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.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Respondents' opposition brief says virtually nothing about the issue presented. Respondents devote their brief to broadside attacks on tribal lending businesses and arguments that the arbitration agreements in this case contain a prospective waiver of federal law. To be clear, Applicants strongly disagree with all of Respondents' contentions on these fronts, including who runs the lending businesses (the Tribe); who benefits from the businesses (the Tribe and its customers); and what law applies in arbitration (Tribal and applicable federal law). But those arguments are irrelevant for purposes of this application. The issue is: *who decides?* The arbitration agreement provides, and the Ninth Circuit has correctly held, that it is the arbitrator's job to determine whether the arbitration agreement contains a prospective waiver of federal law. The Fourth Circuit, joined by the Second and Third Circuits, concluded that the interpretation of the arbitration agreement was the court's job. Because the Court is likely to grant certiorari on this issue and reverse the Fourth Circuit, a stay is warranted.

First, the Court is likely to grant certiorari. As Respondents correctly acknowledge, there is a square circuit split: the Ninth Circuit has expressly rejected case law from the Second, Third, and Fourth Circuits, and enforced a materially identical delegation clause. Contrary to Respondents' claims, the split is unlikely to resolve itself because the Ninth Circuit is unlikely to grant en banc review of that opinion. The split has broad implications for arbitration law—Respondents do not dispute that it will prompt forum-shopping and affect any case involving a delegation clause or the prospective-waiver doctrine. And Respondents' claimed vehicle problem is illusory because only one plaintiff opted out of arbitration. Thus, whether or not the arbitration

agreements are enforceable will determine whether or not this case can proceed as a class action, with all of the resulting burdens that type of litigation entails.

Second, the Court is likely to reverse. Like the Second, Third, and Fourth Circuits, Respondents' position is that the delegation clause should be invalidated based on their interpretation of the arbitration agreement as a whole. But this case is not about what the arbitration agreement means; this case is about who decides what the arbitration agreement means. This Court's precedents make clear that it is the arbitrator who should decide. Respondents' contrary view would allow litigants to sidestep delegation clauses via artful pleading, thus nullifying this Court's case law establishing that such clauses must be enforced.

Third, Applicants would be irreparably harmed without a stay. Denying a stay would result in many of the burdens arbitration is designed to avoid, including expensive class discovery. Respondents' own litigation conduct makes that clear. Before filing the Opposition, Respondents served a first round of discovery that is breathtaking in scope. It encompasses virtually every document involving the Tribal businesses or the Tribe's government, over more than a decade. Among many other things, Respondents seek detailed information about every loan issued to customers geographically located in Virginia, and sensitive and proprietary information about the Tribal businesses as well as the internal operations of a sovereign Indian Nation. Discovery of this scope could never proceed in individualized arbitration, which is no doubt why the Court has granted stays in similar circumstances.

ARGUMENT

I. THIS COURT IS LIKELY TO GRANT CERTIORARI TO REVIEW WHETHER A FEDERAL COURT MAY REFUSE TO ENFORCE A DELEGATION CLAUSE BASED ON ITS OWN INTERPRETATION OF A SEPARATE CHOICE-OF-LAW PROVISION.

The Court is likely to grant certiorari in this case because it presents an ideal vehicle to resolve a square circuit split on a question of national importance.

A. The Circuits Are Divided.

The circuits are at an impasse on the question presented. In *Gibbs v. Haynes Investments, LLC*, 967 F.3d 332 (4th Cir. 2020), the Fourth Circuit refused to enforce a delegation clause in light of the plaintiff's challenge under the prospective-waiver doctrine. In *Brice v. Haynes Investments, LLC*, 13 F.4th 823 (9th Cir. 2021), the Ninth Circuit considered an identical challenge to the identical delegation clause in an identical loan agreement. The Ninth Circuit enforced the delegation clause, noting its disagreement with *Gibbs* and with case law from the Second and Third Circuits. *Id.* at 832-34. In the decision below, the Fourth Circuit followed its own precedent in *Gibbs* while noting that the Ninth Circuit had reached the opposite conclusion. Tab B at 16–17 n.2. Now that the Fourth and Ninth Circuits have each acknowledged that their decisions are irreconcilable, this Court's review is warranted to resolve the split.

Respondents' claim that the Court should deny certiorari based on the "lopsidedness of the split," Opp. at 18, is misguided for several reasons. First, Respondents overstate their side. Respondents count the Seventh and Eleventh Circuits as part of the split, Opp. at 12, but appear to acknowledge that the Seventh and Eleventh Circuit cases did not actually address the issue presented here—whether a court can

invalidate a delegation clause based on a challenge applicable to the arbitration agreement as a whole. So those decisions are not part of any split on the question presented. Opp. at 16.

Second, the split is not as lopsided as Respondents suggest. The Sixth Circuit recently issued an opinion echoing the Ninth Circuit's approach to the question presented. *See In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873 (6th Cir. 2021). There, the Sixth Circuit enforced a delegation clause in a case where the plaintiffs challenged the arbitration agreement based on the infancy doctrine, i.e., by arguing they were minors when they signed it. Plaintiffs directed that challenge both to the delegation clause and the arbitration agreement as a whole. Citing *Rent-a-Center*, the panel majority sent the case to arbitration because the infancy defense "directly affects the enforceability or validity of the entire agreement." *Id.* at 884. Notably, the dissent cited the Second, Third, and Fourth Circuits' tribal lending opinions in support of the opposite position. *Id.* at 889 (Moore, J., dissenting).

Third, even setting aside the Sixth Circuit's opinion, a three-to-one split is not overly "lopsided." This Court routinely grants review in cases with even more "lopsided" splits. For instance, this Term, this Court granted certiorari in *Thompson v. Clark*, 141 S. Ct. 1513 (2021) (No. 20-659) and *Babcock v. Saul*, 141 S. Ct. 1463 (2021) (No. 20-480), in which the petitioners asked the Court to adopt the minority view in seven-to-one and four-to-one circuit splits, respectively. The three-to-one split in this case warrants Supreme Court resolution as well.

Last, the Ninth Circuit's consideration of a petition for rehearing en banc in *Brice* presents no basis for denying a stay. The panel opinion in *Brice* flowed directly from this Court's precedents, and so there is no reason to think the Ninth Circuit will cast it aside. Rehearing en banc in *Brice* also appears unlikely because of a blunder in connection with the rehearing petition. In that litigation, two groups of defendants brought separate appeals raising the same arbitration issue, which were resolved simultaneously in their favor on the same ground. *Brice v. Haynes Investments, LLC*, No. 19-15707 (9th Cir.); *Brice v. 7HBF No. 2 Ltd.*, No. 19-17477 (9th Cir.). But the plaintiffs sought rehearing in only No. 19-15707 and not in No. 19-17477. After the mandate in No. 19-17477 issued, the plaintiffs realized their mistake and filed an unopposed motion to recall the mandate for purposes of filing a petition for rehearing in that case as well. The motion said that the failure to seek rehearing in No. 19-17477 was an "oversight" resulting from a "docketing mishap."[1] However, the Ninth Circuit denied the motion to recall the mandate.[2] As the opposition to the en banc petition in No. 19-15707 explains, this mishap makes the case a poor vehicle for en banc review because it may result in inconsistent treatment of the same litigants in the same case.[3] The Court should not deny this stay application, which

[1] Unopposed Motion to Recall the Mandate and for an Extension of Time to File Petition for Rehearing until 11/01/2021 at 6, *Brice v. 7HBF No. 2 Ltd.*, No. 19-17477 (9th Cir. Oct. 12, 2021), ECF No. 60.

[2] Order, *Brice v. 7HBF No. 2 Ltd.*, No. 19-17477 (9th Cir. Oct. 15, 2021), ECF No. 61.

[3] Response to Petition for Panel Rehearing or Rehearing En Banc at 16-17, *Brice v. Haynes Investments, LLC*, No. 19-15707 (9th Cir. Dec. 29, 2021), ECF No. 85.

is meritorious under current law, based on the unlikely possibility that the Ninth Circuit will grant rehearing *en banc*.

B. The Question Presented Warrants Review.

In addition to the circuit split, this case warrants review because it presents a question of national importance that stretches beyond the parties to this case. Most obviously, the question presented will affect all of the manifold tribal-lending disputes winding their way through the courts. As the stay application explained, the circuit conflict will lead to forum-shopping, wasteful litigation over where to litigate, and the potential for courts to reach conflicting conclusions in the same case. App. for Stay at 21-23. Respondents do not dispute any of these points. Similar forum-shopping concerns led the Court to grant certiorari in *DirecTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), and the Court should follow the same path here.

Moreover, the question presented is important outside the tribal-lending context. As the Ninth Circuit rightly recognized, the Fourth Circuit's opinion, if allowed to stand, would provide a roadmap for plaintiffs to avoid this Court's decisions requiring delegation clauses to be enforced. The Second, Third, and Fourth Circuits "view a party's 'specific challenge' to a delegation clause as a purely formal, procedural requirement." *Brice*, 13 F.4th at 836. Under the precedents of those circuits, "a party complies with *Rent-A-Center* if the party claims the delegation clause is unenforceable even if the arguments made go only to enforceability of the arbitration agreement as a whole." *Id.* "That is, so long as a party states the delegation clause is invalid, that is enough." *Id.* That lenient approach to invalidating delegation clauses cannot be limited to the facts of this case—it

would put the enforceability of all delegation clauses in doubt. The Sixth Circuit's *StockX* decision, which does not involve tribal lending, confirms the point: The panel majority enforced the delegation clause based on similar reasoning to the Ninth Circuit's, but the dissent would have invalidated it for the same reasons as the Second, Third, and Fourth Circuits.

C. There is No Vehicle Problem.

Respondents' claim that this case is a "poor vehicle" because one of the plaintiffs, Lawrence Mwethuku, opted out of the arbitration agreement, Opp. 18-19, is meritless. Whether or not all the other plaintiffs must arbitrate "actually matters" to Applicants for a simple reason, Opp. at 19: Mwethuku is not just the only opt-out in this case—based on the Tribal businesses' records, he appears to be the only opt-out *ever*. All the other plaintiffs' arbitration agreements (and all other arbitration agreements signed by putative class members) contain class action waivers and bar signatories from being class members. *See, e.g.*, Tab D, J.A. 1184 (containing bar on "participat[ing] as a member of a class" (capitalization omitted)). So if those agreements are enforceable, this case cannot proceed as a class action, because Mwethuku cannot proceed as a class of one. Hence, this case matters very much to Applicants.

II. THIS COURT IS LIKELY TO REVERSE THE FOURTH CIRCUIT.

As the stay application explained, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), resolve this case in Applicants' favor. Nothing in the opposition brief shows otherwise.

Indeed, Respondents' analysis of the merits confirms why reversal is appropriate. In the first six pages of Respondents' merits discussion, Respondents argue that the arbitration agreement is invalid because of the prospective waiver doctrine. They spend three pages arguing that the prospective-waiver doctrine is a basis for invalidating arbitration agreements, Opp. at 20-23, and then three pages arguing that the particular language of the parties' agreement contains a prospective waiver of federal law, Opp. at 24-26. Only after laying this groundwork do Respondents contend that the delegation clause is unenforceable too. Opp. at 26-27.

This analysis is exactly backwards. Respondents (and the Fourth Circuit) should have *started* with the delegation clause, and analyzed whether there any defects *specific to that clause* that prevented the Court from referring the dispute to the arbitrator. In this case, no such defects existed. Nothing in the arbitration agreement hinders Respondents from making any argument they wish to the arbitrator regarding the proper interpretation of that agreement, including their prospective waiver argument. If the arbitrator rejects Respondents' interpretation, then Respondents will have the opportunity to make arguments based on federal law in arbitration. And if the arbitrator accepts Respondents' implausible interpretation and holds, at Respondents' invitation, that Respondents are banned from making arguments based on federal law, then

Respondents will have their day in court following the arbitration. The court had no warrant to disregard the parties' agreement and decide those issues on its own in the first instance.

To be clear, Applicants strongly disagree with Respondents' arguments, and would argue to the arbitrator that the arbitration agreement should not be invalidated. The choice-of-law provision in this case is not a poison pill that nullifies federal law and requires the entire arbitration agreement to be invalidated, opening the door to class action litigation. Instead, it merely ensures that the substantive contract law governing the arbitration agreement will be that of a tribal sovereign rather than a state sovereign. Respondents misleadingly quote language from judicial opinions characterizing tribal arbitration agreements as "brazen" and a "farce," *e.g.* Opp. at 3, but those arbitration agreements involved different tribes and different language about federal law. The arbitration agreement in this case—which explicitly invokes the Federal Arbitration Act and explicitly states that the arbitrator has authority to decide federal claims—does not waive federal rights. App. for Stay at 30-31. But again, the crucial point is that this dispute should have been for the arbitrator. The Fourth Circuit interpreted the arbitration agreement incorrectly—but more importantly, it should not have interpreted the agreement at all.

Respondents have little to say on the actual question presented. Respondents claim that their challenge is properly before the court because the delegation clause itself implicates a prospective waiver. Opp. at 26-27. But as a practical matter, their challenge to the delegation clause is not tied to that clause, but to the arbitration agreement as a

whole. That is the type of challenge foreclosed by *Rent-A-Center* and *Henry Schein*. In *Rent-A-Center*, the plaintiff argued that the arbitration agreement as a whole was invalid on the basis of unconscionability. If successful, this argument would have required invalidating the delegation clause, too. The Court held that this type of challenge goes to the arbitrator. Here, too, Respondents argue that the arbitration agreement as a whole is invalid on the basis of the prospective-waiver doctrine, and that the same doctrine requires invalidating the delegation clause, too. Under *Rent-A-Center*, that challenge goes to the arbitrator.

Further, Applicants' argument aligns with the rationale for the *Rent-A-Center* rule. As this Court explained in *Rent-A-Center*'s predecessor case, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the point of the federal rule of severability is to ensure that federal courts do not resolve matters that trench on the arbitrator's authority. App. for Stay at 26-27. And that is exactly what will happen under Respondents' approach. Suppose a court *rejects* Respondents' prospective-waiver challenge as applied to the delegation clause. In that case, the delegation clause will be deemed valid and the case sent to arbitration. Yet the court's resolution of the prospective-waiver issue will necessarily establish that the plaintiff's challenge to the arbitration agreement as a whole fails—*even though that question was supposed to be for the arbitrator*. That rationale applies with identical force in this case and there is no principled reason the case should come out differently from *Buckeye* and *Rent-A-Center*.

Finally, the fact that Respondents' challenge is based on the prospective waiver doctrine provides yet another basis for reversal. This Court has suggested that such

challenges should be addressed—if at all—after arbitration takes place. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The Ninth Circuit's opinion is consistent with that straightforward rule, which provides appropriate deference to the parties' choice to arbitrate and the strong federal policy favoring arbitration. Indeed, this case illustrates why it makes sense for the arbitrator to get the first opportunity to interpret the arbitration agreement and its choice-of-law provision. Most likely, the arbitrator will follow the plain text of the agreement and allow the arbitration of federal claims. But if Respondents' worst-case scenario transpires and the arbitrator refuses to consider federal law, they will get federal judicial review on the back end. App. for Stay at 28-30. Respondents completely ignore this argument, because it has no response.

III. ABSENT A STAY, APPLICANTS WILL INCUR IRREPARABLE HARM.

If the Court denies a stay, Applicants will incur the very expenses and burdens of litigation that arbitration is designed to streamline. The case is pending in the Eastern District of Virginia, and trial could occur in less than a year—suggesting litigation will be fast and furious. *See* Order Setting Pretrial Conference, *Hengle v. Asner*, Case No. 3:19-cv-00250 (E.D. Va. Dec. 15, 2021), ECF No. 149. The stay application explained why the potential for class action discovery, standing alone, constitutes irreparable harm warranting a stay. App. for Stay at 33-35. Respondents identify no relevant authority suggesting otherwise—i.e., a case involving potential arbitration of claims in a class action complaint. *See* Opp. at 30; *see also Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) ("If [a] party must undergo the expense and delay of a trial

before being able to appeal, the advantages of arbitration—speed and economy—are lost forever" and the resulting harm is "serious, perhaps, irreparable").

Respondents' claim that class discovery will occur no matter what because of one plaintiff's opt out is misguided. As explained above, because the arbitration agreements contain waivers of class membership, class discovery would be off the table if the arbitration agreements are upheld and the other Respondents are required to arbitrate. Moreover, the court could well stay Mwethuku's case pending the outcome of arbitration, and it is not clear that any additional discovery would be warranted in Mwethuku's case after the arbitrations wrap up. *See, e.g.*, *Am. Heart Disease Prevention Found., Inc. v. Hughey*, 106 F.3d 389, 1997 WL 42714, at *6 (4th Cir. 1997) (unpublished table decision) ("When arbitration is likely to settle questions of fact pertinent to nonarbitrable claims, 'considerations of judicial economy and avoidance of confusion and possible inconsistent results . . . militate in favor of staying the entire action.'" (quoting *Am. Home Assur. Co. v. Vecco Concrete Constr. Co. of Va.*, 629 F.2d 961, 964 (4th Cir. 1980))).

Respondents' suggestion that discovery will not be burdensome is contradicted by their own conduct. On December 17, 2021, shortly after the Court requested a response to the stay application, Respondents served nine sets of interrogatories each containing 23 interrogatories; seven sets of requests for admission each containing 37 requests; and nine sets of documents requests each containing 54 separate demands. These discovery requests are remarkably far-reaching and intrusive and span virtually every document regarding the origin and operation of the Tribal businesses dating back over a decade. They include requests for detailed information about every loan issued to customers

geographically located in Virginia, which would of course be inappropriate in an individual arbitration. They also include requests for documents that might support future class action litigation in other jurisdictions, such as communications with any consumers nationwide regarding the applicability of federal law, as well as documents shared with the CFPB and any state or federal regulators (including attorney general's offices) in connection with any requests from those entities.

Moreover, as in *Henry Schein*, the requests seek confidential information—which Respondents acknowledge is a basis for finding irreparable harm. *See* Opp. at 31-32; *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011) (discovery "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter"). The broad-ranging requests for production would encompass proprietary information regarding the Tribal businesses, including their processes for screening customers and underwriting loans. Plaintiffs also seek extensive information about the executive and legislative functions of a sovereign government. And Respondents seek borrower names, addresses, email addresses, phone numbers, and documentation related to credit checks with credit reporting agencies, with regard to borrowers who are not plaintiffs but are merely potential members of a putative class. It is doubtful that these types of information would be turned over in arbitration, especially given how tangential they are to Respondents' claims.

CONCLUSION

The application for stay should be granted.

Respectfully Submitted,

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