No. 19-15707

In the United States Court of Appeals for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,
on behalf of themselves and all individuals similarly situated,

Plaintiffs-Appellees,

v.

PLAIN GREEN LLC,

Defendant,

and

HAYNES INVESTMENTS, LLC, and L. STEPHEN HAYNES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California at San Francisco
No. 3:18-cv-01200 (The Hon. William Horsley Orrick)

PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35(B)(1) STATEMENT

The majority of this sharply divided panel fashioned a first-of-its-kind reading of tribal lending arbitration contracts that, if left uncorrected, will spark an intolerable circuit split and force vulnerable consumers to arbitrate federal- and state-law claims before an arbitrator who is forbidden from applying federal or state law.

Until the panel majority's ruling in this case, the federal circuits had been unanimous: The tribal arbitration contracts at the heart of this case are unlawful because they are designed to exempt online lenders and their investors from any federal or state law and rob consumers of any meaningful ability to pursue their rights. Four times the Fourth Circuit has considered these contracts—including the exact one at issue here. And four times it struck them down. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332 (4th Cir. 2020); *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286 (4th Cir. 2020). The Third Circuit has considered them twice, and twice struck them down. *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020); *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018). Ditto for the Eleventh Circuit. *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331 (11th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014). Add to that the Second Circuit, *Gingras*

v. Think Fin., Inc., 922 F.3d 112 (2d Cir. 2019), as well as the Seventh, *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014).[1]

Ten separate panels from five circuits, all unanimous, and dozens of district courts have concluded that these contracts may not be enforced under the Federal Arbitration Act. That is because, as Judge Wilkinson explained, they are a "farce," designed to "game the entire system" by deploying arbitration in a "brazen" attempt to avoid state and federal law that would otherwise apply. *Hayes*, 811 F.3d at 674, 676.

The panel majority explicitly cast aside these decisions, opting instead for an unsupportable interpretation that would allow these contracts to be enforced in the Ninth Circuit and nowhere else. Not only does that decision create an irreconcilable split, it runs afoul of foundational contract interpretation principles and flouts decades-old Supreme Court case law on arbitration.

Nor should the ruling's practical consequences be understated. Left to stand, this decision will hand any unscrupulous company a blueprint for how to draft its way around federal and state laws it deems inconvenient for its bottom line. This would leave millions of residents across the Western states vulnerable to usurious and predatory lending practices. And the Court's dramatic turn would render state and

[1] Up until this panel majority's decision, only the Sixth Circuit had enforced one of these contracts, and only then because the plaintiff failed to properly challenge it. *See Swiger v. Rosette*, 989 F.3d 501, 506 (6th Cir. 2021).

federal regimes enacted to protect consumers a dead letter, affecting not just payday lending but a potentially enormous range of consumer and commercial relationships.

Rehearing is urgently needed to avoid these consequences and restore the "just and efficient system of arbitration intended by Congress when it passed the FAA." *Id.* at 674.

STATEMENT

A. Factual background

Plain Green and Great Plains are online lenders that offer low-dollar, high-interest loans over the internet to consumers across the country. *See* 2-ER-244–47. Both companies hold themselves out as tribal entities, but both were fronts—the consumer-facing websites of a lending scheme that is the brainchild and profit center of non-tribal participants, including the defendants in this case. 2-ER-244, 253–65.

Like other tribal lending schemes, the defendants' scheme was predicated on a contractual web of liability shields—including an integrated set of choice-of-law provisions, forum-selection clauses, and arbitration requirements. It works like this: *First,* each loan contract includes an arbitration provision, and that provision requires arbitration of any "dispute." 2-ER-106; *see also* 2-ER-117. "Dispute" is defined broadly to include "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." 2-ER-70. The definition of "Dispute" also includes a delegation clause,

which requires arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." 2-ER-76.

Second, the arbitration contracts contain choice-of-law provisions, the most prominent of which mandates: "**THIS AGREEMENT TO ARBITRATE SHALL BE GOVERNED BY TRIBAL LAW**. The arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein." 2-ER-128. The loan contracts contain additional choice-of-law provisions, which forbid the arbitrator from applying any rules or law that would "contradict this Agreement to Arbitrate or Tribal Law," and specifically instruct that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal law." ER106–07, 128.

These choice-of-law limitations were intentional. Under the relevant tribal codes, "a claimant would be unable to assert" either a RICO or any state-law claim "against entities associated with a tribal lender" and, "even if he or she were able to assert such a claim, the relief" sought would "remain unavailable." *Haynes*, 967 F.3d at 344 (discussing the tribal codes at issue here); *see also* 1-ER-17.

Third, the contracts shield the arbitrator's decision from any federal- or state-court review. They do this by restricting any "judicial review" to "a Tribal court" and for only "(a) whether the findings of fact rendered by the arbitrator are supported by substantial evidence," "(b) whether the conclusions of law are erroneous under

Tribal law," or (c) whether the decision was "consistent with this Agreement and Tribal law." 2-ER-107, 128.

Taken together, these provisions lay bare the purpose of the contracts: to insulate the defendants from ever facing scrutiny from federal or state courts or liability under any federal or state laws and to leave prospective litigants without a fair chance of prevailing in arbitration. The process, as the Seventh Circuit observed, is a "sham from stem to stern." *Jackson*, 764 F.3d at 779.

B. Procedural background

The plaintiffs in this case represent a class of California residents who obtained Great Plains and Plain Green loans. Although California caps loans at 10% APR, the loans here carried significantly higher rates—up to 448%. 2-ER-264. The lawsuit asserted violations of California and federal laws related to the defendants' illegal lending and sought damages, reimbursement, and injunctive relief. 2-ER-265–79.

Relying on the contracts' arbitration provisions, the defendants moved to compel arbitration. The district court denied the motion, holding that the arbitration provisions were unenforceable because they prospectively waived the plaintiffs' right to pursue federal statutory claims. 1-ER-15–16. On the eve of trial, after the district court had certified a class and issued its pretrial rulings, a divided panel of this Court reversed.

The panel majority acknowledged that the plaintiffs "have a reasonable argument that the arbitration agreement as written precludes them from asserting their RICO claims or other federal claims in arbitration." Op. 28. But it nonetheless concluded that the contracts' delegation provisions were enforceable. *Id.* at 29. In the majority's view, because the "description of what an arbitrator can decide expressly includes enforceability disputes arising under '*federal, state, or Tribal Law* . . . based on *any legal or equitable theory*,'" "[t]his necessarily means that Borrowers' rights to pursue their federal prospective-waiver argument remains intact . . . and the delegation provision is not facially a prospective waiver." *Id.* at 15.

Judge Fletcher "strongly" dissented. *Id.* at 53. The contract's multiple choice-of-law provisions, he explained, expressly prohibit the application of state or federal law. Although "dispute" is defined broadly to include "precisely the claims dissatisfied borrowers are most likely to bring when challenging the loan agreements," that broad definition is not itself a choice-of-law clause. *Id.* at 50. And it does not override the contract's repeated prohibition on applying state or federal law. To the contrary, the definition of dispute that the majority relied on merely sweeps into arbitration consumers' most-likely claims, where the contract then holds that state or federal law may not be applied to them. That means the arbitrator, in evaluating whether the arbitration agreement is invalid, cannot apply state or federal law to do so. By design, the inquiry is "illusory, with the foreordained result that

Plaintiffs will be required to arbitrate under an agreement that categorically forecloses relief on their federal and state claims." *Id.* at 47.

REASONS FOR GRANTING THE PETITION

I. The panel majority's opinion sparks an intolerable circuit split.

Rehearing is warranted because the panel's opinion admittedly splits from the decisions of five other circuits, all of which refused to compel arbitration because the entire tribal lending contracts, including their delegation clauses, are unenforceable.

In *Hayes*, the Fourth Circuit considered a tribal loan contract that, like the contracts here, paired choice-of-law provisions specifying the supremacy of tribal law with an arbitration clause. 811 F.3d at 670. Judge Wilkinson condemned the arbitration contract—as well as its delegation clause—as a "farce," an impermissible scheme that, "[w]ith one hand . . . offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other . . . proceeds to take those very claims away." *Id.* at 673–74. "[A] party may not," he explained, "underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Id.* at 675.[2]

Following *Hayes*, the Fourth Circuit confronted attempts to compel arbitration in tribal lending cases three more times—including two cases involving contracts

[2] Unless otherwise specified, internal quotation marks, citations, emphases, and alterations omitted through the brief.

identical to the one at issue here. And three more times it unanimously struck them down. *Hayne*, 967 F.3d 332; *Sequoia,* 966 F.3d 286; *Dillon*, 856 F.3d 330.

The Second Circuit also held these contracts and their delegation clauses "unenforceable because they are designed to avoid federal and state consumer protection laws." *Gingras*, 922 F.3d at 127. "By applying tribal law only," the court explained, the arbitration contract "appears wholly to foreclose [the borrowers] from vindicating rights granted by federal and state law." *Id*. Notably, *Gingras* involved a materially identical contract to the contracts at issue here.

And in *Williams v. Medley Opportunity Fund*, a unanimous Third Circuit panel joined the Fourth and Second Circuits in concluding that these tribal lending contracts are unenforceable. Like *Gingras*, *Williams* confronted a materially identical contract. The Third Circuit found that "the plain language of the arbitration agreement and the loan agreement shows that only tribal-law claims may be brought in arbitration," and thus "the arbitration agreement . . . requires a borrower to prospectively waive claims based on any other law," 965 F.3d at 239, 241.

Unanimous panels of the Eleventh and Seventh Circuits have likewise invalidated similar tribal lending contracts, though on slightly different grounds. *See Parm,* 835 F.3d at 1332 (refusing to compel arbitration because the choice-of-arbitrator provision mandated an illusory forum); *Inetianbor*, 768 F.3d at 1353–54 (same); *Jackson*, 764 F.3d at 768 (same).

The panel majority here expressly split from these unanimous opinions. In its view, those "decisions considered prospective waiver in the context of the arbitration agreement as a whole—not as applied to the delegation provision." Op. 26. The Supreme Court, the majority suggested, requires more: a "substantive argument that the delegation provision *in and of itself* is unenforceable." *Id.* at 28.

But the decisions dismissed by the panel majority *directly* addressed how the delegation provisions were unenforceable. As but one example, the Third Circuit pointedly explained that an arbitrator evaluating the threshold enforceability question would, because of the choice-of-law clauses, "be expressly forbidden from relying on any federal or state law." *Williams*, 965 F.3d at 243 n.14. As a result, "the arbitrator could not ask whether the arbitration clause—and its complete exclusion of federal law—would violate the federal public policy against arbitration clauses that operate as a prospective waiver," meaning that "there would be no principle of federal law standing in the way" of the contract's enforcement. *Id. See also, e.g.*, *Haynes*, 967 F.3d at 338, n.3.

Bottom line: As the panel majority itself ultimately recognized, there is no way to reconcile its holding with the unanimous view of every other circuit. The result is a lopsided split on the enforceability of tribal arbitration contracts that leaves this Circuit alone on one side.

II. The panel majority's opinion flouts decades of Supreme Court precedent.

The panel majority's rejection of the unanimous view of the other circuits is reason enough to grant rehearing. But the majority's errors run deeper still. Its decision contradicts years of basic Supreme Court teaching on contract interpretation and the FAA.

It is black letter law that a court must take an arbitration contract—no less than any other—as it comes. A court's job is simply to interpret arbitration contracts "according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). It may not override those terms or "reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

Nor may a court expand the arbitrator's authority beyond the limitations imposed by the contract. As the Supreme Court has repeatedly explained, under the FAA, arbitrators derive their "powers from the parties' agreement," so they "wield only the authority they are given" by the contract. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)); *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community

which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties").

The panel majority flouted these fundamental principles in two distinct ways. First, by interpreting a definitional clause to contradict the contracts' controlling choice-of-law limitations, the majority authorized the arbitrator to wield power that the contracts affirmatively prohibited. And second, in a backstop attempt to downplay the consequences of its ruling, it conjured from whole cloth an avenue for federal judicial review that directly conflicts with the contracts' plain terms.

The delegation clause. As noted, each arbitration contract contains a delegation provision nestled into the definition of "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*.

2-ER-117 (emphasis added); *see also* 2-ER-106.

As Judge Fletcher admonished, the majority's "fundamental mistake" was treating this paragraph as if it were not subject to the contracts' clear and controlling choice-of-law limitations. Op. 50. From the words "The term Dispute . . . includes, without limitation, all federal, state or Tribal Law claims . . . based on any legal or

equitable theory," the majority discerned a "plainly stated mandate that the arbitrator decide" any state or federal claim using law "from whatever source they arise." Op. 16, 50. Applying that interpretation, the majority then held that the delegation clause did not operate as a prospective waiver because it empowered an arbitrator to decide those claims using federal law—the "source" from which "they arise." *Id.*

In reaching this conclusion, the majority simply rewrote the contract. The "mandate" the majority described—that the arbitrator must decide claims by applying the law "from whatever source they arise"—appears nowhere in the contract. The cited language says nothing about the arbitrator at all, much less what law the arbitrator may use when deciding a dispute. Those parameters are set out in the contract's choice-of-law provisions—all five of them. *See* 2-ER-128 ("**APPLICABLE LAW . . . THIS AGREEMENT TO ARBITRATE SHALL BE GOVERNED BY TRIBAL LAW**."); 2-ER-116 ("This Agreement and the Agreement to Arbitrate are governed by Tribal Law and such federal law as is applicable under the Indian Commerce Clause. . . ."); [3] 2-ER-128 ("The arbitrator shall apply Tribal Law and the terms of this Agreement. . . ."); *id.* ("The arbitration award . . . must be consistent with this Agreement and Tribal Law. . . ."); 2-ER-129

[3] While this provision references certain federal laws, as Judge Fletcher explained, Op. 42, it includes only non-relevant federal law.

("[Y]ou [] understand, acknowledge and agree that . . . this Loan is governed by the laws of the Otoe-Missouria Tribe and is not subject to the provisions or protections of the laws of your home state or any other state.").

Still other provisions underscore the "primacy and effective control" of tribal law. *Haynes*, 967 F.3d at 343 (construing an identical contract). For example, the arbitration contract provides that, even if a claimant opted out of arbitration, "ANY DISPUTES SHALL NONETHELESS BE GOVERNED UNDER TRIBAL LAW AND MUST BE BROUGHT WITHIN THE COURT SYSTEM OF THE OTOE-MISSOURIA TRIBE." 2-ER-116–17. The contract also makes clear that the plaintiff's choice of forum "shall not be construed in any way . . . to allow for the application of any law other than Tribal Law." 2-ER-118. And, as discussed below, judicial review of any arbitration reward is limited to "review in a Tribal court" on limited grounds, most notably "whether the conclusions of law are erroneous under Tribal Law." *Id.*

In the face of this overwhelmingly clear command, the panel majority purported to find ambiguity about what law an arbitrator would apply, and then used that judge-made ambiguity to fashion a "mandate" that the arbitrator apply federal law when deciding a federal claim. But the words "based on" in the definition of "Dispute" do not mean what the majority said they mean: that the arbitrator could *decide* the claims using federal, state, or tribal law. These words plainly mean that the

disputes subject to arbitration include any claim a consumer brings alleging that the defendants violated federal, state, or tribal law. But those claims, the contract repeatedly states in its multiple choice-of-law clauses, must be decided solely under tribal law.

Reading the provision where it is situated in the contract—a definition of "Arbitration" and "Dispute"—makes this abundantly clear. An arbitrator asking what law applies would look not to the definition of "Dispute" but to the section titled, unambiguously, "APPLICABLE LAW AND JUDICIAL REVIEW OF ARBITRATOR'S AWARD," which provides that "THIS AGREEMENT TO ARBITRATE SHALL BE GOVERNED BY TRIBAL LAW." Indeed, if the majority's view were correct, the "mandate" it described would apply equally in all disputes—not just enforceability disputes—because the language it points to plainly encompasses all "Disputes." Such an interpretation unavoidably "reach[es] a result inconsistent with the plain text of the contract." *Waffle House,* 534 U.S. at 294.

Back-end review. The panel majority opinion ran afoul of this foundational contract principle in yet another way. By their plain terms, the contracts foreclose any federal court from reviewing an arbitrator's decision. They require that any arbitrator's decision "be filed with a Tribal court" and allow only that "it may be set aside by a Tribal court." 2-ER-107. Even then, the arbitrator's decision may only be

set aside if "the conclusions of law are erroneous under Tribal law." 2-ER-118. There is no exception to this mandatory requirement. 2-ER-107, 118.

Notwithstanding this plain language, the panel majority effectively severed these provisions and wedged in a mechanism for federal judicial review that does not exist. It reasoned that, in the event the arbitrator concluded that she could not consider a prospective-waiver challenge, the plaintiffs could simply "return to court and argue the arbitrator exceeded her powers." Op. 29.

But this backdoor to federal judicial review, just like the majority's interpretation of "Dispute," impermissibly rewrote the contracts. As other circuits have recognized, the contracts' back-end review provisions were intentionally drafted to "insulate[] the tribe from any adverse award" and to "leave[] prospective litigants without a fair chance of prevailing in arbitration." *Gingras*, 922 F.3d at 128. When the parties have "chosen to include that language, [the court is] bound to define the scope of this agreement by those limitations." *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 797 (9th Cir. 2017). And where that choice is part and parcel of the entire contract's illegality, a court's job is not to rewrite the contract but to refuse its enforcement. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1272 (9th Cir. 2017). The majority opinion flatly contradicted these basic, bedrock principles.

III. Left to stand, the panel majority's opinion would extinguish the rights and remedies available to millions of consumers across the Western states, erode federal and state regulatory regimes, and trigger a race to the bottom for unscrupulous companies.

The panel majority's split from the unanimous weight of circuit authority and contravention of Supreme Court precedent is far from trivial. Every state in the Ninth Circuit regulates payday lending. *See* Alaska Stat. §§ 06.50.010 *et seq*.; Cal. Fin. Code §§ 23000–23106; Haw. Rev. Stat. § 480F-1; Idaho Code § 28-46-401; Mont. Code § 31-1-701; Nev. Rev. Stat. § 604A.010; Or. Rev. Stat. § 725A.010; Wash. Rev. Code § 31.45.010. Arizona prohibits it outright. Ariz. Rev. Stat. § 6-601. Additionally, seven states have enacted usury laws that cap interest rates and provide usury penalties. *See* Alaska Rev. Stat. § 45.45.010; Ariz. Rev. Stat. § 44-1201; Cal. Const., Art. XV § 1; Cal. Civ. Code §§ 1916-2, 1916-3; Haw. Rev. Stat. § 478-4, *et seq*., 31-1-107; Mont. Code § 31-1-108; Or. Rev. Stat. § 82.010; Wash. Rev. Code § 19.52.020.

The panel majority opinion would render these protections, not to mention federal laws like RICO, a dead letter, at least with respect to consumers' ability to enforce them. And private litigation is a crucial complement to public enforcement of regulatory regimes. "Private enforcement provides, in many respects, a direct response to the functional limitations of public regulatory bodies in the enforcement of various laws," including by supplementing limited government resources. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1142 (2012).

But the Court's ruling would extinguish the remedies these states and Congress intended would compensate harmed borrowers and deter proliferation of illegal loans. What's more, because the opinion upholds the same contract invalidated by the Second, Third, and Fourth Circuits, the residents of the Western states who fall victim to the defendants' predatory practices will have virtually no rights and remedies compared with those who live in the rest of the country, even though their loans are governed by the same contracts. That is intolerable.

If past is prologue, the defendants' illegal lending practices are only the beginning. This opinion hands a blueprint to any unscrupulous company to opt out of inconvenient federal and state laws. Cunning drafting would make it trivially easy for lenders to evade the FAA's prohibition on contracts that seek to avoid otherwise applicable federal and state laws. Already, the tribal-lending market "is exploding." Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, Wall Street Journal (Feb. 10, 2011), https://perma.cc/6628-TX92. One consultant disclosed that "more than 1,000 payday lenders have expressed interest in cloning" the Tribal lending model. *Id.* The appeal is obvious. As one major lender observed, tribal lending is "the new financial strategy that many are using as a loophole through the strict payday loan laws." Nathalie Martin, *The Alliance between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Washington and Lee L. Rev. 751, 766 (2012).

The majority's opinion, if left intact, would only make matters worse. And the impact would be felt far beyond the payday lending context. Any consumer or commercial arbitration contract—indeed, any company that contracts for arbitration—could adopt this three-step opt-out recognized as a "farce" in every other circuit, safe in the knowledge that it would be upheld under the panel majority's opinion in the Ninth Circuit.

It does not have to be this way. Before this outlier opinion, every Court of Appeals to have directly considered this type of contract has found it unenforceable. This Court should grant rehearing, bring the Ninth Circuit back into conformity with the other circuits, and restore the full range of remedies legislatures intended to make available to their residents.

CONCLUSION

The Court should grant the petition for rehearing or for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Circuit Rule 40-1(a) because it contains 4,195 words excluding the parts exempted by Rule 32(f). This petition 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 Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I electronically filed the foregoing petition with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

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

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer 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**: 4,195.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Matthew W.H. Wessler **Date** Nov 1, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

NO. 19-15707

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIMETRA BRICE, EARL BROWNE, AND JILL NOVOROT,
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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—

[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.

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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.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

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

*(use "*s/[typed name]*" to sign electronically-filed documents)*

No. 19-15707

In the United States Court of Appeals for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,
on behalf of themselves and all individuals similarly situated,

Plaintiffs-Appellees,

v.

PLAIN GREEN LLC,

Defendant,

and

HAYNES INVESTMENTS, LLC, and L. STEPHEN HAYNES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California at San Francisco
No. 3:18-cv-01200 (The Hon. William Horsley Orrick)

REPLY IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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REPLY

It is difficult to overstate how much of an outlier the panel decision is in this case. Until the panel majority's opinion, ten separate panels from five circuits had uniformly held that tribal arbitration contracts like those at issue here are unlawful under the FAA. And even after the panel majority issued its opinion, the Fourth Circuit has once again held the same thing, bringing the tally to 11. *See Hengle v. Treppa*, 19 F.4th 324, 336 n.2 (4th Cir. 2021) (opinion of Rushing, J., joined by Niemeyer & King) (noting the Ninth Circuit's break with the other circuits). That makes 27 federal circuit judges—without a single dissent among them. And these 27 judges have all reached the same conclusion because, as Judge Wilkinson has explained, these contracts are a "farce," designed to "game the entire system" by deploying arbitration in a "brazen" attempt to avoid state and federal law that would otherwise apply. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674, 676 (4th Cir. 2016).

The contracts (and tribal lending scheme) in this case are no different. By their terms, the contracts—including their delegation clauses—require an arbitrator to exclusively apply tribal law, expressly prohibit the application of any and all federal or state law that would otherwise apply, and, as a result, strip borrowers of the right to pursue exactly the kinds of claims that would hold defendants accountable for their illegal lending enterprises.

The defendants don't even disagree with any of this. Their main response is to insist that the panel majority was nevertheless correct to enforce a contract that is designed, from top to bottom, to "skirt state and federal consumer protection laws." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019). In service of that position, the defendants boldly assert (at 1) that there "is little new or controversial about the majority's decision," because the majority simply "followed established precedent, including controlling Supreme Court authority," in enforcing the contracts' delegation clauses. And, they say (at 1), that decision was "particularly correct" because the contracts reference the FAA and so afford an arbitrator the authority to "decide issues of arbitrability." Neither claim is even close to correct—as all the other circuits have recognized.

Merits aside, though, one thing is certain. By placing the Ninth Circuit in an extreme outlier position compared with the rest of the country, the panel majority's opinion will turn the Western states into a magnet for tribal lenders (or any other enterprise of questionable legality) who seek to draft their way around legal accountability. Lenders themselves have already recognized the significance of this decision, calling it a "powerful incentive" to move any lawsuit "to a district court in the Ninth Circuit" and insisting that defendants now "fiercely litigate[]" venue "in every case because the location of the lawsuit will be outcome-determinative," *Treppa v. Hengle*, App. for Stay Pending Disposition of Pet. for Writ of Certiorari, No. 21A237

(U.S. Dec. 14, 2021) at 21–22. That is not how it should work. This Court should grant rehearing, and bring the Ninth Circuit back into alignment with every other circuit.

1. The defendants' defense of the panel majority's decision boils down to one central claim (at 6): If an arbitration contract simply *contains* a delegation clause, "[t]hat should end the inquiry." In their view, that "settled principle[]" is "required" by the Supreme Court's decisions in *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 74 (2010), and so justifies the panel majority's decision to enforce the delegation clauses. Opp'n 10–11.

That is not at all what the Supreme Court has said. To be sure, "parties may agree to have an arbitrator decide . . . gateway questions of arbitrability." *Schein,* 139 S. Ct. at 529 (cleaned up). And parties challenging an arbitration contract containing a delegation clause must also "specifically challenge[] the validity of . . . [the] delegation clause." *Rent-A-Center*, 561 U.S. at 76 (cleaned up). But delegation clauses are not self-enforcing. A delegation clause is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Schein*, 139 S. Ct. at 529. So it is unenforceable if a "generally applicable defense" under Section 2 of the FAA renders the delegation clause unenforceable. That could be because the costs of arbitrating even a threshold challenge in arbitration is prohibitively high. *See, e.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90–91 (2000) (discussing "prohibitive costs" challenges to a delegation clause). Or it could be, as here, because

the contracts strip the arbitrator of the necessary law he or she needs to decide the challenge. And that defense may succeed or fail depending on the precise language of the contract and the nature of the arbitration requirements. But either way, nothing in *Rent-A-Center* or *Schein* stands for the proposition advanced by the defendants—that the mere existence of a delegation clause categorically deprives federal courts of the authority to decide any prospective-waiver challenge. *See Hengle*, 19 F.4th at 335 n.1 (rejecting this exact argument); *see also Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 339 n.4 (4th Cir. 2020) (finding *Schein* "inapposite"); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 237 n.7 (3d Cir. 2020) (same).

2. Falling back, the defendants insist (at 5) that the panel majority was right to enforce the contracts because "[a]rbitrators are . . . free under the contracts to decide issues of arbitrability by looking to and applying federal common law under the FAA." *See also* Opp'n 12–13 (same). But the contracts are exceedingly clear: They mandate that an arbitrator "shall apply Tribal Law" and forbid the arbitrator from applying "any law other than Tribal Law." 2-ER-118, 128. So, even for a threshold challenge to the enforceability of the contracts, these contractual restrictions "necessarily restrain[] the arbitrator from considering federal law defenses to arbitrability, thereby precluding [borrowers] from effectively vindicating their federal statutory rights." *Hengle*, 19 F.4th at 342; *see also Williams*, 965 F.3d at 243 n.14 (enforcing a delegation clause that forecloses reliance on federal or state law "would

effectively allow [the lender] to subvert federal public policy and deny [the borrower] the effective vindication of her federal statutory rights before the arbitration of her claims even began").

The only way, then, to conclude that an arbitrator is "free under the contracts" to apply federal law is to rewrite them, and thereby violate the fundamental principle that a court's job is simply to interpret arbitration contracts "according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). That is just what the panel majority did. *See* Op. 14–19.

The contracts' passing references to the FAA do not change any of this, as the defendants now suggest. *See* Opp'n 12–13. As the Fourth Circuit explained when rejecting this same argument, the only way these references can do the work the defendants want is to take them "out of [their] context" in an attempt to construe them "as a portal through which all federal and state law defenses to arbitrability are imported into the agreement and made available for application by the arbitrator." *Hengle*, 19 F.4th at 341. But that interpretation "would create conflict with the other terms" of the contracts that explicitly "require that the arbitration be 'governed by the laws of the [Tribe]' and forbid the arbitrator to apply 'any other law other than the laws of the [Tribe].'" *Id.* As the Supreme Court has made clear, arbitration contracts, no less than any others, must be read to give effect to all of their terms and "to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton,*

Inc., 514 U.S. 52, 63 (1995). Reading these clauses together, the interpretation that gives effect to every clause is the one adopted by the other circuits: The clauses referencing the FAA "assert[] that the arbitration provision falls within the purview of the FAA and should accordingly be enforced by a court of competent jurisdiction, but, once the court conveys the dispute to the arbitrator, he or she must apply only the laws of the Tribe to the exclusion of Plaintiffs' potential federal and state statutory rights, including defenses to arbitrability arising under federal and state law." *Hengle*, 19 F.4th at 341 (internal quotation marks omitted).

3. Nor does the defendants' invocation (at 19–20) of FAA Section 10 as a pathway to federal review *post hoc* make an otherwise unenforceable arbitration contract enforceable *ad hoc*. If that were true, Section 10 would become a cure-all for any illegal arbitration contract. As other courts have concluded, the back-end review provisions in these contracts were intentionally drafted to "insulate[] the tribe from any adverse award" and to "leave[] prospective litigants without a fair chance of prevailing in arbitration." *Gingras*, 922 F.3d at 128. The proper remedy is not to kick the proverbial can down the road—it is to refuse the contracts' enforcement. *See Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1272 (9th Cir. 2017).

4. Finally, the defendants suggest (at 9–10) that tribal arbitration contracts are no different from any other contracts. Far from it. Courts have refused to enforce tribal arbitration contracts under the FAA precisely because they are designed to

"game the entire system" by deploying arbitration to avoid the state and federal law that would otherwise apply. *Hayes*, 811 F.3d at 676. As Judge Wilkinson recognized in *Hayes*, companies that are "on the up-and-up" don't draft arbitration contracts to ensure that the company and its allies can "engage in lending and collection practices free from the strictures of any federal law." *Id.* But these companies do. "[T]ribe-payday lending partnership[s]" involve "transparent attempts to deploy tribal sovereign immunity to skirt state and federal consumer protection laws." *Gingras*, 922 F.3d at 126–27 (noting that "[p]art of this scheme involves crafting arbitration agreements . . . , in which borrowers are forced to disclaim the application of federal and state law in favor of tribal law (that may or may not be exceedingly favorable to the tribal lending entity)"). It is telling that virtually no other form of arbitration contract has been invalidated under the prospective waiver doctrine, and that is because no other form of contract attempts to do what these contracts do—renounce wholesale "the authority of the federal statutes to which it is and must remain subject." *Hayes*, 811 F.3d at 675.[1]

[1] The defendants' odd claim that the absence of a petition for rehearing in a "related" case poses a "procedural vehicle" issue for en banc review here can be easily dismissed. *See* Opp'n 15–18. The existence or status of another case has no effect on whether the plaintiffs can pursue their claims in federal court against these defendants. Cases are deemed "related" when, for example, they "raise the same or closely related issues." Circuit Rule 28-2.6. But each case "retains its independent character . . . regardless of any ongoing proceedings in the other cases." *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018).

CONCLUSION

The Court should grant the petition for rehearing or for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Circuit Rule 40-1(a) because it contains 1,873 words excluding the parts exempted by Rule 32(f). This petition 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 Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2022, I electronically filed the foregoing reply in support of the petition with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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