NO. 19-15707

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIMETRA BRICE, EARL BROWNE, AND JILL NOVOROT,
Plaintiffs/Appellees,

v.

PLAIN GREEN, LLC,
Defendant,

&

HAYNES INVESTMENTS, LLC AND L. STEPHEN HAYNES,
Defendants/Appellants.

On Appeal from the United States District Court for the Northern District of California, Case No. 19-cv-01200, The Honorable William H. Orrick

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RESPONSE TO PETITION FOR PANEL REHARING OR REHEARING EN BANC

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INTRODUCTION

Neither Plaintiffs nor their *amici curiae* offer any compelling argument why the Court should revisit the panel majority's well-reasoned opinion. The panel's narrow decision focuses on one issue: the enforceability of a contract's *delegation* provision against a challenge under the prospective waiver doctrine. The majority followed established precedent, including controlling Supreme Court authority, in enforcing that delegation provision. It did so, in part, because there were no federal rights relinquished by having an arbitrator, rather than a court, decide threshold issues of arbitrability. This result was particularly correct given the contracts expressly embrace the Federal Arbitration Act ("FAA"), "and judicial interpretations thereof," to decide issues of arbitrability. *E.g.*, ER202.

There is little new or controversial about the majority's decision. It follows directly from the Supreme Court's *Rent-a-Center* and *Henry Schein*

decisions,[1] and dozens of this Court's decisions.[2] Yet in seeking rehearing, Plaintiffs ignore the limited nature of the majority's holding and the mandatory authority supporting it—failing to cite or discuss either *Rent-a-Center* or *Henry Schein*. Instead, they seek rehearing based on sprawling arguments about: (1) the arbitration agreement as a whole rather than the delegation provision, specifically; (2) purported ambiguities appearing nowhere in the majority's opinion; (3) an erroneous argument about the lack of back-end review under Section 10 of the FAA; and (4) a supposedly "intolerable" circuit split. None is a sufficient basis to warrant rehearing, nor are they correct as a matter of law.

Similarly incorrect and irrelevant are the overheated arguments accusing the panel's decision of being the first step towards consumers being deprived of all remedies under all laws. That argument is not only without *any* support, it would require the Court to specifically perpetuate different

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[1] *See Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

[2] *E.g.*, *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

rules for arbitration agreements involving Native American businesses and Native American laws. There is no reasoned basis to reach such an inequitable conclusion, let alone a basis in law to do so.

Beyond these substantive defects, this case is also a poor candidate for further review for procedural reasons. As detailed below, Plaintiffs failed to seek rehearing or certiorari in a parallel appeal argued alongside this one, *Brice v. 7HBF No. 2, Ltd.*, No. 19-17477, which presented identical issues. The Court's mandate in that appeal issued almost three months ago and required Plaintiffs to go on to arbitrate their claims against those defendants. They have not done so, possibly hoping that this Petition will somehow resurrect the claims in *7HBF*.[3] Moreover, as Plaintiffs have framed the issues in their Petition, even if the Court were to overlook these problematic procedural defects, the review Plaintiffs seek would require the Court to decide numerous issues beyond the narrow one decided by the panel majority.

[3] It will not. Even if further review were granted as to the Haynes Defendants, the time for further appeals in *7HBF* has expired. No further appellate remedies are available to the Plaintiffs in *7HBF*, as the time to seek certiorari in that case has lapsed. This Court's decision in *7HBF* is now binding in that case.

Thus, both significant substantive and procedural issues militate against the exceptional step of granting further review. The Petition should be denied, and the case sent to arbitration, just as in *7HBF*.

ARGUMENT

It is the rare case that calls for further review after decision, whether that be panel rehearing or rehearing by the Court en banc. Fed. R. App. P. 35(a) ("[R]ehearing is not favored…."). This is not one of those cases. Though Plaintiffs imply that the majority's opinion breaks new ground and may lead to undesirable results, it does not. Each of the bases Plaintiffs advance hoping to garner further review are either manufactured or baseless.

For example, the first sentence of the Petition claims third-party arbitrators from AAA and JAMS are "forbidden from applying federal or state law." Pet. at 1. But this is not so. The Petition ignores that most Plaintiffs are governed by a delegation provision that expressly "comprehends the application of the [FAA]" (ER105, ER200), and similarly requires neutral arbitrators decide issues of arbitrability by looking to *both* Tribal Law and "THE FEDERAL ARBITRATION ACT AND JUDICIAL

INTERPRETATIONS THEREOF…" *E.g.*, ER 107, ER202 (emphasis in original). The remainder are governed by an arbitration agreement requiring arbitrators to apply all generally applicable federal laws, including the FAA. *E.g.*, ER116. Arbitrators are thus free under the contracts to decide issues of arbitrability by looking to and applying federal common law under the FAA.

Plaintiffs' claims (at 4–5, 14–15) that the agreements somehow eliminate back-end review under Section 10 of the FAA are similarly baseless. While they say the agreements will "insulate the defendants from ever facing scrutiny from federal or state courts," that is not what is in the contracts. What the contracts provide for is the ability for any party to seek intermediate review of an arbitrator's decision in a tribal court. *E.g.*, ER118 (providing for limited appellate review in tribal court). But as this Court recognized (en banc) almost two decades ago, the Supreme Court's decision in *Volt Informational Sciences v. Bd. of Trs. Stanford Univ.*, 489 U.S. 468 (1989), permits contracting parties "complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs." *Kyocera Corp. v. Prudential-Bache Trade*

Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc). This includes intermediate appellate processes that do not involve federal courts. *Id.* (expressly permitting intermediate appellate arbitral review). That is what these contracts do—they provide an intermediate point of review *before* the back-end review that is always available under Section 10 of the FAA.

With these misperceptions corrected, what remains of the Petition are merely arguments applicable to the contract as a whole and policy arguments that are neither a basis for further review, nor sufficient to overcome binding precedent. Under the now well-understood standards announced in *Rent-a-Center* and *Henry Schein*, which again Plaintiffs ignore in their Petition, Plaintiffs' arguments fail. As the majority found, there is an enforceable delegation provision here requiring an arbitrator to decide threshold issues of arbitrability. That should end the inquiry.

A. To the extent there is a circuit split, it is not 'intolerable,' because the panel applied existing Supreme Court precedents.

Plaintiffs' principal argument is that rehearing is warranted because the panel decision deviates from results reached by other circuits in other tribal lending cases. Plaintiffs accuse the panel of "spark[ing] an intolerable circuit split" and "flout[ing] decades of Supreme Court precedent," hoping to stir the en banc Court to intervene. These claims lack merit and should be given little consideration before being rejected. The panel decision merely faithfully applied Supreme Court precedent. Its limited holding was correct and does not require revision.

1. *There is no 'intolerable' circuit split.*

While Plaintiffs give the impression that the panel's opinion broached new ground and created an 'intolerable' split of authority, that is not so. True, the panel's opinion acknowledged that it was parting company with the results reached by other courts of appeals in similar cases. Yet, as the panel correctly explained, while "some of the out-of-circuit decisions properly tee up the question, none of them follow through" in *applying* the applicable standards. Op. at 27. The panel fully understood that other

circuits have come out differently and spent nearly a third of its opinion explaining why those decisions failed to 'follow through' in applying the appropriate standards set forth in the FAA and binding Supreme Court precedent. The Petition's claims of an intolerable split are merely an effort to convince the Court to blindly follow these earlier, out-of-circuit decisions. And in making this plea, Plaintiffs fail to engage core Supreme Court decisions relied on, and applied by, the panel.

It is settled that "[a] difference of 'approach' or 'theory' will not be enough to find a credible claim" that a putative circuit split merits en banc reargument. Magnuson & Herr, Federal Appeals Jurisdiction and Practice, § 14:9 (2021 ed.). To the extent that there is even a circuit split here, which is debatable, it is not as 'intolerable' as Plaintiffs say. Plaintiffs claim that some out-of-circuit decisions conflict with the panel's decision considering the same issues. But, as the panel explained, those courts failed to approach the delegation clauses as the Supreme Court requires. That is not the kind of divergence that commands en banc intervention, and the Court is of course not "obligated to avoid, or to eliminate, conflicts with other circuits." Philip

Lacovara, et al., Mayer Brown LLP, Federal Appellate Practice, 512 (§ 13.3(b)(2)) (2nd ed. 2013) (emphasis omitted). Such conflicts are, indeed, "not unusual." *Id*. The Court *is*, however, obligated to apply Supreme Court precedents correctly. The panel explained this was the reason for their divergence from the *outcomes* reached by other courts.

2. *Plaintiffs' myopic focus on "tribal" arbitration contracts is misguided.*

One refrain that appears repeatedly in Plaintiffs' argument about the panel reaching a different ultimate result than other circuits have is the idea that principles of contract and arbitration law in "tribal lending cases"[4] are somehow different than in other contexts. But there is not—and should not be—a separate standard for arbitration agreements in tribal lending cases

[4] *See, e.g.*, Petition at 1 ("The … panel fashioned a first-of-its-kind reading of *tribal lending arbitration contracts*….") (emphasis added); *id.* at 7 ("In *Hayes*, the Fourth Circuit considered a *tribal loan contract*….") (emphasis added); *id.* ("[T]he Fourth Circuit confronted attempts to compel arbitration *in tribal lending cases three more times*….") (emphasis added); *id*. at 8 ("[The] Third Circuit … joined the Fourth and Second Circuits in concluding these *tribal lending contracts* are unenforceable.") (emphasis added); *id*. ("[T]he Eleventh and Seventh Circuits have likewise invalidated similar *tribal lending contracts*.") (emphasis added); *id*. at 9 (arguing the panel's decision created a "split on the enforceability of *tribal arbitration contracts*") (emphasis added).

simply because they involve tribal lending. The FAA and the Supreme Court's precedent interpreting it apply universally. The panel properly recognized this and limited its decision to a narrow issue concerning the delegation provision.

The panel correctly separated its analysis of the delegation clause from the merits of Plaintiffs' claims and its view on the enforceability of the arbitration clauses, generally. By focusing on how the law applies to delegation clauses, the panel left aside the irrelevant issues concerning the contracts as a whole that other courts have focused on in reaching different results. *E.g.*, Op. at 29 ("No matter the court's view of the merits, no matter the inefficiency, no matter the time and money potentially saved…. Instead, we 'must respect the parties' decision as embodied in the contract.'") (quoting *Henry Schein*, 139 S. Ct. at 529–31).

This was doubtless the correct analytical framework required by *Henry Schein*, *Rent-a-Center*, and *Brennan*. *Id.*; *see also* Op. at 28–29 (noting that panel was sympathetic to certain of Plaintiffs' arguments, "[b]ut when there is a clear delegation provision, that question is not for us—or anyone else

wearing a black robe—to decide. Instead, it is for the arbitrator to decide so long as the delegation provision itself does not eliminate parties' rights to pursue their federal remedies"). Plaintiffs offer no reasoned argument to depart from this dispassionate analysis, or why the Court should adopt their preferred analysis focusing on matters outside the delegation clause. At most, the Petition offers no more than recycled arguments about whether Native American laws provide equal remedies and claims as what could be pursued in federal court. But that has no bearing on the limited issue of *who decides* issues of arbitrability.

The Court should decline further review, which may invite the need for a potentially broader ruling on delegation provisions as well as revisiting older circuit precedents concerning compelling arbitrations under non-federal law. *E.g.*, *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295–96 (9th Cir. 1998) (en banc) (holding inability to assert RICO claims in arbitration was not a prospective waiver). Here, the panel's decision was limited to applying settled principles to a specific delegation clause. While Plaintiffs disagree with the *outcome*, given these are "tribal lending" contracts, the panel's

analysis was correct.

3. *The panel correctly adhered to Supreme Court precedent.*

Plaintiffs' remaining arguments seek to artificially amplify their claim that rehearing is "urgently needed." Pet. at 3. None has merit.

Plaintiffs advance an unfounded claim that the panel "flout[ed] decades of Supreme Court precedent." *Id*. at 10. In essence, Plaintiffs argue the Panel failed to correctly interpret the arbitration agreement as a whole and as written because the panel held the delegation provision did not, itself, violate the prospective waiver doctrine. This misses the point in several respects.

First, Plaintiffs fail to acknowledge the arbitration agreements either expressly or implicitly provide for the application of the FAA and the federal common law developed under the FAA. ER107, ER202. All that is required to compel arbitration is the potential for an arbitrator to apply federal law in determining arbitrability challenges. Op. at 30. Plaintiffs have no genuine response—instead arguing that the panel rewrote or reinvented the contracts to permit application of the FAA. But that is not so. Most of the

contracts explicitly empower arbitrators to rely on the FAA "and judicial interpretations thereof" in making any decisions, ER107, ER202, while the remainder implicitly do so. The Petition's blindness to these facts is not a ground for rehearing.

Second, and perhaps most telling, the Petition is silent about the proper analysis required under *Henry Schein*, *Rent-a-Center*, and similar cases—one that requires a focus solely on the delegation provision rather than the arbitration agreement, generally. The Petition (at 10–14) improperly focuses on arguments targeting the arbitration agreement as a whole—arguing that because the choice-of-law clause prevents them from asserting state and federal claims in arbitration, generally, the entire arbitration agreement and delegation clause should be invalidated. That is, as the panel correctly held, backwards.

As the panel noted, *Henry Schein*, *Rent-a-Center*, and *Brennan* require a court to first determine whether the delegation clause, as a separate, antecedent arbitration agreement, is valid. *E.g.*, Op. at 26 ("In our view, our sister circuits have conflated the analysis under *Rent-a-Center*. The out-of-

circuit decisions considered prospective waiver in the context of the arbitration agreement as a whole—not as applied to the delegation provision."); *see also id*. at 27 ("Our sister circuits considered the wrong thing by 'confusing the question of who decides arbitrability with the separate question of who prevails on arbitrability'…. The proper question is not whether the entire arbitration agreement constitutes a prospective waiver, but whether the antecedent agreement delegating resolution of that question to the arbitrator constitutes prospective waiver.") (quoting *Henry Schein*, 139 S. Ct. at 531) (cleaned up). A mere challenge to the delegation provision is not enough. *Id. at* 28 ("We read *Rent-a-Center* as requiring a substantive argument that the delegation provision *in and of itself* is unenforceable.") (emphasis in original).

Plaintiffs make no effort to dispute this point. There is not one mention of, citation to, or attempt to distinguish this line of cases anywhere in the Petition. Throughout, the Petition focuses on the potential outcome of an arbitration rather than the far more limited (and decisive) question of who gets to decide threshold issues. Plaintiffs offer nothing on the issue of the

enforceability of the delegation provision, rather than the arbitration provision as a whole.

It is a serious charge for a petitioner to say a panel "flout[ed] decades of Supreme Court precedent." Plaintiffs fail to back up this claim in the Petition. It is no more than an empty accusation seeking to manufacture the appearance of a basis for further consideration under Rule 35. Fed. R. App. P. 35(b)(1)(A). All the panel did here was diligently *apply*, not 'flout,' Supreme Court case law. Plaintiffs' inability to even confront *Rent-a-Center* or *Henry Schein*, or identify a Supreme Court case with which the panel's decision directly conflicts, is just more evidence that they simply disagree with the outcome, and that this is not a case meriting the extraordinary grant of further review.

B. Procedural issues make this case a poor candidate for further review.

And then there is the issue of whether this case is even a good procedural vehicle for further review. For at least three reasons, it is not.

First, although Plaintiffs ask for both panel rehearing and en banc reargument, they fail to adequately justify why such further consideration

should be granted. They do not advance any specific reasons (other than their disagreement with the result) why the panel should reconsider these issues. The Petition does not seek to correct, differentiate, or distinguish issues of law considered by the panel that could support rehearing. Instead, it seeks to relitigate issues already presented, considered, and rejected by the panel. At best, the Petition argues for rehearing because the panel reached an *outcome* different from other courts of appeals, notwithstanding that the panel followed Supreme Court precedent to reach that outcome. In short, there is therefore no basis for the panel to rehear the case just because Plaintiffs disagree with the outcome it reached.

Second, there are other issues that make this a bad candidate to be considered further by the Court en banc. Take the procedural problems created by Plaintiffs' actions after the panel issued its opinion in this appeal and an identical one argued in tandem, *Brice v. 7HBF No. 2, Ltd.*, 19-17477 (9th Cir.). The *7HBF* case—in which the same Plaintiffs and the defendants are represented by the same counsel here—was decided by a memorandum disposition incorporating the reasoning of the opinion at issue here. 19-17477

at ECF No. 58. Yet Plaintiffs failed to act in *7HBF* and the mandate there has issued. The Court has since denied recall of that mandate despite further review being sought in this case. In the interim, Plaintiffs have not sought certiorari or otherwise protected their appellate rights in *7HBF*,[5] and the time to do so has lapsed under Supreme Court Rule 13. The *7HBF* decision is, therefore, final and will remain binding on those defendants. This leaves the Court's decisions here and in *7HBF* splintered despite the same panel having considered the cases together.

Plaintiffs have also tellingly taken no actions in *7HBF* since the mandate issued. They have not pursued their claims in arbitration—

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[5] They could have done so, had they desired to have further review of this case and *7HBF* together after the apparent oversight about the mandate in *7HBF*. *See, e.g.*, Magnuson & Herr, Federal Appeals Jurisdiction and Practice § 14:7 (2021 ed.) ("Nothing prevents a party from seeking further review—by rehearing, rehearing en banc, certiorari, recall of the mandate or collateral attack—of a court of appeals decision as to which the mandate has been issued. The only danger is that the mandate may cause something to happen that will moot the case."). That may have been the more efficient path anyway. Defendants here are aware of at least one other case, *Hengle v. Treppa*, 20-01062 (4th Cir.), in which Plaintiffs' counsel are involved, where the defendants in that appeal have stated they intend in the near future to seek certiorari on the same issue presented in this case. *Id.* at ECF No. 87 (motion to stay mandate pending certiorari; so indicating).

including their arguments concerning the delegation clause—as the panel directed. Plaintiffs are, therefore, either seemingly content with losing their claims against certain defendants in *7HBF*, or hoping to improperly use this Petition to rescue those claims even though their motion to recall the mandate and seek rehearing in *7HBF* was denied.

Third, the case is also a poor candidate for reargument because the panel's decision did not reach other potentially case-dispositive issues, including the proper application of the prospective waiver doctrine under the Court's precedents. Instead, the panel decision (properly) left those questions to be decided in arbitration. *See* Op. at 28–29 (declining to discuss merits of Plaintiffs' prospective waiver challenge; issue was for an arbitrator). If en banc reargument were granted, and the Court does not simply reaffirm the panel's rationale, it may need to conduct a broader inquiry on issues unaddressed by the panel in the underlying decision. Particularly given the procedural problems with this appeal, the Court should not lightly invite opening such potentially wide-ranging review of the panel's decision but should simply decline to reconsider it.

C. Back-end review under the FAA remains available.

Plaintiffs are also wrong to argue (at 14–15) that the panel improperly enforced the delegation provision because "the contracts foreclose any federal court from reviewing an arbitrator's decision," and there is no review under Section 10 of the FAA possible. That is untrue. The contracts provide for intermediate review of an arbitrator's decision by a tribal court. *E.g.*, ER118. This is precisely the type of intermediate review this Court in *Kyocera*, and the Supreme Court in *Volt*, sanctioned without issue. *Kyocera*, 341 F.3d at 1000. The parties have "complete freedom" to design "whatever procedures and systems they think will best meet their needs" in arbitration, and this has expressly included "review by one or more appellate arbitration panels." *Id.* That is what has been done through the tribal courts—the creation of an intermediate appellate remedy for either party *before* award confirmation and/or review under Section 10 of the FAA. There is effectively no difference between that appellate procedure and the panels offered by AAA and JAMS that are routinely enforced.

But what is also clear from these decisions is that the parties cannot

limit the availability of back-end review under Section 10 of the FAA—that standard is set by statute and cannot be modified by the parties. *See id.* (holding "[p]rivate parties have no power to alter or expand those grounds" for review under Section 10, "and any contractual provision purporting to do so is, accordingly, legally unenforceable"). Plaintiffs' argument that back-end review is unavailable is therefore unavailing. While the parties may expand the appellate review of an arbitrator's decision, just as they have done here, they can never foreclose back-end review.

D. The balance of Plaintiffs' arguments are not bases for rehearing.

Finally, Plaintiffs (at 16–18) and their *amici* present various policy arguments in support of their request for panel rehearing or en banc reargument. In short, those policy considerations are not proper bases for seeking reargument under Rule 35. Plaintiffs and their *amici* both seek to have tribal lending contracts treated differently than contracts in other industries and suggest en banc review is needed to announce broader principles of arbitration law that conflict with Supreme Court authority. If anything, these policy arguments merely suggest Plaintiffs' goal in seeking

rehearing is directed at issues they have with the contracts and arbitration, generally, rather than the far more limited issues relating to the application of a delegation provision. These policy disagreements are not a basis for further consideration.

CONCLUSION

For the above reasons, panel reconsideration and en banc reargument are unwarranted. The Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 2021, I electronically filed this brief with the Clerk of Court by CM/ECF. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Michael C. Witsch
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-15707

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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,868.

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Signature s/ Michael C. Witsch **Date** Dec 29, 2021

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