No. 19-15707

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMETRA BRICE, EARL BROWNE, JILL NOVOROT, ON BEHALF OF THEMSELVES AND ALL INDIVIDUALS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

PLAIN GREEN, LLC,
Defendant,

and

HAYNES INVESTMENTS, LLC; L. STEPHEN HAYNES;
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California, No. 3:18-cv-01200-WHO (Orrick, J.)

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

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

Counsel for Amicus Curiae *Native American Financial Services Association*

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF AMICUS CURIAE

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

NAFSA's member tribes face several barriers to economic prosperity, including extreme rural isolation, which eliminates their ability to leverage gaming and other brick-and-mortar consumer-based industries as effective tools to stimulate their economies. NAFSA members have found the internet and e-commerce to be great equalizers in overcoming such isolation and providing for their people. For example, tribes have formed businesses—acting as arms of their tribal governments—to provide financial services to consumers that traditional banking interests are unwilling to serve. Harnessing the potential of e-commerce is vital to ensuring that American Indian tribes have not only the right, but also the ability, to exercise self-determination. And importantly, these tribes have promulgated and actively enforced sophisticated financial-services laws and regulations for many years, hiring nationally respected attorneys and banking professionals to assure regulatory compliance.

By creating tribal businesses, tribal leaders have filled the gap in federal funding that tribes receive for basic social services, while additionally working to alleviate generational reservation poverty.

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

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

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus, its counsel, and AWL, Inc. (a lending company owned by the Otoe-

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

Appellants' opening brief demonstrates that the loan agreements' delegation clause requires that an arbitrator, not a court, resolve challenges to the enforceability of the arbitration agreements. Appellant's Opening Br. at 23-38. NAFSA supports those arguments and will not repeat them here.

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

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

If the Court addresses the validity of the arbitration provisions, NAFSA urges the Court to reject the district court's ruling that GPL's arbitration provision is unenforceable because it forces plaintiffs to give up in arbitration federal statutory rights that they would have in litigation, thereby violating the "prospective-waiver" doctrine. The GPL arbitration provision explicitly adopts for arbitration the same body of federal law that would apply in litigation, namely the federal laws applicable to tribal entities under the Indian Commerce Clause. Adopting the same federal law for arbitration that would apply in litigation is by definition not a prospective-waiver violation.[3]

The district court's prospective-waiver ruling rested principally on *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), which each held that an arbitration agreement violated the prospective-waiver doctrine. But the agreements in those cases expressly waived the application of any federal law. Here, as just noted, GPL's agreement expressly adopts federal law. The decision below also relied on various other provisions in the arbitration agreement. None of those provisions

[3] Appellants' brief explains why Plain Green's arbitration provision likewise does not effect a prospective waiver. *See* Appellants' Opening Br. at 38-45. NAFSA agrees with those arguments.

waives federal law—certainly not unambiguously, as is required for a court not to enforce an arbitration agreement.

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

Finally, reversal is warranted because unduly restricting the ability of tribes and tribal businesses to access arbitration will stymie needed economic development.

ARGUMENT

I. PLAINTIFFS AGREED TO RESOLVE THEIR CLAIMS THROUGH BINDING ARBITRATION.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, was enacted to combat widespread "judicial hostility to arbitration." *New Prime Inc. v. Olivera*, 139 S. Ct. 532, 543 (2019). It therefore adopted a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quotations omitted). Under the FAA, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

This is a straightforward case for compelling arbitration under the FAA. Plaintiffs have never disputed that they each agreed to arbitrate "any dispute" under their loan agreement. ER209-10; ER105-07. Nor have they denied that each of their claims is a "[d]ispute" as defined in the loan agreements, i.e., a "claim or

controversy of any kind between [the borrower] and [the lender] … involving this Agreement or the Loan[.]" *Id.* The district court likewise did not hold that plaintiffs' claims fall outside the agreement. There is thus no question that plaintiffs agreed to arbitrate the claims they now seek to litigate. The only question is whether the arbitration agreements are enforceable. For the reasons explained in the balance of this brief, they are.[4]

II. THE INDIAN COMMERCE CLAUSE GIVES CONGRESS PLENARY AND EXCLUSIVE POWER TO REGULATE INDIAN AFFAIRS.

Federal law has long recognized that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quotation marks omitted). At the same time, Congress has "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that Congress's power with respect to Indian tribes has consistently been described as "plenary and exclusive"). That power derives from the Indian Commerce Clause, which

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[4] Because Brice and Novorot executed materially identical loan agreements with GPL, this brief cites only to Brice's. Browne's agreement with Plain Green was not attached to the complaint, but plaintiffs have agreed that Darlene Gibbs's Plain Green loan agreement, attached to defendants' motion to dismiss, is "similarto the one Browne signed." ER006-07.

provides that "Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. In addition to empowering Congress, and only Congress, this clause "protect[s] tribal self-government from state interference." *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 574 (10th Cir. 2000) (citation omitted).

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

The district court denied defendants' arbitration motions on the ground that the arbitration provisions are unenforceable because they violate the prospective-waiver doctrine. ER009-18. Under that doctrine, "a prospective waiver of a party's right to pursue statutory remedies" under federal law is unenforceable "as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). This "judge-made exception to the FAA . . . serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the 'effective vindication' of a federal statutory right." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (citation omitted).

The arbitration provisions here do not violate the prospective-waiver doctrine. GPL's provision makes clear that any arbitration is governed by the same body of federal law that would apply in litigation. That is not a prospective waiver. The provision's language adopting federal law also distinguishes this case

from *Hayes* and *Dillon*, because the arbitration provision in each of those cases expressly disclaimed the application of any federal law.

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

The FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Parties may "choose to have portions of their contract governed by the law of Tibet [or] the law of pre-revolutionary Russia." *Id* (citation omitted). Consistent with this principle, this Court has enforced a choice-of-law clause calling for the application of English law. *See Hatfield v. Halifax, PLC*, 564 F.3d 1177, 1182 (9th Cir. 2009); *accord Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643, 646 (4th Cir. 2010) (likewise enforcing a clause adopting English law). And other courts of appeals have enforced similar provisions. *See, e.g.*, *Barbey v. Unisys Corp.*, 256 F. App'x 532, 533-34 (3d Cir. 2007) (choice-of-law clause adopting Swiss law).

Although the prospective-waiver doctrine limits parties' choice-of-law flexibility, that doctrine applies only when an arbitration provision *unambiguously* prohibits parties from vindicating in arbitration federal statutory rights that they would have in litigation. If, the Supreme Court has said, a provision is instead "ambiguous," then a prospective-waiver challenge is not ripe until the arbitrator decides whether the choice-of-law provision disclaims federal law. *Pac.*

Healthcare Sys., Inc. v. Book, 538 U.S. 401, 406-07 (2003). In other words, "[w]hen there is uncertainty whether the foreign choice of law would preclude otherwise applicable federal substantive statutory remedies, the arbitrator should determine in the first instance whether the choice-of-law provision would deprive a party of those remedies." *Dillon*, 856 F.3d at 334 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995)). That approach is consistent with the broader principle that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *accord Lamps Plus Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019). Hence, plaintiffs' prospective-waiver argument is viable only if the arbitration provision unambiguously precludes them from enforcing in arbitration federal statutory rights that they would have in litigation.

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

GPL's arbitration provision does not prohibit the application of federal law, let alone do so unambiguously. To the contrary, the provision expressly *requires* the application of federal law in arbitration: It provides that "[t]he arbitrator shall apply Tribal Law and the terms of this Agreement." ER210. And those "terms" include the "Governing Law" provision, which adopts Otoe-Missouria tribal law

and "such federal law as is applicable under the Indian Commerce Clause of the Constitution of the United States of America." ER209.

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

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

630, 635 (W.D.N.C. 2016); *Dwyer v. Discover Fin. Servs.*, No. WMN-15-2322, 2015 WL 7754369, at *2 (D. Md. Dec. 2, 2015); *Lee v. Deng*, 72 F. Supp. 3d 806, 807-08 & n.1 (N.D. Ohio 2014). GPL's provision should be enforced as well.

The GPL arbitration provision's adoption of applicable federal law distinguishes this case from *Hayes* and *Dillon*, on which the district court relied, *see* ER009-10. The agreements in those cases expressly *waived* the application of any federal law. The *Hayes* agreement stated that "no . . . federal law applie[d] to" it. 811 F.3d at 670. And the governing-law provision of each agreement stated that the agreement was "subject solely to the exclusive laws and jurisdiction of the" relevant tribe. *Dillon*, 856 F.3d at 332; *Hayes*, 811 F.3d at 669; *accord Gingras v. Think Fin., Inc.*, 922 F.3d 112, 118 (2d Cir. 2019), *pet. for cert. docketed sub nom. Sequoia Capital Operations, LLC v. Gingras*, No. 19-331 (U.S. Sept. 11, 2019) (quoting the materially identical language in the agreement there). GPL's agreement lacks any remotely similar language. And as discussed, its governing-law provision explicitly adopts "applicable" federal law. Those differences preclude any reasonable argument that *Hayes* and *Dillon* have persuasive value here.

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

The district court held that the agreement's language regarding the Indian Commerce Clause did not prevent a prospective-waiver violation because the

clause is an "irrelevant constitutional provision." ER013. But the case on which the court relied for that assertion, *Jackson v. Payday Financial, LLC,* 764 F.3d 765 (7th Cir. 2014), involved materially different contract language. In *Jackson*, "[t]he loan agreements recite[d] that they [were] 'governed by the Indian Commerce Clause.'" *Id.* at 769. Here, GPL's contracts reference "such federal law as is applicable under the Indian Commerce Clause." This is a body of law that a court or an arbitrator can apply. The GPL agreement's language thus constitutes a coherent choice of law, whereas the language in *Jackson* did not.

Plaintiffs also argued below (*see* Pls.' Resp. in Opp'n to Defs.' Mot. to Compel Arbitration at 16, *Brice v. Plain Green, LLC*, No. 18-cv-01200 (N.D. Cal. Dec. 19, 2018), ECF No. 102 ("ECF No. 102")) that the Indian Commerce Clause language did not avoid a prospective-waiver violation because the agreements in *Hayes* and *Dillon* also referred to that clause. But those agreements did not have the language here; they instead stated that they were "made pursuant to a transaction involving the Indian Commerce Clause." *Hayes*, 811 F.3d at 670; *Dillon*, 856 F.3d at 335; *see also FTC v. Payday Fin., LLC,* 935 F. Supp. 2d 926, 931 n.4 (D.S.D. 2013) (agreement containing identical language). That language says nothing about what law *governs*, and thus it is unsurprising that the Fourth Circuit did not deem the phrase relevant to the prospective-waiver issue. The agreement here, by contrast, specifically states that a body of federal law governs

any arbitration. Again, then, the language in *Hayes*, *Dillon*, and *Jackson* is materially different from the language here.

The court also asserted that the Indian Commerce Clause "does not provide a basis for tribal jurisdiction over non-Indians." ER013 (citation omitted). But appellants do not base any "tribal jurisdiction over non-Indians" on the Indian Commerce Clause. To the extent the court was referring to the jurisdiction that tribal courts have under the arbitration provision to review arbitral awards, that jurisdiction stems not from the Indian Commerce Clause but from plaintiffs' choice to consent to it.

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

To buttress their argument that the GPL agreement impermissibly precludes an arbitrator from applying federal law, plaintiffs' briefing before the district court cited various sentences in the loan agreements. Those sentences do not work a prospective waiver—particularly when read, as they must be, together with the Indian Commerce Clause language discussed above.

Most fundamentally, conclusive reliance on those other provisions fails to give *any* effect to the Indian Commerce Clause language, the key language in the agreement regarding what law governs. In other words, plaintiffs argued that the district court should give effect to other language and simply ignore the Indian

Commerce Clause language. That flouts the "cardinal principle of contract construction … that a document should be read to give effect to all its provisions." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). NAFSA's position, by contrast, is consistent with this principle, giving effect to every term of its arbitration provision—including, as explained in the balance of this section, all the language plaintiffs cited.

In any event, none of that language disclaims federal law. And certainly none of it does so unambiguously (even standing alone, let alone when considered along with the language affirmatively adopting federal law). That is dispositive because, as explained, courts may decline to enforce an arbitration agreement only if it unambiguously effects a prospective waiver. *See supra* pp. 5, 9.

Plaintiffs cited a sentence in the "Location of Arbitration" section stating that if borrowers exercise their right to conduct arbitration within 30 miles of their homes, that "shall not be construed in any way … to allow for the application of any law other than [Tribal Law]." ECF No. 102 at 4 (brackets in original) (citing Compl. Ex. 12, *Brice v. Plain Green, LLC*, No. 18-cv-01200 (N.D. Cal. Feb. 23, 2018), ECF No. 1-12 at 7 ("ECF No. 1-12")). This language means exactly what it says: The fact of where arbitration is conducted does not by itself provide a basis for applying federal law. As explained, however, the agreement's governing-law provision *does* provide such a basis.

The district court similarly relied on a pair of provisions explaining that GPL's voluntary compliance with certain federal laws does not constitute consent to the application of those laws. ER012. One provision notes that although GPL "may choose to voluntarily use certain federal laws as guidelines for the provision of services," "[s]uch voluntary use does not represent acquiescence of the [Tribe] to any federal law." ER209. This provisions means just what it says. A federal law does not apply in arbitration solely because of GPL's voluntary compliance with that law or use of that law as a guideline. But nothing in these provisions undermines the governing-law provision's express adoption of applicable federal law. Rather, the language eliminates any risk that federal law that is *not* "applicable under the Indian Commerce Clause" will somehow be deemed applicable because of GPL's voluntary compliance with or use as guidelines of certain federal laws.

The district court also looked to language providing that the arbitrator "shall apply Tribal law[.]" ER015. The district court concluded that this language waived statutory rights and remedies. That reasoning fails because the agreement does not say that an arbitrator may "only" award remedies under tribal law. This omission is critical, because the Supreme Court has made clear that mere *silence* as to the applicability of federal remedies does not constitute a prospective-waiver violation. In *Vimar Seguros*, for example, the Supreme Court found no

unambiguous prospective waiver even though the agreement provided that it was "governed by the Japanese law," with no mention of federal law, 515 U.S. at 531, 543. Similarly, the Court in *Mitsubishi* refused to find a prospective waiver where the agreement provided that it "will be governed by and construed in all respects according to the laws of the Swiss Confederation," again with no mention of federal law. 473 U.S. at 637 n.19. Under those cases, the district court erred in relying on silence as to the applicability of federal remedies to find a prospective-waiver violation. Here, moreover, there is not even silence; as explained, the agreement elsewhere expressly adopts applicable federal law.

The district court acknowledged that some remedy was available to plaintiffs under tribal law, but purported to distinguish cases upholding similar contract language on the grounds that the earlier cases called for the application of British law. ER017. In the district court's view, plaintiffs could contract for British law—even if certain claims would not be recognized by British law—because the United Kingdom has a more "demonstrably robust legal and court system" than the Chippewa Cree or Otoe-Missouria Tribes. *Id.* This colonialist assumption is unsupported by modern jurisprudence and does not persuasively distinguish the cases relied upon by the defendants. Indeed, one could persuasively argue that consumers are better served by the adoption of the Otoe-Missouria tribal law than

British law, because the Otoe-Missouria's ordinances require that their lending businesses operate in accordance with applicable federal law.

Plaintiffs also noted that the arbitration agreement "repeatedly specif[ies] that [it is] not subject to the laws of any state of the United States." ECF No. 102 at 10. This Court has squarely held, however, that the prospective-waiver doctrine "does not apply to state statutes." *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). This is because the doctrine "rest[s] on the principle that other federal statutes stand on equal footing with the FAA," and so is "reserved for claims brought under federal statutes." *Id.*

Finally, plaintiffs cited the arbitration agreement's provision allowing borrowers to opt out of arbitration and instead bring claims under Otoe-Missouria law within the Tribe's court system. ECF No. 102 at 4-5; *see* ECF No. 1-12 at 6. That reliance is likewise misplaced, because a provision regarding the law that governs *outside* arbitration (i.e., if the plaintiff opts out of arbitration and then sues in tribal court) does nothing to establish what law governs *in* arbitration. In any event, that provision does not disclaim the application of federal law even for borrowers who opt out; it is merely silent on that point, which as explained is insufficient to effect a prospective waiver. *See supra* pp. 8-9, 14.

In short, plaintiffs' prospective-waiver argument fails because the loan and arbitration agreements, read as a whole and giving effect to all of their language,

do not disclaim the application of federal law, and certainly do not do so unambiguously, as is required to find a prospective-waiver violation.

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

Plaintiffs' briefing below offered arguments other than prospective waiver for holding the arbitration provisions unenforceable. Specifically, plaintiffs contended that the provisions were procedurally and substantively unconscionable, as well as the product of "overreach" (by which plaintiffs meant "the product of fraud or coercion"). ECF No. 102 at 19-25. These arguments are meritless, but this Court should not reach any of them, because the GPL and Plain Green provisions delegate all of them to the arbitrator.

Plaintiffs argued in the district court that the arbitration provisions were procedurally unconscionable for three reasons: 1) they are prospective waivers; 2) they are "'boilerplate' contracts of adhesion"; and 3) judicial review of an arbitrator's award is impossible because the Chippewa Cree lack a tribal court and the federal Court of Indian Offenses ("CIO"), which functions as the Otoe-Missouria's court system, would lack jurisdiction over any borrower's attempt to confirm or challenge an award. *Id.* at 20-22. None of that is correct.

The prospective-waiver issue has been addressed above. Plaintiffs' argument as to the adhesive nature of the arbitration provision is equally infirm:

This Court has explained that "the adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261-62 (9th Cir. 2017) (citation omitted) (describing California law). Procedural unconscionability does not invalidate a contract under California law unless the contract is also substantively unconscionable. *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 748 (Cal. 2015). And where, as here, there is only a "low degree of procedural unconscionability," a California plaintiff must show that the contract term is *particularly* substantively unconscionable before a court will hold it unenforceable. Plaintiffs cannot satisfy this test because, as explained below, the GPL agreement poses no risk of substantive unconscionability.

Finally, plaintiffs' argument about tribal-court jurisdiction fails with regard to both the Chippewa Cree and the Otoe-Missouria. The claim that the Chippewa Cree tribal court does not exist ignores Article XII of the Chippewa Cree Constitution, which establishes a "Judicial Branch." Constitution and Bylaws, *Chippewa Cree Tribe*, http://www.chippewacree-nsn.gov/index.php/about/constitution-and-bylaws. As for GPL, plaintiffs consented in their loan agreements to the jurisdiction of the CIO (i.e., the Otoe-Missouria tribal court, as designated in the tribal constitution). ECF No. 1-12 at 2. While a party cannot consent to Article III subject-matter jurisdiction, tribal-court jurisdiction, as this Court sitting en banc

has held, sounds instead in "personal jurisdiction," *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc). And parties can undoubtedly consent to personal jurisdiction by contract. *E.g.*, *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1406-07 (9th Cir. 1994). Plaintiffs did so here.

Plaintiffs' last two arguments against enforcing the arbitration agreements—that the agreements are substantively unconscionable and the product of "overreach"—are equally infirm. The former rests on two points that have already been addressed: prospective waiver and lack of judicial review. ECF No. 102 at 23-24. The "overreach" argument, meanwhile, boils down to the assertion that the entire loan agreement is unfair and the product of "blatant misrepresentations." *Id.* at 23-25. Those characterizations are wrong, but regardless, they are foreclosed by *Rent-A-Center West, Inc. v. Jackson*, which requires arbitration of disputes when an arbitration agreement is challenged on the basis of an "alleged fraud that induced the whole contract," even if that alleged fraud "equally induced the agreement to arbitrate which was part of that contract," 61 U.S. 63, 71 (2010).

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

The district court's decision improperly limits the ability of tribes and tribal businesses to employ arbitration, thereby impeding desperately needed economic development. It also has the potential to undermine the tribal businesses' freedom to contract, by taking away arbitration from their vendors.

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

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

CONCLUSION

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

Respectfully submitted,

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

Attorney for Amicus Curiae *Native American Financial Services Association*

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 37(a)(7)(B) in that, according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word), the brief contains 4,688 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY

CERTIFICATE OF SERVICE

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

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY