressed whether the agreements to arbitrate were unenforceable because they waived federal claims. This Court's decisions make plain throughout that they were addressing the enforceability of the agreements to arbitrate *as a whole*, not the delegation provision in those agreements, in particular.[6]

[6] In *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019), the Second Circuit ruled that plaintiffs' arbitration agreements with the Native-American-tribe-affiliated entity Plain Green, LLC, were not enforceable on, among other grounds, prospective waiver. *See id.* at 126–28. The court did not, however, invoke prospective waiver to invalidate the delegation provision at issue. Rather, the court reasoned it could bypass this provision because the plaintiffs in that case had alleged in their complaint that the delegation provision was "fraudulent." *Id.* at 126. Plaintiffs made no such allegation or assertion here; and, in any event, as noted above, that would not be a proper approach to this issue in the Fourth Circuit. In *Minnieland*, this Court held that, if a party has specifically challenged the enforceability of a delegation provision, a court "then must decide whether the delegation provision is unenforceable 'upon such grounds as exist at law or in equity.'" 867 F.3d at 455 (quoting 9 U.S.C. § 2). It is thus not enough in the Fourth

Here, Defendants seek to enforce the Delegation Provision—so that the arbitrator can determine whether the Arbitration Agreements are enforceable. The "prospective waiver" doctrine is not a ground for refusing to enforce a delegation provision. Indeed, while the Supreme Court has never applied the prospective waiver doctrine to refuse to enforce any agreement to arbitrate—and has referred to the doctrine most recently as "dicta," *see American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 n.2 (2013)[7]—neither the Supreme Court nor this Court has ever suggested that prospective waiver would be a basis for not enforcing an antecedent *delegation provision*. Nor would that make any sense, because prospective waiver addresses whether an agreement to arbitrate as a whole is

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Circuit for a party seeking to avoid an arbitration agreement to simply allege or assert a "challenge" to a delegation provision; a court must *decide* whether that challenge has merit before bypassing the delegation provision.

[7] Defendants recognize that this Court has applied the doctrine of prospective waiver to invalidate arbitration agreements. Respectfully, though, prospective waiver is not a proper basis for invalidating an agreement to arbitrate under the Federal Arbitration Act. This court-made concept stems from arbitration-specific "public policy" concerns. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). It is therefore not a proper basis "at law or in equity" for invalidating contracts under Section 2 of the FAA. As the Supreme Court has made clear: "Courts may not" "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citations omitted, emphasis in original); *see also Rent-A-Center*, 561 U.S. at 67–68 (noting that the FAA "places arbitration agreements on an equal footing with other contracts" and "[l]ike other contracts" they may be invalidated only by "'generally applicable contract defenses'") (quoting *Doctor's Assocs. Inc.*, 517 U.S. at 687).

unenforceable, on the ground that it purports to improperly waive a party's federal substantive rights.

In the absence of a delegation provision, such disputes about the applicability of prospective waiver could indeed be for a court to decide. *See First Options of Chicago*, 514 U.S. at 943 ("If . . . the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."). But, under binding Supreme Court authority, a delegation provision is an antecedent agreement to arbitrate any dispute about, *inter alia*, the enforceability of an agreement to arbitrate and a court must enforce that antecedent agreement absent a specific basis "at law or in equity," 9 U.S.C. § 2, not to enforce it. *See Schein*, 139 S. Ct. at 529; *Rent-A-Center*, 561 U.S. at 70, 73; *Minnieland*, 867 F.3d at 455.

The doctrine of "prospective waiver" is not a proper basis for refusing to enforce a delegation provision, as the district court incorrectly held. It is, at most, a basis for refusing to enforce an agreement to arbitrate as a whole—as this Court ruled in *Hayes* and *Dillon*. Defendants, however, seek to enforce the antecedent Delegation Provision in the Arbitration Agreements, and the doctrine of prospective waiver is not a proper or even coherent basis for refusing to enforce that provision.

4. The District Court's Attempt to Invalidate the Delegation Provision Fails Under Supreme Court Case Law and Returns to the Old Judicial Hostility to Arbitration

The district court tried to address this deficiency by reasoning that a "delegation provision cannot be 'valid' if it resides in a contract that disclaims federal law, as that would place 'an arbitrator in the impossible position of deciding the enforceability of the agreement without authority to apply any applicable federal or state law.'" JA357 (quoting *Smith v. W. Sky Fin.*, LLC, 168 F. Supp. 3d 778, 786 (E.D. Pa. 2016)).

That presupposes the very issue that, under the Delegation Provision, is for the arbitrator to address. Under the plain terms of the Delegation Provision, it is for the arbitrator to determine whether the Arbitration Agreement is enforceable. It is not for a court to presuppose that it is "impossible" for the arbitrator to decide this issue because, when the *court* undertakes its own review of the agreement to arbitrate and applies the doctrine of prospective waiver, the *court* determines that the underlying agreement to arbitrate prospectively waives application of federal or state law. Courts are not permitted to refuse to enforce a delegation provision by taking a sneak peek at arbitrability issues in this manner. *See De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795 (S.D. Ohio 2019) (noting that "[a]n effective vindication challenge is a challenge to the enforceability of the arbitration agreement" and, holding that, "[a]fter *Henry Schein* …, these challenges are heard

by the arbitrator where, as here, the parties' agreement includes a delegation clause"). The Supreme Court, in *Schein*, made this clear when it held that a court may not refuse to enforce a delegation provision on the ground that, in the court's view, an assertion that the underlying claims are arbitrable is "wholly groundless." Even "[i]n those circumstances, a court possesses no power to decide the arbitrability issue." *Schein*, 139 S. Ct. at 529.

Under *Schein*, a court may not—as the district court did—refuse to enforce a delegation provision on the ground that, in the court's view, the Arbitration Agreements "unambiguously" "contravene the prospective waiver doctrine." JA362. Just as a court may not refuse to enforce a delegation provision on the basis that an arbitrability assertion is "wholly groundless," a court also may not refuse to enforce a delegation provision on the ground that an agreement to arbitrate "unambiguously attempt[s] to apply tribal law to the exclusion of federal and state law," *id.* *See Schein*, 139 S. Ct. at 530 ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."). The Supreme Court's jurisprudence is emphatic that this is for an arbitrator to decide under a delegation provision.

Plaintiffs' other attempt in the district court to assert that the Delegation Provision itself is not enforceable has also been directly addressed and rejected by

the Supreme Court. Plaintiffs reasoned that the Delegation Provision is unenforceable on the ground that, under Virginia law, the underlying Lending Agreements are void because they allegedly charge rates of interest in excess of what is allowed under Virginia law. DE No. 84 at 22; DE No. 86 at 8. This is two steps ahead of the appropriate inquiry. In making this argument, Plaintiffs are not only improperly looking beyond the Delegation Provision—the enforceability of which is all that was at issue on Defendants' arbitration motions—but are also improperly looking beyond the Arbitration Agreement to a *merits* question concerning the enforceability of the underlying Lending Agreement. *See Schein*, 139 S. Ct. at 529–30; *Rent-A-Center*, 561 U.S. at 69–70.

The Supreme Court has rejected this very argument. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), two consumers alleged in a putative class action that they were charged usurious interest rates under Florida law in connection with check-cashing transactions. The consumers sought to avoid their agreement to arbitrate on the ground that, under Florida law, the underlying contract should be deemed illegal and void *ab initio*. The Supreme Court rejected this attempt to avoid an agreement to arbitrate and reasoned that, under the FAA-mandated doctrine of severability, the agreement to arbitrate is "enforceable apart from the remainder of the contract," even if the underlying contract would be considered void as a matter of state law. *Id.* at 446. The Supreme Court held: "[A] challenge to the

validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Plaintiffs cited this Court's decision in *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449 (4th Cir. 2017). *See* DE No. 84 at 22; DE No. 86 at 8. But, for this issue, that case is the exception that proves the rule. In *Minnieland*, this Court addressed a provision of Virginia law that rendered void any insurance contract that "'[d]eprive[s] the courts of this Commonwealth of jurisdiction in actions against the insurer.'" 867 F.3d at 452. As this Court explained, the FAA generally preempts any state law that limits the enforceability of agreements to arbitrate. *See id.* at 453–54. In the specific area of insurance regulation, however, the McCarran-Ferguson Act provides that "'[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.'" *See id.* at 453 (quoting 15 U.S.C. § 1012). This federal statute effects so-called "reverse preemption" and allows the Commonwealth of Virginia to deem invalid agreements to arbitrate in the specific area of insurance regulation. *See id.* In this very narrow context, the Fourth Circuit held that the delegation provision at issue was itself an "insurance contract" under Virginia law and, as such, was invalid from its inception under the "state policy choice that insureds should have the option to seek

enforcement of Virginia's insurance laws and regulations in court, rather than through arbitration." *Id.* at 456–57.

Plaintiffs argued that "[n]othing is different about the delegation provision here." DE No. 84 at 22; DE No. 86 at 9. But there are two critical differences. Namely, Plaintiffs do not point to—nor are Defendants aware of—any parallel provisions of either (i) Virginia law, that would purport to preserve claimants' rights to seek enforcement in court of laws governing permissible rates of interest on loans, or (ii) federal law, that would allow for "reverse preemption" of any such rule of state law. Without *both* of these provisions, the Supreme Court's decision in *Buckeye Check Cashing* forecloses Plaintiffs' argument that the Delegation Provision is not enforceable because the Lending Agreements as a whole are purportedly void as a matter of Virginia law.

As the Supreme Court has held in *Buckeye Check Cashing*—and its decisions in *Rent-A-Center* and *Schein* reinforce—the Delegation Provision is a severable, antecedent agreement to arbitrate all disputes concerning the scope and enforceability of the Arbitration Agreements. A court may not refuse to enforce this antecedent agreement on the ground that the Arbitration Agreements or the Lending Agreements as a whole are not enforceable. Absent a specific basis for refusing to enforce the Delegation Provision—and there is none here—it must be enforced.

* * *

The Supreme Court has recognized repeatedly that the FAA "was designed to allow parties to avoid the 'costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts,'" thereby "reversing centuries of judicial hostility to arbitration agreements." *E.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (same); *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 302 (2010) (same); *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (same); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (same). To ensure that Congress's policy choice is respected, the Supreme Court has not hesitated to step in when lower courts fail to enforce parties' arbitration agreements in accordance with longstanding contract law, including agreements to submit disputes regarding arbitrability to an arbitrator. *E.g.*, *Schein*, 139 S. Ct. at, 531 (vacating lower court's order that refused to enforce delegation provision); *Rent-A-Center*, 561 U.S. at 76 (reversing order declining to enforce delegation provision); *see also Am. Express Co.*, 570 U.S. at 233; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339 (each reiterating that lower courts should enforce arbitration agreements according to their terms).

To bypass a delegation provision absent a specific ground for refusing to enforce it—as happened here—harkens back to the old judicial antipathy to arbitration that Congress overrode in enacting the Federal Arbitration Act and that the Supreme Court has been at pains to eradicate in its contemporary jurisprudence. The Delegation Provisions are straightforward, simple, and enforceable here, and there was no proper basis—nor did the district court provide one—for refusing to enforce these separate agreements to arbitrate arbitrability. It is for an arbitrator, not a court, to determine the enforceability of Plaintiffs' Arbitration Agreements, and this dispute should be referred to arbitration for that purpose.

II. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE AGREEMENTS TO ARBITRATE PURSUANT TO THE DOCTRINE OF PROSPECTIVE WAIVER

The threshold question on this appeal is whether the Delegation Provision should be enforced, and the answer to that question, as shown above, is yes. The doctrine of "prospective waiver" is not applicable to the antecedent question concerning the validity of the Delegation Provision and is not a ground for refusing to enforce it. The Delegation Provision should be enforced and the action against Defendants should be stayed pending arbitration. The Court should go no further on this appeal under binding Supreme Court case law. But, even assuming for the sake of argument that the district court had the authority to decide whether the doctrine

of "prospective waiver" was a ground for refusing to enforce the Arbitration Agreements as a whole, that doctrine would still not apply.

A. The District Court Does Not Address that the Arbitration Agreements Provide, and Defendants Acknowledge, that Federal and State Claims Are To Be Resolved in Arbitration

Most fundamentally, the Arbitration Agreements do *not* provide that any federal or state statutory claims may not be pursued in arbitration. That is the entire predicate of the district court's order, but it is simply not true. Each of the Arbitration Agreements at issue here plainly provides 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." *See* JA208; JA219. With this plain language, it certainly cannot be said with the requisite "'positive assurance'" that "'the arbitration clause is not susceptible of an interpretation'" that allows for Plaintiffs to assert their federal and state law claims; and, under federal arbitration law, all "'[d]oubts 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)).

The district court ignored not only this mandatory presumption but also ignored this contractual provision entirely—it does not quote it or even refer to it anywhere in its opinion—even though Defendants highlighted that the Arbitration

Agreements provide for the resolution of all claims asserted under federal or state law.[8] The district court likewise simply ignored Defendants' repeated, express representations that they will *not* take the position in an arbitration that Plaintiffs have prospectively waived or otherwise may not pursue remedies for their claims under federal and Virginia law.[9]

The doctrine of prospective waiver is solely addressed to whether a party may pursue their statutory claims in an arbitration, but there is no mention anywhere in the district court's decision that Defendants have provided clear assurances that Plaintiffs may arbitrate the federal and state claims they have asserted in this action. Plaintiffs too, inexplicably, had nothing to say about Defendants' representations.

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[8] *See, e.g.*, DE No. 60 at 1–2 ("Plaintiffs *can* take their claims to arbitration on an individual basis—just as they agreed to do in each of their consumer loan agreements. In individual arbitration, Plaintiffs have the ability to pursue any and all relevant claims against all of the Defendants, and the arbitrator can resolve these claims.") (emphasis in original); *id.* at 9 ("Plaintiffs had no barriers to access arbitration to resolve any dispute."); DE No. 66 at 13 ("This quite clearly provides for arbitration of Plaintiffs' federal claims."); *id.* at 15 ("Plaintiffs thus cannot resist arbitration on the ground that the Agreements to Arbitrate purportedly operate as a "prospective waiver" of their RICO claims. They do not operate that way . . . ."); *id.* at 29 ("[T]he defendant has acknowledged that plaintiffs' claims should be referred to arbitration.").

[9] *See, e.g.*, DE No. 66 at 15 n.8 ("Sequoia is not going to assert in arbitration proceedings that Plaintiffs may not pursue or have waived their RICO claims or their claims under Virginia law."); *see also id*. at 28 ("Sequoia has made clear—and states again—that it will not assert that Plaintiffs are barred from pursuing their claims under RICO and Virginia law in arbitration.); *id.* at 30 ("Sequoia reiterates for a third time" that "it will not assert that these Agreements" "waiv[e] federal substantive rights.").

But Defendants' representation should make plain to Plaintiffs and the Court—in a manner that apparently was not in *Hayes* or *Dillon*—that Plaintiffs will *not* face any defense in the arbitration proceedings that they have "prospectively waived" their right to pursue remedies for their claims against Defendants under federal and state law.

On this record, it does not suffice for the district court to quote choice-of-law and other provisions in the Lending Agreements. JA363–69. As an initial matter, it is well-established that a provision in contract that a state or foreign jurisdiction's law will apply to a contract does *not* displace federal arbitration law. *See Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 698 n.7 (4th Cir. 2012) ("Unquestionably, a contract's general choice-of-law provision does not displace federal arbitration law if the contract involves interstate commerce."). Nor does such a choice-of-law provision operate to foreclose a contracting party from pursuing claims under another state's law or federal law. *See Sanchez v. Lasership, Inc.*, No. 1:12-cv-246, 2012 WL 3730636, at *5 (E.D. Va. Aug. 27, 2012) (holding that the governing law provision in the contract which indicated that Virginia law was applicable, does not bar the application of Massachusetts statutory law because the provision only applies to matters of contract interpretation). A choice-of-law provision states what law will apply to the interpretation of the contract; it does not have the sweeping effect that Plaintiffs and the district court claim to automatically

foreclose Plaintiffs from pursuing any relief for their claims in an arbitration. JA363–69; DE No. 84 at 16; DE No. 86 at 15.

The district court also mischaracterized the Arbitration Agreements. Not only does the court fail altogether even to mention the most plainly applicable provision directly addressing what claims are subject to arbitration—and providing that all "claims or demands" arising under federal and state law "will be resolved by Arbitration"—but it elides other provisions that show the Arbitration Agreements do not exclude the application of federal law to arbitration proceedings. For example, the Plain Green Agreement provides: "The Agreement to Arbitrate also comprehends the application of the Federal Arbitration Act." JA207. In these circumstances, there is, at a bare minimum, at least some "uncertainty" concerning whether Plaintiffs will be able to pursue their claims under federal and state law in arbitration. And this Court has held that where the applicability of prospective waiver is uncertain "the arbitrator should determine in the first instance whether the choice of law provision would deprive a party of those [federal statutory] remedies." *Dillon*, 856 F.3d at 334.

Plaintiffs, as the parties seeking to avoid their agreement to arbitrate, have the burden to establish that they cannot effectively vindicate their rights, and "[m]ere speculation about how the terms of the arbitration agreement might be construed by the arbitrator or how the agreement might affect the prospective litigant is

insufficient to carry that burden." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 283 (4th Cir. 2007) (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90–91 (2000)). This burden is "a substantial one" and it cannot be satisfied by "speculation about difficulties that *might* arise in arbitration." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 286–87 (emphasis in original); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

The district court, however, insisted that Plaintiffs *will definitely* be deprived of their ability to pursue their federal and state claims in arbitration (JA362), notwithstanding an Arbitration Agreement that expressly provides that their federal and state statutory claims "will be resolved by arbitration" and Defendants' unambiguous representations that Plaintiffs may pursue remedies for their claims under federal and state law in arbitration. *See supra* nn.8 & 9. At best for Plaintiffs, their arguments about how the doctrine of prospective waiver will be applied in the arbitration is mere speculation about how the arbitration will turn out. Apparently, in light of Defendants' representations, Plaintiffs intend to be the party to argue in the arbitration proceeding that they may not pursue their federal and state law claims. It is quite obvious why Plaintiffs are trying to do this—to avoid their Arbitration Agreements—but the law does not permit them to manufacture a basis for making an agreement to arbitrate unenforceable by ignoring parts of the record that show they are *not* at risk of prospective waiver.

Under *Schein* and *Rent-A-Center*, it is for the arbitrator to decide the scope of the Arbitration Agreements and whether they are enforceable. The district court is not permitted to short-circuit that process by skipping ahead of the Delegation Provision to address and decide for itself whether Plaintiffs' claims are arbitrable or whether their Arbitration Agreements are enforceable.

B. Binding Supreme Court Case Law Provides That Prospective Waiver May Not Be Invoked in the Posture of This Action

Even assuming all of the above away—i.e., even assuming that the district court had the authority to decide whether the Arbitration Agreements are enforceable and disregarding both that those Agreements expressly provide for resolution of Plaintiffs' federal and state claims in arbitration and Defendants' representations that Plaintiffs may pursue these claims in the arbitration—prospective waiver would still not apply to prevent arbitration of Plaintiffs' claims here.

The Supreme Court and this Court have both made clear that "prospective waiver" may *not* be invoked to invalidate an agreement to arbitrate where there is a subsequent opportunity for federal court review. This Court has observed that the Supreme Court has "qualified the doctrine, recognizing that a prospective waiver would contravene public policy *only where there is 'no subsequent opportunity for review' in federal court*." *Aggarao*, 675 F.3d at 371 (emphasis added; quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995)); *see also Sky Reefer*, 515 U.S. at 540 (noting that it is "premature" to decide whether an

agreement prospectively waives statutory claims when a party "seek[s] only to enforce the arbitration agreement"; "[w]ere there no subsequent opportunity for review *and* were we persuaded [of prospective waiver] 'we would have little hesitation in condemning the agreement as against public policy'") (emphasis added; quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

This is because, as the Court explained in *Aggarao*, the proper question in applying the doctrine of prospective waiver is whether a claimant's rights will be "effectively vindicate[d]." *Aggarao*, 675 F.3d at 373 n.16. As this Court has established in *Aggarao*, the substance of a party's rights under U.S. federal law may be effectively vindicated in an arbitration under another sovereign's laws—in that case, the law of the Philippines—even where an arbitrator ultimately determines that U.S. federal law should *not* be applied to the merits of the dispute. *See id.* (holding that it is premature to apply the doctrine of prospective waiver at the "arbitration-enforcement stage" because "[i]t is possible that the Philippine arbitrator(s) will apply United States law … or that Aggarao will be able to effectively vindicate the substance of those claims under Philippine law and obtain an adequate remedy"). A court must wait until *after* an arbitral award has been rendered to evaluate whether a party's federal rights have been "effectively vindicate[d]" through an arbitration. That is not a determination a court can make by simply reading the provisions of the

arbitration agreement. *See id.*; *see also id.* at 372 & n.15 (pointing out that, in *Sky Reefer*, the Supreme Court held it was "premature" to apply prospective waiver before the award-enforcement stage where the agreement provided for the application of Japanese law but it "had not been established 'what law the arbitrators will apply … or whether [the plaintiff would] receive diminished protection as a result'") (alterations in *Aggarao*; quoting *Sky Reefer*, 515 U.S. at 540).

This Court has therefore articulated a firm rule that, under Supreme Court precedent, a federal court may not apply the doctrine of prospective waiver at the "arbitration-enforcement" stage—i.e., where this case is now, to determine whether the arbitration agreement should be enforced—but only at the "award-enforcement" stage, i.e., after the arbitration has concluded and when the court will have an opportunity to review the award. *See Aggarao*, 675 F.3d at 373. That Fourth Circuit and Supreme Court precedent applies directly here and disposes of this appeal on this independent ground.[10]

[10] In *Gingras*, the Second Circuit held that plaintiffs' arbitration agreements with Plain Green, LLC were not enforceable on the ground that they "appear[] to disallow claims brought under federal and state law." 922 F.3d at 127. The court invoked a Supreme Court decision suggesting, *in dicta*, that there is a prospective waiver doctrine and relied on this Court's decision in *Hayes* that applied it. *See id.* (citing *Am. Express Co.*, 570 U.S. at 235–36; *Hayes*, 811 F.3d at 674). But neither *Gingras* nor *Hayes* discussed or even cited the rule from the Supreme Court and this Court that the doctrine of prospective waiver has no application at the arbitration-enforcement stage.

Under *Mitsubishi Motors* and *Sky Reefer*, prospective waiver may not be invoked as this stage of the proceedings to refuse enforcement of the Delegation Provision or the Arbitration Agreements as a whole. Rather, a court may only apply that doctrine *after* the arbitration has been conducted, upon review of the award. That approach is not only mandated by the Supreme Court, but eminently sensible because a court cannot be certain that an arbitrator will deem federal statutory claims effectively waived until the arbitration has actually taken place and the arbitrator has had a chance to consider that issue. That is even more so here, in light of Defendants' representations that Plaintiffs may pursue their federal and state statutory claims in arbitration and the clause in the Arbitration Agreement providing for resolution of claims asserted under federal and state law. JA208; JA219; *supra* nn.8 & 9.

In any event, Supreme Court and Fourth Circuit case law mandates that prospective waiver may not be invoked in the posture of this case to refuse to enforce the Arbitration Agreements. The district court failed to address this ground, too, for why the prospective waiver doctrine cannot apply at this stage of the proceedings. Plaintiffs, for their part, asserted that "a federal court will have no opportunity to review the arbitration award." DE No. 84 at 23; DE No. 86 at 10. That is not true. Under Fourth Circuit law, the district court will retain jurisdiction over this action to review any final award in arbitration, because the Defendants sought a stay of this action pending arbitration pursuant to Section 3 of the FAA, DE No. 60 at 29; DE

No. 66 at 1, 25–26, 30. *See Aggarao*, 675 F.3d at 374. This was not addressed in *Dillon* or *Hayes*. But under binding Supreme Court and Fourth Circuit law, the doctrine of prospective waiver cannot, in these circumstances, be applied at this stage in order to refuse to enforce either the Delegation Provision or the Arbitration Agreements.

It is for the arbitrator to decide whether, as Plaintiffs contend, the doctrine of prospective waiver makes the Arbitration Agreements unenforceable. The district court will have a chance to review the award pursuant to the FAA after the arbitral proceedings have concluded. Defendants fully expect that the arbitrator will allow Plaintiffs to pursue their claims under federal and state law, in light of their representations in connection with this motion and the clear language of the Arbitration Agreements providing that claims under federal and state law "will be resolved by arbitration." If, for some reason, the arbitrator determines that Plaintiffs may not pursue their claims, they may return to court to assert them. But at this stage of this case, under binding Supreme Court law, the Court must enforce the Delegation Provision and refer Plaintiffs' claims against Defendants to arbitration.

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 against Defendants 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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REQUEST FOR ORAL ARGUMENT

Oral argument is warranted and respectfully requested in this appeal. The Court may benefit from the opportunity to pose questions to counsel regarding the issues presented by this appeal, which raises significant questions concerning the enforcement of a delegation provision in an arbitration agreement and arbitrability under the Federal Arbitration Act.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), because this brief contains 11,954 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.

/ s / Stephen D. Hibbard
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CERTIFICATE OF SERVICE

On November 26, 2019, 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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