No. 21A237

IN THE

Supreme Court of the United States

SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, IN HER OFFICIAL CAPACITY, ET AL.,

Applicants,

v.

GEORGE HENGLE, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO THE APPLICATION FOR STAY

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INTRODUCTION

The applicants in this case are the architects of a scheme to make payday loans over the internet. Operating through a website nominally controlled by a federally recognized Native American tribe, the applicants' loans carried triple-digit rates—some as high as 900%—that exponentially exceeded the 12% rate cap under Virginia law. A typical consumer borrowing $600 under this scheme would end up owing almost $2,500 on the loan—more than four times what they borrowed. To shield this illegal scheme from scrutiny, the applicants drafted contracts that purport to confer tribal sovereign immunity from all relevant state and federal law on the participants in the lending enterprise. It then coupled that condition with an arbitration clause requiring an arbitrator to apply tribal law and "expressly prohibiting 'the application of any other law than the laws of the [Tribe].'" Tab B at 22–23 (opinion of Rushing, J., joined by Niemeyer & King). The Fourth Circuit refused to enforce this contract under the FAA, holding, in line with the nearly unanimous view of the federal circuits, that an arbitration contract that "demands exclusive application of tribal law" and "preempt[s] application of other authority," "operate[s] as a prospective waiver." *Id.* The applicants now seek a stay from this Court pending the filing of their petition for certiorari. But nothing about this issue, or this garden-variety civil case, warrants the applicants' extraordinary request for a stay here.

First, the federal circuits have, with one exception, repeatedly ruled that the tribal arbitration contracts like those at issue here are unlawful because they are designed to exempt online lenders and their investors from any federal or state law and strip consumers of any meaningful ability to pursue their rights. Cases challenging these "tribe-payday

lending partnership[s]" are "not unique." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 856 (2020). And when "[c]ourts across the country have confronted transparent attempts to deploy tribal sovereign immunity to skirt state and federal consumer protection laws," that have nearly unanimously refused to sanction them. *Id.* The decision below adds to that list—it is now the *fifth time* that the Fourth Circuit has considered these contracts and invalidated them. *See 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). Same 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 at 126–28, as well as the Seventh, *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014). Only one circuit— a 2-1 panel of the Ninth Circuit—has enforced one of these contracts. *See Brice v. Haynes Invs., LLC*, 13 F. 4th 823 (9th Cir. 2021). But the sharply divided panel decision in that case is currently the subject of a pending rehearing petition that could eliminate any disagreement and align the Ninth Circuit with the uniform view of the other circuits.

Second, the applicants are demonstrably unlikely to succeed on the merits here. Eleven separate panels from five circuits—all unanimous—have concluded that these contracts may not be enforced under the Federal Arbitration Act. These 28 judges have all reached

this conclusion because, as Judge Wilkinson has explained, the 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*, 811 F.3d at 674, 676.[1] By their terms, the contracts require an arbitrator to exclusively apply tribal law, expressly prohibiting "the application of any other law other than the laws of the [Tribe]," and accommodating other rules and procedures only "to the extent [they] do not contradict the express terms of this Arbitration Provision or the law of the [Tribe]," Tab B at 21–22.

The FAA forbids this. Although it has a broad reach, this Court has made clear that the FAA will not sanction the enforcement of a contract that operates as a "prospective waiver of a party's right to pursue statutory remedies." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). Just the opposite. Courts will invalidate any contract—arbitration or otherwise—that attempts to foreclose "the assertion of certain statutory rights," because such a contract would jeopardize a party's "right to pursue statutory remedies." *Id.* at 236. Because the contracts here "expressly prohibit[] . . . not only a borrower's right to pursue federal statutory remedies . . . but also the very federal and state defenses to arbitrability that preserve that right," they straightforwardly run afoul of this rule. Tab B at 23.

Third, the applicants have come nowhere close to establishing a risk of irreparable harm to them in the absence of a stay. They barely even try, offering (at 33) only that, without a stay, they will incur the "expenses and burdens of litigation." But they will have

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

to "incur" these expenses regardless, given that not every plaintiff is bound by the applicants' contracts. So win or lose on arbitration, the applicants will defend this lawsuit under appropriate federal and state law, and in federal court. Nor is this generic concern enough to justify a stay even if it were accurate. The applicants identify only one example in which this Court granted a stay in a civil case involving a dispute about arbitration. *See Henry Schein, Inc. v. Archer & White Sales, Inc.,* No. 17A859. But there, the threat of irreparable harm was real, concrete, and substantial—a "public trial" was imminent and risked the possibility that the applicant's "most valuable secrets" would "be exposed" if allowed to proceed. *See id.*, Stay App. at 30 (arguing that the "specific harm" that "the confidentiality of applicants' business information will have been destroyed for no reason" was enough to "warrant[] the entry of a stay"). The applicants have made no similar showing (or even assertion) here. In the absence of such concrete and specific harm, including in cases involving arbitration, this Court has refused to grant the extraordinary remedy of a stay. *See, e.g., The Rams Football Co., LLC, v. St. Louis Reg'l Convention and Sports Complex Auth.,* No. 19A335.. It should do so here as well.

STATEMENT

1. The plaintiffs in this case are Virginia consumers who each received online loans originated by one of the Tribe's lending entities while residing in Virginia. JA1487, JA1710.[2] These loans carried interest rates ranging from 543% to as high as 919%, making them 45 to 75 times the amount permitted by Virginia law. *See* JA1487, JA1710. As but one example,

[2] All references to the record are from the Joint Appendix filed in the Fourth Circuit.

one plaintiff who borrowed $600 was charged an interest rate of 636%—meaning he owed $2,400 over the roughly 10-month life of the loan. Tab B at 8. These loans violated Virginia's general usury laws and licensing requirements, rendering them contrary to public policy and void. *See* JA1486–87, JA1710. But even though the loans were made to Virginia consumers and collected from Virginia bank accounts, the entities involved in this case do not attempt to comply with Virginia's usury statutes, including the state's 12% interest rate cap. JA1486.

2. The applicants' lending scheme was, like most others, pioneered by non-tribal investors and lenders. After federal regulators shutdown a similar scheme using banks as the conduits for their illegal loans, several non-tribal payday lenders approached the Habematolel Pomo of Upper Lake, a federally recognized Native American tribe in northern California, to pursue a lending enterprise that would peddle loans through the internet and not comply with any federal or state laws. *See* JA1466–81. Although the website of each of the lending entities in this case claimed that the company was "wholly owned and operated" by the Tribe, JA1477–78, nearly all the activities during the relevant time period were performed by other non-tribal companies. JA1707. These companies were, directly or indirectly, owned by the non-tribal defendants in this case, who operated the lending operations out of Overland Park, Kansas, the hotbed of the online payday lending industry. JA1479, JA1708. The vast majority of the revenue was distributed to non-tribal outsiders, including the non-tribal defendants. JA1480, JA1708.

3. In an effort to shield the non-tribal payday lenders (who otherwise enjoy no entitlement to sovereign immunity) from any liability, the applicants predicated their

scheme on a contractual web of legal waivers—including an integrated set of sovereign immunity claims, arbitration requirements, choice-of-law provisions, and forum-selection clauses. It works like this: *First*, each loan contract purports to cover not just the Tribe and any shell tribal lending company, but also "any authorized representative, agent, independent contractor, affiliate or assignee." Tab D at 2 (defining "We," "Our," and "Us"). The contract then takes this definition and asserts that any individual or entity covered under it is "entitled to sovereign immunity" and, as a result, that a borrower "will be limited as to what claims, if any, you may be able to assert." *Id.* at 6 (stating, in addition, that "[i]t is the express intention . . . to fully preserve, and not waive either in whole or in part, sovereign governmental immunity" and that "no person may assume a waiver of sovereign immunity").

Second, each contract then includes an arbitration provision, and that provision requires arbitration of any "dispute" against any of the individuals or entities defined above. *Id.* "Dispute" is also defined broadly to include "all tribal, federal, or state-law claims, disputes or controversies, arising from or relating directly or indirectly to" the loan contract. *Id.* The definition of "Dispute" also includes a delegation clause, which requires arbitration of "the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision." *Id.*

Third, the arbitration contracts contain mandatory choice-of-law provisions, dictating that any

> dispute[s] will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision

> or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below.

Id. at 7.

The loan contracts also contain additional choice-of-law restrictions, including those imposed directly on the arbitrator. One makes clear that if a borrower requests that the arbitration take place close to their residence, "such election to have binding arbitration occur somewhere other than on Tribal land shall in no way . . . allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake." *Id.* Another, captioned "**GOVERNING LAW**," asserts that the loan contract "is made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake, and shall be governed by applicable tribal law," and that each borrower "agree[s] that this governing law provision applies no matter where" the borrower "reside[s] at the time" the loan is requested. *Id.* Another mandates that "[t]he arbitrator shall apply applicable substantive Tribal law consistent with the [FAA]" and that "any arbitration shall be governed by the FAA and subject to the law of the [Tribe]." *Id.*

Fourth, to further insulate any defendant, the contracts require exclusive enforcement of any arbitration award before what it called the "Tribal Forum"—"the applicable governing body" of the Tribe, but the contract does not provide any specific details regarding this undefined "Tribal Forum." Tab C at 18; *see also* JA269 (tribal code provision mandating that a "consumer must be provided a template" loan contract that contains "disclosures regarding exclusive tribal jurisdiction"). On top of those provisions, the relevant tribal law, contained in the Tribe's Consumer Financial Regulatory Ordinance explicitly denies an arbitrator the authority to award damages beyond "the maximum value

of the Loan at issue" and prohibits the awarding of any punitive damages or equitable relief. JA281.

As a result of these integrated contractual provisions, a borrower is unable to assert either a federal 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.

4. After obtaining loans from the tribal lenders, the plaintiffs, on behalf of themselves and a putative class of similarly situated individuals, brought suit in the U.S. District Court for the Eastern District of Virginia against the non-tribal lenders and the members of the Tribal Executive Council in their official capacity (the Tribal Officials), alleging violations of RICO and Virginia usury and consumer finance laws. *See* JA1465–1511. From the Tribal Officials, the plaintiffs sought only prospective declaratory and injunctive relief. From the non-tribal defendants, the plaintiffs sought prospective and monetary relief. In response, all the defendants moved to compel arbitration. JA1468–69.

The district court rejected the defendants' attempt to enforce their arbitration contracts because the contracts prospectively waived statutory remedies otherwise available to the plaintiffs. Tab C at 37. The district court also held that the delegation clause was unenforceable because it, too, operated as a prospective waiver. *Id.* at 31. In refusing to sever the offending provisions, the court found that "[t]he Tribal Lending Entities took advantage of their superior bargaining power to extract Plaintiffs' assent to terms couched in an Arbitration Provision that plainly functioned to violate public policy by depriving Plaintiffs of statutory remedies otherwise available to them." *Id.* at 32, 38.

5. The Fourth Circuit unanimously affirmed. In an opinion authored by Judge Rushing, the court held that the contracts were unenforceable because, under the FAA, they violated the "generally applicable defense" known as the "'prospective waiver' doctrine." Tab B at 13. As the court explained, "[a]lthough parties possess broad latitude to specify the rules under which their arbitration will be conducted, they must preserve the ability to assert federal statutory causes of action so that 'the statutes will continue to serve both their remedial and deterrent functions.'" *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Consistent with this requirement, if an arbitration contract "prevents a litigant from vindicating federal substantive statutory rights, courts will not enforce the agreement." *Id.* at 13–14.

This rule, the court explained, applies equally to both a contract for arbitration and any delegation clause included within—which is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 14 (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019)). Because "the FAA operates on this additional arbitration agreement just as it does on any other," a delegation clause that prospectively waives a party's right to pursue federal substantive statutory remedies is just as invalid as any other contract that does the same thing. *Id.* at 14–15.

Applying these principles here, the court had little difficulty invalidating the contracts. By their terms, the contracts' choice-of-law clauses "mandate exclusive application of tribal law during any arbitration" and, as a result, "operate as a prospective waiver twice over, waiving not only a borrower's right to pursue federal statutory remedies . . . but also the very federal and state defenses to arbitrability that preserve that right." *Id.* at 21–23.

That was true with respect to the delegation clauses, the court explained, because the choice-of-law clauses require the arbitrator to apply tribal law, expressly prohibit "the application of any other law other than the laws of the [Tribe]," and accommodate "other rules and procedures only 'to the extent [they] do not contradict the express terms of this Arbitration Provision or the law of the [Tribe].'" *Id.* at 21. Put another way, "the arbitration provision requires application of tribal law to the exclusion of federal (and state) law." *Id.* at 23. So even for a threshold challenge to the enforceability of the contract, these contractual limitations "would require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law." *Id.* at 21. And, "by preventing the arbitrator from applying federal law, the arbitration provision necessarily restrains the arbitrator from considering federal law defenses to arbitrability, thereby precluding [borrowers] from effectively vindicating their federal statutory rights." *Id.* at 28.

The effect of these limitations also rendered the "entire arbitration provision" unenforceable because the choice-of-law clauses also strip a borrower of the right "to pursue federal statutory remedies." *Id.* at 21. The court reached this conclusion based on a plain reading of the choice-of-law restrictions discussed above—which, taken together, "unambiguously attempt[] to apply tribal law to the exclusion of substantive federal law." *Id.* at 29. "As a result," the court recognized, the contract "functions as a prospective waiver of the borrowers' rights to pursue federal statutory remedies, including the remedies under RICO that Plaintiffs seek here." *Id.*

In reaching this conclusion, the court also rejected the applicants' repeated attempts to avoid the plain meaning of their contracts. For instance, the applicants argued that the court had "overread" the choice-of-law provisions forbidding application of "any other law." *Id.* at 26. As the applicants' saw it, this restriction should have been read to "merely prevent[] application of the forum State's law if the arbitration occurs off tribal land." *Id.* But, as the Fourth Circuit explained, "the text of the clause proscribes 'application of *any* other law other than the laws of the [Tribe],' not only the law of the forum State." *Id.* The applicants also argued that the contracts did not strip borrowers of their right to pursue claims because another clause in the contract said that the disputes subject to arbitration explicitly include "all tribal, federal or state law claims" and "all claims based upon a violation of any tribal, state or federal constitution, statute or regulation" and so could be interpreted to "contemplate[] arbitration of federal claims." *Id.* at 29. This language, however, could not "counteract the effect of the choice-of-law provisions," and was, "[i]f anything," just an illustration of the contract's "impermissible tactic of compelling arbitration of federal claims only to then nullify those claims by precluding application of federal law." *Id.* at 30. Ultimately, "in line" with the near-uniform view of the federal circuits, the court here refused to enforce these contracts because they "require[d] arbitration of all disputes, including those arising under federal law, while depriving borrowers of any remedy under federal law." *Id.* at 33.

6. On November 30, 2021, the applicants asked the Fourth Circuit to stay its mandate pending a petition for writ of certiorari. On December 3, 2021, the Fourth Circuit denied

that motion. Tab A. On December 14, 2021, the applicants filed with this Court their application to stay pending a petition for writ of certiorari.

ARGUMENT

The applicants ask this Court to take the extraordinary step of halting proceedings in this case pending their petition for a writ of certiorari. But "[d]enial of . . . in-chambers stay applications is the norm," and "relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 129 S. Ct. 1861 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). The applicants have not carried their heavy burden of showing an "extraordinary" entitlement to a stay.

I. There is no reasonable probability that this Court will grant certiorari.

The applicants claim (at 14) this case "satisfies the first criterion for granting a stay" because there is a circuit split over the proper interpretation of tribal arbitration contracts and a need for this Court to "harmonize federal law nationwide." But since 2016, every circuit panel but one that has directly considered a tribal arbitration contract, delegation clause included, has refused to enforce it under the FAA. The list is long: The Fourth Circuit has rejected these contracts five times, the Third and Eleventh Circuits have rejected them twice, and the Second and Seventh Circuits have each reached the same conclusion as well. Against this weight of authority, the Ninth Circuit alone has enforced a tribal arbitration contract—in a sharply divided panel opinion which is currently the subject of a pending rehearing petition. That lopsided tally, coupled with the distinct possibility that whatever disagreement may exist will be resolved by the lower courts themselves, makes this issue an unworthy candidate for this Court's review.

Even if this Court's intervention on this issue was necessary, however, this case presents a particularly unsuitable vehicle for deciding it. At least one of the named plaintiffs is not subject to the applicants' arbitration contract and remains free to pursue the claims in the case, under appropriate federal and state law and in federal court. So the outcome of the applicants' petition will have no material effect on the proceedings below. Because there is no reasonable probability that this Court will grant the applicants' petition, the stay request should be denied.

A. There is no certworthy conflict.

The lowers courts have been nearly uniform in their recognition that tribal arbitration contracts are unenforceable under the FAA because they are drafted in a calculated attempt to avoid the application of state and federal law and thus operate as prospective waivers. Eleven unanimous panels from six different federal Courts of Appeal have invalidated these contracts while only one—a 2-1 split panel in the Ninth Circuit—has enforced a tribal arbitration contract. And any conflict that may exist is likely to dissolve on its own: The divided Ninth Circuit decision is not yet final and currently the subject of a pending rehearing petition. That makes for a particularly uncertworthy setup.

To begin, the Fourth Circuit has invalidated these contracts five separate times. See Tab B at 16 (noting that "[i]n four prior cases, this Court has assessed arbitration provisions requiring application of tribal law to the practical exclusion of other law and, in each case, has held the arbitration provision (including the delegation clause) invalid as a prospective waiver of federal rights" and that "[o]ther circuit have reached the same conclusion"). The "inaugural case in this uniform line of precedent," *id.* at 17, was *Hayes*, 811 F.3d 666. There,

the court 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. *Id.* at 670. The contract required the arbitrator to apply "'the laws of the [tribe] and the terms of this Agreement'" and confirmed that the arbitrator could not apply "'any law other than the law of the [tribe] to this Agreement'" no matter where the arbitration occurred. *Id.* at 675. Taken together, these "'choice of law' provision[s] . . . waive[d] all of a potential claimant's federal rights" in an attempt to "flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Id.* As a result, Judge Wilkinson condemned the arbitration contract—delegation clause included—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" in a "brazen" attempt "to achieve through arbitration what Congress has expressly forbidden." *Id.* at 675–76. Because the tribal arbitration contract did just that, it was "invalid and unenforceable." *Id.*

Following *Hayes*, the Fourth Circuit has confronted attempts to enforce tribal arbitration contracts four more times. And four more times it has unanimously struck them down. *See* Tab B at 33; *Haynes*, 967 F.3d 332; *Sequoia*, 966 F.3d 286; *Dillon*, 856 F.3d 330. In each of these cases, the court recognized that the use of exclusive tribal choice-of-law clauses that bind both the parties and arbitrator reflect "an unambiguous attempt to apply tribal law to the exclusion of federal and state law," *Dillon*, 856 at 336, and, in turn, to ensure

"that tribal law preempts the application of any contrary law—including contrary federal law," *Haynes*, 967 F.3d at 342 (noting that "the relevant tribal codes would not permit [the borrowers] to effectively vindicate the federal protections and remedies they seek"); *see also Sequoia*, 966 F.3d at 293. As a result, the Fourth Circuit held that the tribal arbitration contracts "operate as a prospective waiver twice over, waiving not only a borrower's right to pursue federal statutory remedies . . . but also the very federal and state defenses to arbitrability that preserve that right." Tab B at 23 (holding that, because the contracts "require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law," the entire contract is unenforceable).

The Second Circuit has likewise 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.* And in *Williams*, a unanimous Third Circuit panel joined the Fourth and Second Circuits in concluding that these tribal lending contracts are unenforceable. Like *Gingras*, 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. The Third Circuit also pointedly explained why the delegation clause—which relied on the same choice-of-law clause "provid[ing] that the arbitrator can only apply tribal law"—was likewise

unenforceable. *Id.* at 243 n.14. That is because 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." *Id.* So "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.*

Unanimous panels of the Eleventh and Seventh Circuits have also invalidated similar tribal arbitration contracts, including delegation clauses, on slightly different grounds. *See Parm*, 835 F.3d at 1332 (invalidating both the entire arbitration contract 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); *see also MacDonald*, 883 F.3d at 232 (holding that the "entire arbitration agreement, including the delegation clause, is unenforceable"). And district courts across the country have likewise refused to enforce tribal arbitration contracts that prospectively waive federal law. *See, e.g.*, *Gibbs v. Stinson*, 2021 WL 4812451 (E.D. Va. Oct. 14, 2021); *Dunn v. Global Trust Mgmt., LLC*, 506 F. Supp. 3d 1214 (M.D. Fla. 2020); *Rideout v. CashCall, Inc.*, 2018 WL 1220565 (D. Nev. Mar. 8, 2018); *Ryan v. Delbert Servs. Corp.*, 2016 WL 4702352 (E.D. Pa. Sept. 8, 2016).

Of course, as the applicants note, the Ninth Circuit recently enforced a tribal arbitration contract. *See Brice*, 13 F.4th 830–831. There, the majority first asserted that the other circuits had only "considered prospective waiver in the context of the arbitration agreement as a whole—not as applied to the delegation provision." *Id.* at 835–836

(observing that this Court requires a "substantive argument that the delegation provision in and of itself is unenforceable"). But as the discussion above makes clear, the decisions dismissed by the majority directly addressed how the delegation provisions were unenforceable under the FAA. *See, e.g.*, *Haynes*, 967 F.3d at 345; *Sequoia*, 966 F.3d at 294; *Williams*, 965 F.3d at 243 n.14.

The panel majority next held that the delegation clauses in the tribal arbitration contracts were valid and enforceable. *Brice*, 13 F.4th at 828–29. To reach this conclusion, the panel majority isolated a definitional clause in the contracts that included a "description" of the types of disputes an arbitrator was authorized to decide. *Id.* at 830. In the majority's view, because that clause permitted an arbitrator to decide "enforceability disputes arising under 'federal, state, or Tribal Law . . . based on any legal or equitable theory,'" that qualified as a "plainly stated mandate that the arbitrator decide" any state or federal claim using law "from whatever source they arise." *Id.* As a result, the panel majority concluded that "Borrowers' rights to pursue their federal prospective-waiver argument remains intact . . . and the delegation provision is not facially a prospective waiver." *Id.*

But in reaching this conclusion, the majority had to rewrite 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—and they make clear that any claim, along with the arbitrator,

are governed exclusively by tribal law. *See* Tab D at 6–7. The Ninth Circuit's interpretation, therefore, unavoidably "reach[es] a result inconsistent with the plain text of the contract." *Equal Emp. Opportunity Comm'n v. Waffle House*, 534 U.S. 279, 294 (2002).

In any case, the panel decision in *Brice* is not yet final. A rehearing petition is pending, *see* Dkt. 72, *Brice v. Haynes Invs., LLC*, No. 19-50707 (9th Cir. Nov. 1, 2021), and the Ninth Circuit is, at this point, fully capable of resolving any disagreement and aligning itself with the uniform view of the other circuits. Coupled with the lopsidedness of the split, that makes it unlikely that this Court will grant the applicants' petition, and it is reason enough to deny the applicants' extraordinary request for a stay.

B. This case is an unsuitable vehicle to resolve the issues.

A grant in this case is unlikely for another reason: It is a poor vehicle for this Court's review. The applicants, of course, disagree. They claim (at 21) that it is "an ideal vehicle" because the "upshot of the Fourth Circuit's decision was to displace individual arbitration under tribal law in favor of class action litigation in Virginia." But regardless of whether the applicants' petition is granted and they prevail on the merits, this case will move forward in court, under the relevant federal and state law. So a decision by this Court won't enable the applicants to avoid litigating in federal court.

Although the applicants' fail to acknowledge it, they cannot dispute that a decision by this Court won't alleviate any purported "burdens" of proceeding in federal court. When the applicants originally moved to compel arbitration of the claims in this case, they did not do so for one of the named plaintiffs, Lawrence Mwethuku, because he had opted out of any arbitration requirements. Tab C at 10 (noting that the arbitration contract did not bind

Mwethuku). Instead, the applicants sought to force him out of federal court on the theory that he was required to first exhaust his claims in a "Tribal Forum." *Id.* at 38. The district court rejected this effort, noting, among other things, that the applicants had not asserted "a colorable claim of tribal jurisdiction" sufficient to justify requiring exhaustion and that the contract had failed to provide any meaningful explanation of what a "Tribal Forum" was or demonstrate that it would provide a borrower with access to a fair and unbiased adjudication. *Id.* at 41–44 (registering the concern that forcing borrowers into such a forum would lead them to "a tribal adjudicative structure that lacks any meaningful procedures" or "worse yet, does not exist at all").

The applicants did not appeal this part of the district court's decision to the Fourth Circuit, so it is now final. And because Mr. Mwethuku's claims are identical to everyone else's, *see* JA1489–1509, he will pursue those claims (including on behalf of a putative class of Virginia borrowers) in federal court, under the relevant federal and state law, regardless of whether this Court grants the petition and ultimately reverses. As a result, the only impact a decision in favor of the applicants will have here is that several individual borrowers will be forced into arbitration for their personal claims.

That, standing alone, is reason enough to deny the stay here. If the applicants' policy concerns—including "pernicious" forum-shopping in which defendants "will have powerful incentive" to attempt transfer to the Ninth Circuit in an effort to enforce tribal arbitration contracts—ultimately materialize, this Court can wait to consider a case where a decision on this issue actually matters for a defendant.

II. There is no significant possibility that this Court will reverse the Fourth Circuit's decision.

The applicants also claim that "it is likely" that they will prevail on the merits. The overwhelming majority of the federal circuits and district courts, not to mention this Court's own clear case law, says otherwise.

Eleven times panels of the federal circuits have confronted these tribal arbitration contracts in various forms, and eleven times they have unanimously refused to enforce them—without a single dissent. That is not surprising. These contracts are unenforceable because, by their terms, they ensure that, no matter who the arbitrator is or where the arbitration occurs, the federal and state laws governing a borrower's claims may not be applied. Although the FAA has a broad reach, courts will not enforce a contract that operates as a "prospective waiver of a party's right to pursue statutory remedies." *Am. Express*, 570 U.S. at 235. Over the past five years, this rule has been routinely applied to invalidate efforts by payday lenders across the country to enforce tribal arbitration contracts that attempt to disavow state and federal law. The federal courts have thus delivered an unmistakable message: When an arbitration contract is drafted "in a calculated attempt to avoid the application of state and federal law," the "entire arbitration agreement is unenforceable." *Dillon*, 856 F.3d at 337. None of the applicants' attacks on the Fourth Circuit's decision here raise the possibility that this Court will overturn this understanding.

1. The principle that a contract is unenforceable when it prospectively waives a party's right to pursue statutory remedies is grounded in both the FAA's text and its policy. Under the FAA, arbitration contracts are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By

stressing the contractual nature of FAA arbitration, this statutory command "establishes an equal-treatment principle." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). A court may invalidate an arbitration contract based on "generally applicable contract defenses" but not on legal rules that "'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). In this way, the FAA expressly preserves any contract-law doctrine that would "place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339.

One of these rules is that a contract is invalid if it forbids the assertion of statutory rights. Courts will invalidate any contract—arbitration or otherwise—that attempts to foreclose "the assertion of certain statutory rights," because such a contract would jeopardize a party's "right to pursue statutory remedies." *Am. Express*, 570 U.S. at 236. And this Court has in fact recognized this rule for as long as it has applied the FAA to statutory claims. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (holding that "a substantive waiver of federally protected civil rights will not be upheld"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (noting that arbitration must permit a party to pursue statutory claims so that "the statute will continue to serve both its remedial and deterrent function"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("condemning" a contract that would foreclose the right to pursue statutory claims as "against public policy"). Under the FAA, then, an arbitration contract (no less than any other) is invalid where it attempts to "eliminat[e] . . . the right to pursue" a statutory remedy. *Am. Express*, 570 U.S. at 236.

The FAA's core policy reinforces the centrality of this rule. The FAA was enacted to overcome "widespread judicial hostility to arbitration," and its "overarching principle" that "arbitration is a matter of contract" means that courts must "rigorously enforce" arbitration agreements according to their terms. *Id.* at 232–33. But although "a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019). To the contrary, "no matter how emphatically [a contract] may express a preference for arbitration," *id.*, the FAA "may not play host" to an arbitration 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." *Hayes*, 811 F.3d at 673–74. That is because, although the FAA permits parties to "forgo the legal process and submit their disputes to private dispute resolution" to enhance the "simplicity, informality, and expedition" of the matter, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682–83 (2010), it does not allow the terms of a contract to employ arbitration to sacrifice substantive claims. *See* 9 U.S.C. § 2 (providing for enforcement of contract "to settle by arbitration a controversy"). "By agreeing to arbitrate a statutory claim," in other words, "a party does not forgo the substantive rights afforded by the statute" but "submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628.

This rule must be rigorously enforced. If arbitration is to have any "meaningful sense," courts must refuse to endorse schemes that "would undermine, not advance, the federal policy favoring alternative dispute resolution." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (Wilkinson, C.J.). Consistent with this understanding, "so long as

the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," courts may enforce the parties' contract under the FAA; but where, in contrast, a contract denies a litigant this very opportunity, courts should not. *Mitsubishi*, 473 U.S. at 637.

2. Applying these basic precepts, it is plain that the contracts operate as a prospective waiver by stripping both borrowers and any arbitrator of the right to pursue or apply federal or state law. The contracts explicitly state that *any* dispute—regardless of whether it arises under federal or state law or involves a threshold challenge to enforceability—"will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes" but only "to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below." Tab D at 7. Then, in the very next two paragraphs, the contract dictates that "[t]he arbitrator shall apply applicable substantive Tribal law" and, regardless of where the arbitration occurs, shall "in no way . . . allow for the application of any other law other than the laws of the [Tribe]." *Id.* The only way to read the import of these of these clauses is, as the court below explained, "to require exclusive application of tribal law in arbitration . . . . to the exclusion of federal (and state) law." Tab B at 22–23. And that, in short, is as clear a prospective waiver as one can find. *See Gingras*, 922 F.3d at 127 ("By applying tribal law only," the contracts wholly foreclose borrowers "from vindicating rights granted by federal and state law"); *Williams*, 965 F.3d at 240

("Because the arbitration agreement mandates that only tribal law applies in arbitration, federal law does not.").

Nevertheless, the applicants push back against the plain meaning of these contractual provisions. They insist (at 30) that the Fourth Circuit adopted a "remarkably uncharitable interpretation" of the contract's choice-of-law provisions. But the court below—just like all the others—simply read them according to their plan text. *See, e.g.*, Tab B at 26 (responding to the applicants' argument that the court had "overread" the provisions by quoting their text). Indeed, 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*, 570 U.S. at 233; *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." *Waffle House, Inc.*, 534 U.S. 294. The applicants may now prefer a different contract, but this is the one they drafted.

Nor does the contract's reference to the FAA change anything, as the applicants appear to suggest. *See* App. 31 (arguing that the contracts reference to the FAA is "hardly language indicative of an intent to nullify federal law"). As the court below recognized, the applicants take this clause "out of its context" in an attempt to construe it "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." Tab B at 25. But that interpretation "would create conflict with the other terms" of the arbitration contract 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.* at 25–26. As this Court has made clear, arbitration contracts, no less than any others, must be read to give effect to all of its 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 Fourth Circuit: The clause referencing the FAA "assert[s] 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.'" Tab B at 26.

Falling back, the applicants make a push for ambiguity, arguing (at 28) that it is only "the mere possibility that the arbitrator will be unable to apply federal law." In that scenario, the applicants insist, courts "should not short-circuit arbitration" because the arbitrator "may find that . . . the choice-of-law provision does not bar the arbitrator from considering federal law." App. 29. That is doubly wrong. Not only do the contracts "unambiguously attempt[] to apply tribal law to the exclusion of substantive federal law," but an arbitrator would have no license to disregard this clear command. Tab B at 29. As this 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.*, 559 U.S. 682); *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 Fourth Circuit was right to reject the applicants' attempt to run from the plain meaning of their contract. *See, e.g.*, *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").

3. The presence of a delegation clause—a provision designed to allow an arbitrator to decide certain threshold questions concerning the contract's enforceability—does not change any of the foregoing. The applicants argue (at 1-2) that the Fourth Circuit should have let an arbitrator resolve all threshold questions of arbitrability surrounding the contracts simply because the contracts *contain* a delegation clause. But a contract that contains an FAA-prohibited prospective waiver like this one is unenforceable in its entirety, delegation clause included. As the Fourth Circuit correctly explained, the choice-of-law clauses in these contracts "mandate exclusive application of tribal law during any arbitration" and so "require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law." Tab B at 21; *see also Williams*, 965 F.3d at 243 n.14 (explaining that enforcing a delegation clause in an arbitration provision that excludes 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").

As they did below, the applicants contend that this Court's decisions in *Rent-A-Center* and *Schein* require a contrary conclusion. They say (at 24) that these decisions mandate

that "enforceability challenges directed to the arbitration agreement as a whole go to the arbitrator" and that this rule "should have resolved this case" in the applicants' favor. They are mistaken. As the foregoing makes clear, the delegation clause in these contracts is invalid separate and apart from the "whole contract" because it, too, operates as a prospective waiver, by "requir[ing] an arbitrator to determine whether a valid and enforceable arbitration agreement exists without access to the substantive federal law necessary to make that determination." Tab B at 23. That results in exactly the "sort of farce" that is prohibited by the FAA and makes the delegation clause itself "unenforceable as a violation of public policy." *Id.*

Contrary to the applicants' assertion, nothing about this straightforward application of the FAA's prospective waiver rule will "reduce" both *Rent-A-Center* and *Schein* "to near meaningless." To invalidate a delegation clause—which is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," *Schein*, 139 S. Ct. at 529—a party must still identify a "generally applicable defense" under section 2 of the FAA that 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 or the arbitration requirements. But either way, nothing in *Rent-A-Center* nor *Schein* stands for the proposition advanced by the applicants here—that the mere existence of a delegation

clause categorically deprives federal courts of the authority to decide any prospective-waiver challenge.

Finally, the applicants accuse the Fourth Circuit (at 30–31) of "hostility toward arbitration" because these tribal arbitration contracts are "not meaningfully different from various other form contracts entered into by consumers every day." 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 126–127 (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.

III. The applicants have not shown that they will suffer irreparable injury absent a stay.

Finally, the applicants come woefully short of establishing irreparable harm, which independently dooms their request. As this Court has explained, an applicant's burden on this front is "particularly heavy" where—as here—a stay has been denied by "a unanimous panel of the Court of Appeals." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977); *Blum v. Caldwell*, 446 U.S. 1311, 1315 (1980) (same); *see also Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973) (recognizing the "great weight" given to decision by Court of Appeals on stay request). That alone is enough to deny the applicants' request for a stay here. The applicants make virtually no effort to shoulder their "particularly heavy" burden.

They offer only one generic reason (at 33) to support their claim of irreparable harm—that, without a stay, they will incur the "expenses and burdens of litigation." But they will incur the expenses and burdens of litigation regardless of whether their request is granted. As we have explained, at least one of the named plaintiffs in this case is indisputably *not* subject to the applicants' arbitration contract. The applicants themselves recognized that this was the case, and they did not seek to compel him arbitration. *See* Tab C at 9–10. Instead, they sought to compel him into Tribal Court. *See id.* at 38. But the district court rejected this effort, holding that this plaintiff's claims should proceed in federal court, and the applicants did not appeal that decision. *Id.* at 38–44. As a result, the applicants will face the same "expenses and burdens of litigation" regardless of the outcome of their forthcoming petition. So granting a stay would not shield the applicants from discovery or prevent them from incurring litigation expenses, and thus not remedy their supposed irreparable harm.

Even setting that aside, however, generic claims of litigation expense have never been enough to demonstrate irreparable injury. As this Court itself has squarely held, "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see also Commonwealth Oil Refin. Co. v. Lummus Co.*, 82 S. Ct. 348, 349 (1961) (Harlan, J., in chambers) (denying motion for stay where the only possible harm was that it could "set in motion the machinery for arbitration and . . . other matters affecting the possible future conduct of the arbitration"). Others are in accord. *See United States v. Microsoft Corp.*, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (denying motion to stay where movant "failed to demonstrate any substantial harm that would result from the reactivation of proceedings in the district court during the limited pendency of the certiorari petition"). This sensible rule recognizes the basic principle that "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *FTC v. Std. Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).[3]

That rule carries the day here. Contrary to the applicants' suggestion, there is nothing about arbitration that fundamentally changes the basic irreparable harm standard. Indeed, if incurring the "expenses and burdens" of litigation qualified as irreparable harm, then litigants would be incentivized to seek a stay from this Court in all sorts of garden-variety

[3] The applicants' suggestion that "awaiting final judgment would cause irreparable harm" is, even if true, irrelevant. *See* App. 34 (noting that the FAA seeks to ensure a "definitive ruling" on arbitration before a party "will have to endure a full trial on the underlying controversy"). Discovery in this case only just began, so any decision on the applicants' forthcoming petition will occur well before even dispositive motions practice, let alone a trial.

civil cases. As but one example, consider the mine-run case in which a lower court refused to grant a motion to dismiss. The claim of injury there—being forced to litigate a case that the applicant asserts should have been dismissed entirely—would be undeniably greater than the claim of injury here—being forced to litigate in the wrong forum. Yet if that were enough, the grant of a stay would become the norm, instead of a remedy reserved only for "extraordinary cases." *Conkright*, 129 S. Ct. at 1861.

And even if the cost of discovery in a putative class action could alone justify a stay in certain cases, the applicants fail to demonstrate why this is one of those cases. Here, class discovery will entail a simple electronic data analysis that involves three steps: (1) determining whether a consumer had a loan originated by the tribal fending entities, (2) for all such consumers, determining whether they had a Virginia address when they executed the loan, and (3) identifying any payments made by those consumers. Pulling this data would take no more than a few hours. *See, e.g., Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 572 (S.D. Tex. 2000) ("[I]dentification of consumers who took the allegedly unlawful loans and the amount of their injuries would be easily ascertainable from Defendants' records and thus constitute[s] no obstacle to class certification.").

The applicants nevertheless point (at 33–35) to this Court's grant of two stays in *Schein* as evidence that cases "in the same procedural posture" have held that such "expenses and burdens qualify as irreparable harm warranting a stay." That is wrong twice over. *Schein* was not "in the same procedural posture" because there—unlike here—trial was imminent. *See Schein* Stay App., No. 17A859, at 29 (explaining that a full trial was "currently scheduled to begin" within three months of the filing of the stay application). And in

Schein—unlike here—the applicants identified a "specific harm" they would suffer absent a stay. *Id.* at 30. Because the trial would involve claims of an anticompetitive conspiracy, it would result in the public exposure of "applicants' most valuable secrets"—secrets that had, until then, been "protected from disclosure by the parties' protective order." *Id.* at 30–31 (explaining that "the confidentiality of applicants' business information" would be destroyed without a stay); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19A766, Stay App. (same). Not surprisingly, given that "specific harm," this Court granted the requested stay. *Cf. FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984) ("The loss of trade secrets cannot be measured in money damages" where those secrets, once lost, are "lost forever"). But where an applicant has failed to identify a similar threat of irreparable harm, including in cases involving arbitration, this Court has likewise denied the stay. *See, e.g.*, Stay App., *Rams Football*, No. 19A335, at 33 (denying stay where only allegation of irreparable harm was "subjecting" the applicant to "court proceedings" and the possibility of discovery). It should do the same here.

CONCLUSION

The application for a stay of proceedings pending a petition for a writ of certiorari should be denied.

Dated: December 30, 2021

Respectfully Submitted,

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IN THE

Supreme Court of the United States

SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, IN HER OFFICIAL CAPACITY, ET AL.,
Applicants,
v.
GEORGE HENGLE, ET AL.,
Respondents.

RESPONDENTS' OPPOSITION TO THE APPLICATION FOR STAY

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CERTIFICATE OF SERVICE

In compliance with Supreme Court Rules 29.3 and 29.5, I, Matthew W.H. Wessler, counsel of record for the applicants and a member of the Bar of this Court, hereby certify that on December 30, 2021, a copy of the accompanying Opposition to the Application for Stay, filed in the above-captioned manner, was sent by commercial carrier and by electronic mail to:

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