No. 17-2161

In the United States Court of Appeals for the Third Circuit

JOHN S. MACDONALD,
Plaintiff-Appellee,

v.

CASHCALL, INC., WS FUNDING LLC,
DELBERT SERVICES CORP., and J. PAUL REDDAM,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey, Case No. 2:16-cv-02781-MCA

BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

The plaintiff in this case, John MacDonald, is a New Jersey resident who was lured into obtaining a payday loan from Western Sky. Even though New Jersey caps loan interest rates at 16% and makes it a crime to charge someone a rate above 30%, Mr. McDonald's loan carried a triple-digit interest rate of 116%. All told, under the defendants' lending scheme, Mr. MacDonald's $5,000 loan put him on the hook for about $41,000—more than eight times what he borrowed.

This appeal concerns the enforceability of the defendants' effort to contract their way out of legal accountability. To evade courts and regulators, the defendants did their lending over the Internet and sought to cloak themselves in immunity from all federal and state law through a "tribal arbitration" contractual scheme that has been called "a sham from stem to stern." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778–779 (7th Cir. 2014). By its terms, the contract expressly disavows the application of all federal and state law to any dispute, and it specifically forbids an arbitrator from applying any federal or state law in any arbitration proceeding. The contract then, in turn, requires arbitration before an "authorized representative" of the Cheyenne River Sioux Tribe and under the Tribe's "consumer dispute rules." But both that arbitrator and those rules "do not exist." *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014). Although Western Sky halted its lending four years ago, the defendants—the true architects

of the lending scheme—have continued to insist that courts enforce this arbitration contract.

"[E]very Court of Appeals that has considered" the contract has found it entirely unenforceable and "refused to dismiss the case or compel arbitration." *Smith v. Western Sky Fin. LLC*, 168 F. Supp. 3d 778, 781 (E.D. Pa. 2016). Judge Wilkinson—writing for a unanimous panel of the Fourth Circuit—labeled it a "farce," designed specifically "to avoid state and federal law," and deployed by these very defendants "to game the entire system." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674, 676 (4th Cir. 2016). The Seventh Circuit has said much the same thing. *Jackson*, 764 F.3d at 779. And the Eleventh Circuit has likewise held the contract unenforceable not once, not twice, but *three* times. *See Parnell v. Western Sky Fin. LLC*, 664 Fed. App'x 841 (11th Cir. 2016); *Parm v. Nat'l Bank of Cal.*, 835 F.3d 1331 (11th Cir. 2016); *Inetianbor*, 768 F.3d at 1354.

Now, the Western Sky affiliates once again seek a federal court's aid in salvaging their contract. But doing so would require departing from the Fourth, Seventh, and Eleventh Circuits and holding that an arbitration agreement requiring consumers to prospectively waive all state and federal rights and arbitrate their claims in a nonexistent forum must be enforced. The district court's decision refusing to do just that should be affirmed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1332(d), and 1367. Holding Western Sky's arbitration agreement unenforceable, the court issued a final judgment denying the defendants' motion to dismiss and to compel arbitration on April 28, 2017. JA4-38. The appellants timely appealed on May 23, 2017. JA1-2. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B).

STATEMENT OF THE ISSUE

Consistent with every federal court of appeal to have considered it, the district court refused to enforce the Western Sky tribal-arbitration agreement because the agreement expressly forbids an arbitrator from applying any state or federal law and requires that arbitration be conducted by an "authorized representative" of the Cheyenne River Sioux Tribe who does not exist under the Tribe's non-existent "consumer dispute rules." Should this Court depart from the Fourth, Seventh, and Eleventh Circuits and hold that an arbitration agreement requiring consumers to prospectively waive all state and federal rights and arbitrate their claims in a nonexistent forum must be enforced?

STATEMENT OF RELATED CASES

This case has not been before this Court previously. Appellee is not aware of any previous or pending appeals before this Court arising out of the same case.

STANDARD OF REVIEW

This Court's review of a district court's order denying a motion to compel arbitration is plenary. *Kirleis v. Dickie, McCarmey & Chilcote, P.C.*, 560 F.3d 156, 159 (3d Cir. 2009).

STATEMENT OF THE CASE

1. *The Western Sky lending scheme.* Western Sky Financial was an online lender that used an association with the Cheyenne River Sioux Tribe of South Dakota to peddle low-dollar loans to thousands of consumers through marketing "designed to reach potential borrowers who reside off the Reservation and outside of South Dakota." *FTC v. Payday Fin. LLC*, 935 F. Supp. 2d 926, 930 (D.S.D. 2013) ("*FTC I*"). In a typical loan, a consumer borrows several thousand dollars but has to repay the loan at triple-digit interest rates that easily end up quadrupling or quintupling the total dollar amount ultimately owed on the loan. *See, e.g.*, *Hayes*, 811 F.3d at 668–69.

Although "clearly illegal" under both state and federal law, Western Sky premised its lending scheme on the theory that it could avoid liability by cloaking its activities in tribal immunity. *Moses v. CashCall, Inc.*, 781 F.3d 63, 66 (4th Cir. 2015); *see generally* Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326 (2012). But Western Sky's official owner, Martin "Butch" Webb, "is not an official of the Tribe," and

"does not represent or act on behalf of the Tribe." *FTC I*, 935 F. Supp. 2d at 929. Nevertheless, Western Sky insisted that any challenge to its loans would be "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe" and that "no United States state or federal law applies." JA85.

Not only has no court ever accepted this confusing premise—for starters, it simply "misunderstand[s]" the Indian Commerce Clause, *see FTC I*, 935 F. Supp. 2d at 931 n.4—but Native American advocacy groups have condemned Western Sky's cynical efforts to game tribal sovereignty. When the New York Attorney General sued Western Sky for illegal lending practices, the Native American Financial Services Association "applaud[ed]" the action, explaining that, unlike member tribes, Western Sky "does not operate under tribal law or abide by tribal regulatory bodies and is not wholly-owned by a federally-recognized tribe."[1]

Four years ago, Western Sky's lending scheme came to a halt. Faced with multiple regulatory enforcement efforts, as well as a raft of lawsuits challenging its lending and business practices, Western Sky shuttered its doors in September 2013.[2]

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[1] *See* NAFSA, *NAFSA Applauds New York Attorney General Decision to File Suit Against Lender Circumventing Tribal Law* (Aug. 13, 2013), https://perma.cc/GZ3G-Y8WE.

[2] *See CFPB Sues CashCall for Illegal Online Loan Servicing* (Dec. 16, 2013), http://1.usa.gov/1EAEgew.

2. The Western Sky affiliates. As it turns out, Western Sky was only a front. Although it "purports" to make loans "in its name," the loans are actually "marketed by CashCall, financed by WS Funding," and "almost immediately sold and assigned to WS Funding, and then serviced and collected by CashCall, Delbert, or both." Am. Compl. ("CFPB Compl.") ¶¶ 19, 21, *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 13-cv-13167 (D. Mass. Mar. 21, 2014); *see also Hayes*, 811 F.3d at 669 (explaining that, "[a]fter issuing a loan, Western Sky's practice was to transfer the loan to an assortment of allied servicing and collection firms").

This scheme was the brain child of J. Paul Reddam—a former philosophy professor who made millions pushing subprime mortgage loans and then devised and founded the CashCall/Delbert-WS Funding-Western Sky enterprise. *See* Richard Sandomir, *In Other Races: Paying Back The Owner of a Triple Crown Hopeful*, N.Y. Times (June 5, 2012), http://nyti.ms/2gLWmfD. Through an "intentionally complicated and sham structure of the Western Sky loan program," hundreds of thousands of loans were made to consumers nationwide (including Mr. MacDonald here). *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016). These loans, according to the CFPB and other regulators, violated a host of state usury laws, by ignoring interest-cap rates and evading licensing requirements. *See* CFPB Compl. at ¶¶ 26–31. As one enforcement agency put it, the Western Sky "business scheme" is "nothing more than a front to enable

CashCall to evade licensure by state agencies and to . . . shield its deceptive business practices from prosecution by state and federal regulators." *In re CashCall, Inc.*, 2013 WL 3465250, at *3 (N.H. Banking Dept. June 4, 2013).

3. Mr. MacDonald's loan. In late 2012, Mr. MacDonald found himself in need of a small loan to cover unexpected personal expenses after a divorce. JA58. While researching online he was shown an advertisement from the Western Sky enterprise that pitched their ability to process and fund a small personal loan very quickly and with little hassle. JA58. When Mr. MacDonald clicked on the advertisement he was directed to the Western Sky website where he was provided with the ability to complete an online loan application. JA58. After just a few clicks, he was able to take out a loan. JA58.

Although the loan was advertised for $5,000, when it was finalized the company immediately took $75 off the top as a "Prepaid Finance Charge/Origination Fee." JA83. Interest was nonetheless compounded on the total amount ($5,000) at an annual percentage rate of 116.73%. JA81. That rate clearly ran afoul of New Jersey law—which caps any interest rate chargeable to consumers at 16%, *see* N.J. Stat. § 31:1-1(a), and makes it a crime to charge consumers interest rates above 30%, N.J Stat. § 2C:21-19. Nevertheless, the defendants required Mr. MacDonald to make 83 monthly payments of $486.58 (plus an initial payment of $210.75) over the life of the repayment plan—a total of seven years. JA81-82. In

total, for a true-dollar loan of $4,925, the defendants charged Mr. MacDonald approximately $41,000—more than eight times the amount borrowed—including around $36,000 in "finance charge[s]." JA81.

A week after borrowing the money, Mr. MacDonald received an email informing him that WS Funding, not Western Sky, now owned the loan and that CashCall would handle all servicing and payment collection for the loan. JA58. After six months of sending his monthly repayment installments to CashCall, Mr. MacDonald was then told that Delbert would take over. JA58. By April 2016—two and a half years after the loan was finalized—the defendants had extracted $15,493 in total payments from Mr. MacDonald. JA59. Of this, only $38.50 had been applied to pay down the principal. JA59.

4. Mr. MacDonald sues the Western Sky enterprise. In an effort to curtail Western Sky affiliates' unlawful conduct, Mr. MacDonald brought a putative class action against CashCall, Delbert, WS Funding, and J. Paul Reddam individually. JA46–70. He asserted violations of various New Jersey and federal laws related to the illegal loans offered by CashCall and its affiliated entities. *See* JA62–69 (asserting common-law claims for usury, unjust enrichment, and restitution and statutory claims for violations of the New Jersey Consumer Finance Licensing Act, N.J. Stat. § 17:11C-1 *et seq.*, the New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-2 *et seq.*, and civil RICO, 18 U.S.C. § 1961 *et seq.*). Mr. MacDonald

sought damages, reimbursement, and injunctive relief on behalf of himself and the class of New Jersey consumers who received similar loans. *See* JA62–70.

5. The defendants attempt to shield their scheme from scrutiny. Almost immediately, the defendants moved to force the case into some type of tribal forum, advancing a cascade of arguments based on the Western Sky Loan Agreement.

First, the defendants argued that the Loan Agreement's forum-selection clause, coupled with its choice-of-law provision, required that "every aspect" of this case be sent to the "Cheyenne River Sioux Tribal Court," for resolution exclusively under "the laws and jurisdiction of the Cheyenne River Sioux Tribe." Dkt. No. 11 at 2. Both of these clauses are set out, in relevant part, here:

> **This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

JA80.

> **GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor lender is subject to the laws of any state of the United States of America. . . . You also expressly agree that this Agreement shall be subject to and construed in accordance only with

> the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement.

JA85.

Second, the defendants argued that, even if the forum-selection clause was unenforceable, the "doctrine of tribal exhaustion" required the case to be sent to the Cheyenne River Sioux Tribal Court. Dkt. No. 11 at 12. The defendants admitted that the consumer here was not "physically present within the boundaries of the CRST." Dkt. No. 11 at 14. But they referred to another provision in the Loan Agreement forcing consumers to pretend that they had executed the agreement as though physically present on tribal land:

> You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe . . . and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation[.]

JA85. Because, in their view, the Reservation was the place of contracting, the tribal court had jurisdiction over all disputes over the Loan Agreement. Dkt. No. 11 at 10-12.

Third, assuming (1) the forum-selection clause was invalid and (2) tribal exhaustion was a nonstarter, the defendants argued that the contract's tribal-arbitration clause required the parties to arbitrate all of their claims.

The system contemplated by Western Sky's arbitration agreement has been called a "procedural nightmare," lacking in any ability to ensure the "orderly

administration of justice." *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1192 (D.S.D. 2014). The key provision requiring arbitration states:

> **Agreement to Arbitrate.** You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rule and the terms of this Agreement.

JA86.

But the Cheyenne River Sioux Tribe doesn't authorize arbitrators, and it doesn't have consumer dispute rules. *See Inetianbor*, 768 F.3d at 1354. Western Sky's arbitration provision is thus impossible to enforce.

In addition, the agreement requires borrowers to relinquish their rights under state and federal law. It expressly forbids an arbitrator from applying any law other than Tribal law: "The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." JA88. The agreement, in turn, explicitly disclaims the application of any state or federal law. JA80 ("[N]o other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation."); *see also* JA88 (stating that the arbitration provision "shall be governed by the law of the Cheyenne River Sioux Tribe").

The contract here contains one additional component: a provision permitting parties to choose the AAA, JAMS, or some other arbitration organization to "administer" the arbitration. JA87. But the agreement expressly

limits the role of the arbitration administrator, stating that the administrator's "rules and procedures" govern only "to the extent" that they "do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement." JA87.

6. The district court's decision. In a thorough, 33-page decision, the district court refused to allow the defendants to enforce the contract's forum-selection, choice-of-law, or arbitration clauses and rejected their bid to dismiss the case. JA6–38. It held that the arbitration contract was an unenforceable "sham." JA16. "It is difficult to imagine," the court remarked, "a more transparent attempt to hijack the [Federal Arbitration Act] to deprive aggrieved parties of an opportunity to meaningfully adjudicate their claims." JA15.

That was so, the court explained, because the Western Sky contract—by its terms—repeatedly "ensures that no matter who the arbitrator is or where the arbitration occurs, . . . federal and state law may not be applied." JA15. That sort of "categorical[]" prohibition is unacceptable: Though the FAA "has a broad reach," it does not sanction a company's effort to "enforce a prospective waiver' of statutory rights, 'whether in an arbitration agreement or any other contract.'" JA15. Joining the "numerous courts" before it, the district court thus held that the Loan

Agreement's "wholesale renunciation of federal and state law" violated the FAA and "render[ed] the arbitration agreement unenforceable." JA15.[3]

Turning to the defendants' additional arguments, the district court rejected them all. *First*, the court dismissed their claim that the plaintiff "had not asserted a challenge to the delegation clause" both because the complaint "specifically" challenged the clause, and because the opposition brief "dedicated" an entire section specifically arguing "against enforcement of the delegation clause" JA12. And, like other courts within this Circuit (as well as other courts of appeal), the district court explained that the delegation clause was "unenforceable for virtually the same reason as the underlying arbitration agreement"—it categorically prohibits an arbitrator "from applying federal or state law." JA12 (citing *Smith*, 168 F. Supp. 3d at 786, and *Ryan v. Delbert Servs. Corp.*, 2016 WL 4702352, at *4–6 (E.D. Pa. Sept. 8, 2016).

Second, the court refused the defendants' invitation to attempt to sever the "unenforceable segments" of the agreement. JA13. Consistent with the unanimous view of the Fourth, Seventh, and Eleventh Circuits, the district court determined

[3] The district court also observed that multiple courts "had held that even with the AAA/JAMS provision, the arbitration agreement is unenforceable because the CRST forum and consumer dispute rules do not exist." JA16 (citing *Parm v. Nat'l Bank of Cal., N.A.*, 2015 WL 11605748, at *8–11 (N.D. Ga. May 20, 2015); *Parm*, 835 F.3d at 1336; *Parnell*, 664 Fed. App'x at 843-44). But, because the agreement "fail[ed] for other reasons," the court "decline[d] to address this alternative argument at this time." JA16. It also reserved decision on "whether the arbitration clause" was unenforceable under "basic contract law principles." JA16.

that the offending provisions "'defeat the central purpose of the contract,' which was to insulate the defendants from the application of state and federal law." JA13.

Third, the court refused to enforce the agreement's Tribal forum selection clause. The clause was unenforceable "because the CRST Court does not have subject matter jurisdiction over Plaintiff's claims." JA17–18. As the district court explained, "few if any of the relevant activities occurred on tribal land" and so the "Tribe's conspicuous lack of connections to the underlying dispute" rendered the clause unenforceable. JA18.

Fourth, the court rejected the defendants' reliance on the contract's choice-of-law clause to avoid the application of New Jersey law. Following the Restatement's framework for deciding choice-of-law questions, the court held that "application of CRST law would be contrary to New Jersey's fundamental public policy of protecting its citizens from usurious loans and unlicensed lenders." JA20–21 (applying Restatement (Second) of Conflict of Laws § 187(2) (1971)). In reaching this conclusion, the court explained that "[t]here is little question that New Jersey has a strong public policy" against "usurious interest rates like the 116.73% interest rate charged under Plaintiff's Loan Agreement." JA21–22.[4]

[4] Although it is not the subject of this appeal, the district court also firmly denied the defendants' motion to dismiss all of the federal and state claims in the case as well as their effort to dismiss J. Paul Reddam for lack of personal jurisdiction. *See* JA27–38.

SUMMARY OF ARGUMENT

Consistent with every circuit court that has considered it, the district court correctly concluded that the Western Sky arbitration agreement is unenforceable in its entirety. The contract explicitly robs consumers of their federal and state statutory rights while expressly prohibiting an arbitrator from applying any state or federal law. It also requires any arbitration to take place in front of an arbitrator who does not exist and under rules that don't exist. As they have many times before, the defendants' recycled arguments all fail here. JA15.

I. The defendants wrongly claim that their contract does not constitute an impermissible prospective waiver. As the defendants themselves acknowledge, winning this argument requires this Court to explicitly reject the Fourth Circuit's holding in *Hayes*. But the Fourth Circuit got it exactly right. Although the FAA hands parties considerable freedom to structure arbitration agreements, it has long been the rule that that this freedom does not extend to a prospective waiver of a party's statutory rights. By "flatly and categorically" renouncing both federal and state law, this contract takes that "plainly forbidden step" and is therefore "invalid and unenforceable." *Hayes*, 811 F.3d at 675.

And that conclusion is not affected by the defendants' flawed focus on cases involving international arbitration contracts governed by Chapter 2 of the FAA. The specific international-comity concerns that drive those decisions are entirely

absent here—as evidenced by the fact that the defendants do "not attempt to ground" their "renunciation of federal law in any claim" of tribal sovereignty. *Id.* at 673. Ultimately, the contract's unambiguous "prospective waiver of federal statutory rights" means that "the entire arbitration agreement is unenforceable" against all claims, state and federal. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336–37 (4th Cir. 2017). As a result, the district court was right to invalidate the agreement at the threshold.

II. Even putting the prospective-waiver problem to one side, the defendants contend that the contract is enforceable because consumer claims could be channeled to legitimate arbitration providers like the AAA or JAMS. But doing that would require rewriting the contract. The FAA "ensure[s] that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). And the terms of this contract do not allow for unfettered arbitration before any forum—they instead inescapably require the Tribe's participation. But the tribal arbitration scheme contemplated in the contract is illusory—it requires that any arbitrator be an "authorized representative" of the Tribe and that any arbitration be conducted under the Tribe's "consumer dispute rules," neither of which exist. *Jackson*, 764 F.3d at 778–779; *see also Inetianbor*, 768 F.3d at 1354. The defendants may now wish this case involved a different agreement, but it does not.

Nor can the offending provisions of this contract be severed, as the defendants insist. That is because the contract's "pervasive references to the tribal forum and its rules," make clear that "the forum selection clause was not simply an ancillary concern but an integral aspect of the parties' agreement to arbitrate." *Parm*, 835 F.3d at 1338; *see also Hayes*, 811 F.3d at 675–76 (holding that, under "basic principle[s] of contract law," the offending provisions are unenforceable and "cannot be severed" because they go "to the 'essence' of the contract"); *Jackson*, 764 F.3d at 780–82 (same). Yet again, the only way the defendants can avoid this conclusion here is if this Court openly splits with its sister circuits.

III. The district court was right to reject the defendants' delegation-clause arguments. Contrary to their assertion, a specific challenge to this clause was repeatedly raised in the district court. And that challenge was successful because the delegation clause fails for the same reason the rest of the arbitration contract fails: it requires arbitration in a forum that does not exist and bars the application of any state or federal law. This Court should affirm the district court's refusal to enforce this sham arbitration contract.

ARGUMENT

I. The arbitration agreement is unenforceable because, by its terms, it forbids the application of any state or federal law.

The district court in this case refused to enforce the defendants' arbitration contract for one simple reason: by its terms, the contract "ensures that no matter

who the arbitrator is or where the arbitration occurs, . . . federal and state law may not be applied." JA15. That is forbidden: Although the FAA has a broad reach, "courts will not enforce a prospective waiver" of statutory rights, "whether in an arbitration agreement or any other contract." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313–14 (2013). That decision should be affirmed. Because this very arbitration contract "purports to renounce wholesale" a party's "right to pursue statutory remedies," it is "simply unenforceable." *Hayes*, 811 F.3d at 673–74 (internal quotations omitted). None of the defendants' arguments for why this Court should reverse the district court and part ways with the Fourth Circuit are persuasive.

A. The district court correctly held that the arbitration agreement is invalid under the FAA because it prospectively waives all state and federal statutory rights.

As the Supreme Court has repeatedly made clear, a contract that operates "as a prospective waiver of a party's right to pursue statutory remedies" is unenforceable. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see Am. Express*, 133 S. Ct. at 2310. Under this "prospective waiver" doctrine, courts will not enforce an arbitration agreement if doing so "would prevent a litigant from vindicating federal substantive statutory rights." *Dillon*, 856 F.3d at 334. As the Fourth Circuit explained, this Western Sky arbitration contract is invalid under this "fundamental" rule because of its "categorical rejection of the

requirements of state and federal law." *Hayes*, 811 F.3d at 668, 673; *see Dillon*, 856 F.3d at 334.

That the Western Sky agreement tosses state and federal law overboard cannot be seriously disputed. The contract repeatedly states that it is governed solely by the law of the Cheyenne River Sioux Tribe. *See* JA80, JA85–88. But it doesn't just require the arbitrator to apply Tribal law; it also expressly forbids the "application of any other law." JA87–88. And in case that left any doubt, the loan contract also states that "no United States state or federal law applies to this Agreement." JA85. There is nothing subtle about this: Under the agreement, no consumer can bring a federal or state statutory claim in arbitration and no arbitrator can apply federal or state law.

In *Hayes*, the Fourth Circuit saw this scheme for what it is: a transparent attempt to avoid federal and state law through a set of calculated "prospective waiver" provisions found directly "in the arbitration agreement." 811 F.3d at 673. The FAA does not permit a company to free itself of the "strictures of any federal law." *Id.* at 676. As the Fourth Circuit explained, an arbitration agreement may not, "[w]ith one hand," offer "an alternative dispute resolution procedure in which aggrieved persons may bring their claims," and "with the other, [] proceed[] to take those very claims away." *Id.* at 673–74. Were it otherwise, the "just and efficient system of arbitration intended by Congress when it passed the FAA"

would be made to "play host" to arbitration schemes designed "to game the entire system." *Id.* at 674–75. As a result, because the defendants' contract "flatly and categorically" disavows "the application of all state and federal law," the Fourth Circuit did not hesitate in condemning the agreement as "simply unenforceable." *Id.* at 675, 670, 673.

The defendants' response is to argue that "prospective waiver challenges are disfavored given the strong federal presumption in favor of arbitration." *See* Opening Br. 18–20 (citing several examples in which courts declined to apply the rule). But this is no answer. There are of course dozens—maybe hundreds—of cases rejecting prospective-waiver challenges to particular arbitration agreements where those agreements do not explicitly compel the waiver of statutory rights. The Fourth Circuit in *Hayes* specifically acknowledged many of them. *See Hayes*, 811 F.3d at 674–75. But the hallmark of those cases—and what distinguishes them from this case—is that the agreements under consideration "only reduced the economic incentive" to bring a statutory claim but did "not prevent a party from pursuing" the claim altogether. *Id.* at 675.

The problem for the defendants is that the agreement here "goes well beyond the more borderline cases involving mere disincentives to pursue arbitral relief." *Id.* at 675. It runs directly into the primary aim of the prohibition—to "prevent [a] 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Am.*

Express, 133 S. Ct. at 2310 (emphasis in original). That rule "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* And because "[t]hat sort of outright prohibition is exactly what we have here," the defendants' effort to shift the focus onto cases involving less burdensome features—"mere disincentives" to pursuing relief—does nothing to aid their cause. *Hayes*, 811 F.3d at 675.

B. The choice-of-law clause does not save the agreement.

The defendants next claim that the contract's choice-of-law clause completely insulates the agreement from a prospective-waiver challenge. In their view, the contract simply reflects "the parties' intention to allow foreign law to govern their disputes under the Loan Agreement." Opening Br. 20. In this way, the defendants say, the district court was wrong to invalidate the contract because it is "*no different* from an agreement governed by Japanese, Bahamian, Philippine or British law." Opening Br. 20 (emphasis in original). But this argument fails for the same reason their previous argument did: this contract goes well beyond the mere choice of foreign law.

In *Hayes*, the defendants pressed the same theory—that their contract reflected nothing more than a choice to be bound by Tribal, not federal or state, law—and the Fourth Circuit rejected it. "[P]arties are free within bounds to use a choice of law clause in an arbitration agreement to select which local law will

govern the arbitration," the court explained, "[b]ut a party may not 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." *Hayes*, 811 F.3d at 675.

The defendants of course dispute that their contract contains anything more than a garden-variety foreign choice-of-law clause. In their view (at 20), "[a]ffirmatively excluding federal and state law has the *same effect* as stating that CRST or any other foreign law applies to an agreement." In other words, their argument turns on the theory that, when "foreign law governs an agreement, it necessarily means that no federal or state law can apply." Opening Br. 20-21. That is wrong.

To be effective, a foreign choice-of-law clause cannot "wholly [] displace American law even where it otherwise would apply." *Mitsubishi Motors*, 473 U.S. at 637 n.19. Instead, all it may do is "select[] the law of a certain jurisdiction to govern *the agreement*." *Hayes*, 811 F.3d at 675 (emphasis added). Under this settled approach, so long as the arbitration agreement does not explicitly eliminate a claimant's right to bring a statutory claim, it's choice of foreign law should not be disturbed. But the flip side of this rule is just as true: an agreement that "expressly forfeits" a claimant's statutory rights is unenforceable as a matter of law. *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994); *see also Dillon*, 856 F.3d at

336 (explaining that an agreement that "forbids an arbitrator from even applying the applicable law" functions as "a prospective waiver"). The defendants' core premise thus gets it exactly backward.

In support of their contrary view, the defendants rely on several cases involving Chapter 2 of the FAA, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* Opening Br. 18–19 (discussing, among others, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011), and *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012)). But the contract at issue here is not governed by Chapter 2 or the Convention. *See* 9 U.S.C. § 202. It is therefore not subject to the Convention's specific framework for evaluating the enforceability of Chapter 2 contracts. *See Aggarao*, 675 F.3d at 372–73 (explaining how international-comity concerns inform the enforceability analysis of arbitration contracts governed by the Convention).

Not surprisingly, neither the Fourth nor Eleventh Circuits saw these decisions (several of which arose within their own circuits) as compelling a different result here. As the court in *Hayes* explained, the defendants here do "not attempt to ground" their "renunciation of federal law in any claim of tribal affiliation" that renders them "not subject to the authority of federal law." *Hayes*, 811 F.3d at 673. Instead, the agreement "offers an alternative dispute resolution procedure in which

aggrieved persons may bring their claims" but then "proceeds to take those very claims away." *Id.* at 673–74. The contract achieves this result by using "its 'choice of law' provision to waive all of a potential claimant's federal rights"—disclaiming the application of all state and federal law and forbidding an arbitrator from applying "any law other than the law of the Cheyenne River Sioux Tribe of Indians." *Id.* at 675.

Coupled with the contract's "brazen" disclaimer that "no United States state or federal law applies to this Agreement," *id.* at 676, the Fourth Circuit had little difficulty concluding that the arbitration agreement was part of an "integrated scheme to contravene public policy," *id.* at 675–76 (explaining that the contract "almost surreptitiously waives a potential claimant's federal rights through the guise of a choice of law clause"). Because this arbitration agreement reflects "an unambiguous attempt to apply tribal law *to the exclusion of federal and state law,*" it is "unenforceable as a matter of law." *Dillon*, 856 F.3d at 336 (emphasis in original).

C. The district court's decision invalidating the agreement was not premature.

Falling back, the defendants make a play for delay. The district court's decision to invalidate the agreement was premature, they say, because the agreement could "be read to contemplate that federal law may also apply in the arbitral proceeding." Opening Br. 22. Since a court "does not 'know how the arbitrator will construe'" the statutory limitations—he might apply federal law, or

tribal law that is consistent with federal law, or use federal law to fill any possible gaps in tribal law—the defendants argue that the "proper course" is to compel arbitration. Opening Br. 22.

This argument fails for a simple reason: the contract unambiguously forbids the application of any federal or state law. There is, in other words, nothing "speculative" about what law the arbitrator must apply. And the court cannot "rewrit[e] the unenforceable foreign choice of law provision in order to save the remainder of the arbitration agreement." *Dillon*, 856 F.3d at 336. The defendants "purposefully drafted the choice of law provisions in the arbitration agreement to avoid the application of state and federal consumer protection laws," so the contract's choice-of-law provisions are "essential to the purpose of the arbitration agreement." *Id.* The defendants' late-breaking (albeit hedged) "consent to application of federal law" would therefore "defeat the purpose of the arbitration agreement in its entirety." *Id.*

Nor does the abstract possibility of back-end review mean that the district court should have delayed. *See* Opening Br. 23–24. Waiting until the award-enforcement stage is only appropriate where there is "uncertainty regarding the effect of the choice of law provision." *Dillon*, 856 F.3d at 335; *see also Vimar*, 515 U.S. at 540–41. But here "there is no uncertainty." *Dillon*, 856 F.3d at 335. The defendants' contract "effects an unambiguous and categorical waiver of federal

statutory rights" and so it "is unenforceable" at the threshold. *Id.*; *see also Jackson*, 764 F.3d at 779 (refusing to defer consideration until after arbitration because the contract "provides that a decision is to be made under a process that is a sham from stem to stern").

D. The defendants' request that this Court only partially invalidate the arbitration agreement should be denied.

Finally, the defendants suggest that, even if their contract prevented the assertion of *federal* statutory rights, the district court should have nonetheless forced Mr. MacDonald's *state-law* claims into arbitration. Relying on a line from Justice Kagan's dissent in *American Express*, they argue (at 25) that "there is absolutely no rule that prevents arbitration when a person cannot effectively vindicate his or her state statutory rights."

The Fourth Circuit has shut the door on this argument as well. Regardless of the state-law claims in the case, when a company drafts an arbitration agreement "in a calculated attempt to avoid the application of state and federal law," the "*entire arbitration agreement* is unenforceable" because it "contravene[s] public policy." *Dillon*, 856 F.3d at 337 (emphasis added). In *Dillon*, like here, the plaintiffs brought both federal RICO claims and state-law usury and consumer-lending practices claims. The defendants in that case, like here, argued that, even if the arbitration agreement was invalid as to the federal claims, the contract could still be enforced to bar litigation of the state-law claims.

The Fourth Circuit squarely rejected this request. Under the prospective-waiver doctrine, "courts will not enforce an arbitration agreement" *at all* "if doing so would prevent a litigant from vindicating federal substantive statutory rights." *Dillon*, 856 F.3d at 334. In other words, if "the arbitration agreement functions as a prospective waiver of federal statutory rights," then it is "unenforceable as a matter of law" and "render[s] the entire arbitration agreement unenforceable." *Id.* at 336–37 (refusing to permit the arbitration of either the federal RICO or state-law claims in the case).

Other courts, including several within this Circuit, have quite sensibly applied this rule to this same agreement. *See, e.g.*, *Ryan*, 2016 WL 4702352, at *5 (holding that "the wholesale waiver of federal and state law thus dooms both the delegation provision and the arbitration clause"); *Smith*, 168 F. Supp. 3d at 785 (holding that this arbitration agreement is completely unenforceable because its "purpose" is not "to create a fair and efficient means of adjudicating Plaintiff's claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely"). This Court should affirm the district court's decision that the entire arbitration agreement in unenforceable.

II. The arbitration agreement is unenforceable because it requires arbitration in a forum that does not exist.

Even if the defendants could convince this Court to openly reject the Fourth Circuit's holdings in *Hayes* and *Dillon*, the arbitration contract is fatally defective for

another fundamental reason. This contract is invalid—as both the Seventh and Eleventh Circuits have held—because the only arbitral forum in which the contract permits consumers to bring disputes is one that literally doesn't exist. *Jackson*, 764 F.3d at 779; *see also Inetianbor*, 768 F.3d at 1354. The contract promises "a process conducted under the watchful eye of a legitimate governing tribal body" but delivers no such thing, for a proceeding subject to tribal oversight "simply is not a possibility." *Jackson*, 764 F.3d at 779. It is, in other words, a "sham from stem to stern." *Id.* The defendants' advance several arguments to avoid this conclusion. All fail.

A. The plain terms of the agreement require consumers to arbitrate their claims before an arbitrator who does not exist and under nonexistent rules.

The defendants' principal theory for why the district court erred is that "well-respected organization such as AAA or JAMS are available to adjudicate" the case. Opening Br. 35. But this argument fails for the very reason the defendants think it carries the day: Arbitration agreements must be "enforced according to their terms." Opening Br. 36 (quoting *Stolt-Nielsen*, 559 U.S. at 682). Although "there is [a] presumption in favor of arbitration, '[t]he courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.'" *Parm*, 835 F.3d at 1335.

That rule forecloses the defendants' reading of their own contract. Citing several pre-*Hayes* district court opinions—but not the language of their own contract—they assert that, under their agreement, a consumer "has the option of choosing to arbitrate any claims . . . before AAA, JAMS, or another mutually acceptable organization, applying the consumer dispute rules of the selected administering organization and conducted by an arbitrator from the selected organization's system." Opening Br. 37 (citing *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847, 854 (E.D. Wis. 2015)). But that is not what the contract says—far from it.

Contrary to their interpretation, the contract expressly requires that an authorized representative of the Tribe—not a AAA or JAMS arbitrator—*conduct* the arbitration. The agreement states:

> You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

JA86. There is only one way to interpret this provision: Arbitration "'is required to' be conducted by an authorized representative of the Tribe" under the Tribe's consumer dispute rules. *Inetianbor*, 768 F.3d at 1351 (quoting Black's Law Dictionary and explaining that "shall" means "is required to"). As a result, there is only one "way to enforce the arbitration agreement 'in accordance with [its] terms,'" as required by the FAA: "to compel arbitration before an authorized representative of the Tribe." *Id.* at 1352. And, because the CRST forum is

unavailable—it is an "imaginary forum with imaginary rules,"—it cannot be used to arbitrate any claims. *Inetianbor v. CashCall, Inc.*, 2016 WL 4702370, at *5 (S.D. Fla. Aug. 18, 2016).[5]

Despite the agreement's plain-text requirement that that any arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative," the defendants argue that this requirement was more like an optional choice. And they point to the contract's later reference to the possibility that AAA or JAMS could "administer the arbitration." JA87. (The defendants appear to abandon this claim in their opening brief, relegating it to a footnote. *See* Opening Br. 37 n.9.)

The Eleventh Circuit already rejected this argument, and for good reason. Interpreting "the Choice of Arbitrator clause to conclude that AAA or JAMS could

[5] Case in point: In one of the only reported arbitrations stemming from a Western Sky tribal-arbitration agreement, one consumer, Abraham Inetianbor, was forced to begin an arbitration under the agreement. *See Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1305 (S.D. Fla. 2013). The result was a mockery. The parties—a pro se Mr. Inetianbor and (a represented) CashCall—"attended a preliminary arbitration hearing" before the supposed arbitrator—Mr. Chasing Hawk. *Id.* at 1308. At the hearing, Mr. Inetianbor asked Mr. Chasing Hawk how he was selected "to be an arbitrator." *Id.* Mr. Chasing Hawk's reply: "The Western Dakota owner." *Id.* When Mr. Inetianbor pressed again, asking "[s]o the owner of Western Sky asked you to be an arbitrator for this case?" Mr. Chasing Hawk responded, "Yes because I've been on the Tribal Council for 20 years." *Id.* It gets worse. Mr. Chasing Hawk also confirmed that his daughter worked at Western Sky, and Mr. Chasing Hawk admitted that he was not a lawyer, had no formal training as an arbitrator, and was selected by Martin Webb (Western Sky's owner) solely because he was a Tribal Elder. *Jackson*, 764 F.3d at 771.

appoint any arbitrator, regardless of his or her affiliation with the tribe" would "effectively eliminate the agreement's express requirement that the arbitrator be a representative of the CRST." *Parm*, 835 F.3d at 1336. And, it misinterprets the material differences between "administering" an arbitration and "conducting" one. *See id.* at 1336 n.3 (explaining that, "when acting as an administrator," the AAA's "role is to manage the administrative aspects" like "the appointment of the arbitrator," but "not decide the merits of a case or make rules on issues"). Worse still, it can't even be squared with the rest of the language in the specific provision referencing the AAA and JAMS. As the Eleventh Circuit put it, the terms of that provision:

> state that the AAA or JAMS may administer arbitration under that organization's rules "to the extent that those rules and procedures do not contradict" the law of the CRST and the express terms of the arbitration agreement. The terms of the arbitration agreement, incidentally, *require* that the arbitration be conducted by a representative of the CRST. Therefore, the Choice of Arbitrator clause only provides an administrative vehicle to appoint the CRST arbitrator and does not affect the importance of the CRST forum in the agreement.

Id. at 1338.

There is, in short, only one reading that "harmonizes the clauses in the agreement"—and it is the one that the district court (along with every other circuit court) has adopted. *Id.* at 1336 "[T]here is simply no good reason" to reject this

construction here. *Id.* at 1337; *see also Smith*, 168 F. Supp. 3d at 785 (calling this AAA-administration clause "mere artifice").

Nor is it relevant, as the defendants seem to think (at 38), that "nearly a dozen" cases have in some form reached the doors of the AAA or JAMS. If AAA or JAMS attempts to administer the arbitration according to the contract's requirements (as they are required to by law), they will find that no such arbitration can be conducted. But if they ignore the contract's express limitations—if they appoint their own arbitrator and apply their own rules—any decision the arbitrator reached would be void because the arbitration would not be conducted in accordance with the terms of the agreement. *See, e.g.*, *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."). And, the AAA and JAMS would still be prohibited, under the terms of agreement, from applying any state or federal law. That is why the Eleventh Circuit held that the defendants' appeal to the AAA or JAMS "lack[s] merit." *Parnell*, 664 Fed. App'x at 844 (finding it irrelevant that "professional arbitration organizations are actively conducting Western Sky loan agreement arbitrations").

B. The agreement's offending provisions cannot be severed because tribal involvement is integral to the agreement to arbitrate.

Shifting gears, the defendants fault the district court (at 33) for "refusing to sever" the unenforceable provisions of their contract. They accuse the district court of reaching this "unsubstantiated conclusion" based on nothing more than "a select group" of other decisions. Although the defendants don't name them, these decisions happen to be: *Hayes*, *Jackson*, *Inetianbor*, and *Parm*. Every one rejected the defendants' severance argument. None of them are unsubstantiated.

Hayes delivered the message loud and clear. In that case, the defendants pressed the same argument they do here: that the offending provisions should have been severed, a new arbitrator substituted, and the parties sent to arbitration. But the Fourth Circuit dismissed the idea outright. "[W]e do not believe the arbitration agreement's errant provisions are severable." *Hayes*, 811 F.3d at 675. That was so, the court explained, because, under "basic principle[s] of contract law," an "unenforceable provision cannot be severed when it goes to the 'essence' of the contract." *Id.* at 675–76. And here, "the offending provisions go to the core of the arbitration agreement"—the "animating purpose[]" behind the Western Sky agreement is a "brazen" effort "to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law." *Id.* at 676. "Good authority," the court held, "counsels that severance should

not be used when an agreement [like the defendants'] represents an 'integrated scheme to contravene public policy.'" *Id.* (quoting E. Allan Farnsworth, *Farnsworth on Contracts* § 5.8, 70 (1990)).

The Eleventh Circuit has twice reached the same conclusion. *See Parm*, 835 F.3d at 1337 (holding that FAA section 5's sever-and-substitute option is "preclude[d]" in cases where, as here, an unavailable "choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern"); *Inetianbor*, 768 F.3d at 1354 (holding the defendants "to the terms of the integral forum selection provision" and declining to sever-and-substitute). And, the Eleventh Circuit reached this result even though the contract referenced an AAA- or JAMS-administered arbitration because that provision "does not affect the importance of the CRST forum in the agreement." *Parm*, 835 F.3d at 1338.

On appeal, the defendants' only response is to suggest that this Court's severance case law requires a different result. *See* Opening Br. at 34 (arguing that, under *Spinetti*, the district court's decision was wrong). Not so. The Third Circuit—no different than the Fourth, Seventh, and Eleventh—applies the "general rule of severability." *Parilla v. IAP Worldwide Servs., VI*, 368 F.3d 269, 288–89 (3d Cir. 2004) (discussing *Spinetti*'s "endorse[ment]" of the Restatement). Under that settled framework, in this Circuit both "severance and enforcement of arbitration" will be "preclude[d]" where doing so "will defeat the primary purpose of the agreement"

or where the "degree of unfairness support[s] the inference" that the company "was not seeking a *bona fide* mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage." *Parilla*, 368 F.3d at 288–89.

This contract fails for both reasons. An arbitration agreement "does not, in the context of litigation, become [an] opening bid in a negotiation . . . over the agreement's unconscionable terms." *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 205 (3d Cir. 2010). Instead, where a company drafts the agreement, it is "saddled with the consequences of the [contract] *as drafted*." *Id.* (quoting *Spinetti*, 324 F.3d at 21–18 n.2). And where an agreement's illegal provisions constitute the "primary" or "essential" purpose of the arbitration, *id.* at 206 (quoting the Restatement), courts will not reward that illegality by enforcing a stripped-down version of the agreement. *See, e.g.*, *Graham Oil*, 43 F.3d at 1248–49 (holding that multiple illegal provisions tainted the entire purpose of the arbitration agreement); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that where the challenged provisions defeat basic remedial purposes of federal law, the arbitration agreement cannot be enforced). This Court should decline the defendants' invitation to do that here.

III. The plaintiff adequately challenged the invalid delegation clause.

The defendants' last-ditch argument that Mr. MacDonald failed to adequately challenge the delegation clause also goes nowhere. This argument, it appears, turns on the defendants' belief that any challenge to a delegation clause must be pled in detail in a plaintiff's complaint. *See* Opening Br. 39 (arguing that the "complaint's *only* reference to the Delegation Clause" was inadequate). That is wrong. Neither the FAA nor basic pleading standards require such rule. How could they? A party seeking to enforce an arbitration clause under the FAA must first file a motion to compel arbitration (and it may elect not to). *See* 9 U.S.C. § 4. And it is not until *after* that happens that the party opposing the motion can raise his challenge.

That is why the Supreme Court itself focused exclusively on what the plaintiff said "in his opposition to [the] motion to compel arbitration" in determining whether a sufficient challenge to the delegation clause had been raised in *Rent-A-Center, West, Inc. v. Jackson*. *See* 561 U.S. 63, 72 (2010). And it is why the Eleventh Circuit rejected this same argument in *Parm*. *See* 835 F.3d at 1335 n.1. In any event, as the district court found, both the complaint and Mr. MacDonald's opposition "specifically" challenged the delegation clause. *See* JA12 (quoting the complaint and the opposition). That "is more than sufficient." JA12.

Finally, the defendants insist (at 39–40) that any challenge to the delegation clause must rest on some independent and "exclusive" ground, *i.e.*, that it may not be invalid for the same reason that the entire arbitration provision is invalid. That is nonsensical. If an arbitral forum that is designated by the contract—and is integral to that contract's agreement to arbitrate—does not exist, but the delegation clause is enforceable anyway, then a consumer's claims cannot be heard anywhere. Put another way: "In practical terms, enforcing the delegation provision would place an arbitrator in the impossible position of deciding the enforceability of the agreement *without* authority to apply any applicable federal or state law." *Smith*, 168 F.3d at 786 (emphasis in original); *see also Parm*, 835 F.3d at 1338 (invalidating *both* the delegation clause *and* the underlying arbitration agreement because it requires "arbitration in a tribal forum that is both unavailable and integral to the parties' agreement to arbitrate"); *Parnell*, 664 Fed. App'x at 843–44 (same); *Hayes*, 811 F.3d at 671 n.1 (same). There is no reason to depart from this settled approach here.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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COMBINED CERTIFICATIONS

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2. WORD COUNT, TYPEFACE, AND TYPE STYLE. I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure of 32(a)(7)(B) because the brief (as indicated by my word processing program, Microsoft Word) contains 8,918 words, excluding those portions excluded under Rule 32(f). I also certify that this brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements because this brief has been prepared in the proportionally spaced typeface of 14-point Baskerville.

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