THE CHICKEN OR THE EGG: THE PROPER ORDER OF ANALYSIS WHEN DETERMINING THE ENFORCEABILITY OF A DELEGATION CLAUSE AND THE BROADER ARBITRATION AGREEMENT IN CONSUMER CONTEXTS

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I. INTRODUCTION

What do companies such as Amazon, Walmart, American Airlines, and Exxon Mobil all have in common? Each company uses mandatory arbitration clauses in their consumer contracts.[1] Mandatory arbitration clauses have become commonplace and are buried within most consumer contracts.[2] Although arbitration can be a cheaper and more efficient alternative to litigation, it can also disproportionately favor corporations, making it imperative that the judicial system maintain legal safeguards to protect consumers in arbitration.[3]

In recent years, predatory psayday lenders have attempted to abuse the arbitration process at the consumer's expense by teaming up with Native American tribes to sidestep federal and state lending laws and exert tribal sovereignty.[4] Native American tribes possess "an inherent, natural sovereignty that preceded or otherwise remained an inherent sovereign authority of the United States" and are not bound by state laws and regulations.[5] With tribes acting as a front for their businesses, these lenders

1. *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 238 (2019) (listing eighty-one companies in the 2018 Fortune 100 list that include mandatory arbitration agreements in consumer contracts).

2. *Id*. (estimating that at least 826,537,000 consumer arbitration agreements were in effect for the year 2018 alone); *see also* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/ (providing a statistical analysis of top-selling brands that incorporate mandatory arbitration clauses).

3. *See generally* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ (describing how mandatory arbitration can act as a "get out of jail free card" for corporations).

4. *See* Max King, *Tribal Lending After* Gingras, 19 DUKE L. & TECH. REV. 122, 127–28 (2021) (explaining how payday lending companies provide struggling tribes with investment capital to benefit from their sovereign immunity); *see also* Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326 (2012) (detailing Rent-A-Tribe schemes and why state regulation cannot prevent these companies from evading state consumer regulations).

5. Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 675 (2002); *accord.* Gingras v. Think Fin., Inc., 922 F.3d 112, 120 (2d Cir. 2019) (pointing out that tribes enjoy common law immunity from suit).

carefully craft their consumer agreements with several important elements: (1) mandatory arbitration agreements forcing arbitration; (2) choice of law clauses asserting that the arbitrator shall enforce tribal law should a dispute arise; and (3) delegation clauses that assign the question of arbitrability to the arbitrator preventing a plaintiff from bringing a prospective waiver claim before a court.[6] The combination of these elements effectively waives the consumer's federal and statutory rights.[7]

These tribal payday lending schemes have sparked much litigation. In a case involving a predatory payday lending scheme, *Brice v. Plain Green, LLC*,[8] the Ninth Circuit determined that if an arbitration agreement contains an enforceable delegation clause, the question of arbitrability is solely for the arbitrator even if the agreement acts as a prospective waiver of the plaintiff's federal statutory rights.[9] The decision in *Brice* clashes with the reasoning previously established by several of its sister courts, representing a tension between respecting the arbitration process and protecting consumers.[10]

First, this Comment will provide pertinent background on the Federal Arbitration Act ("FAA") to better understand the intent of the legislation and how it has historically been applied. Second, this Comment will seek to not only explain the underlying cause of the circuit split but also offer a framework for the proper order of analysis in situations with both a delegation claim and an unenforceability claim. Specifically, this Comment will argue that although a delegation clause's enforceability must be analyzed separately from the entire agreement's enforceability, the delegation clause must be examined within the context of the arbitration

6. *See* Gibbs v. Haynes Invs., LLC, 967 F.3d 332, 339 (4th Cir. 2020) (detailing analogous situations in prior litigation involving choice of law clauses asserting the application of tribal law); Hayes v. Delbert Servs. Corp., 811 F.3d 666, 675 (4th Cir. 2016) (proclaiming that these lenders "underhandedly convert a choice of law clause into a choice of no law clause"). *See generally* BROOK I. LANDIS, VALUE JUDGEMENTS IN ARBITRATION (1977) (defining arbitrability as an examination of whether a dispute that arises during the contract term is subject to arbitration under the terms of the contract).

7. *See* Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 237 (3d Cir. 2020) (citing cases involving a delegation clause that limited the plaintiff's availability to have their federal statutory claim heard).

8. 13 F.4th 823 (9th Cir. 2021).

9. *See id*. at 829–33, 838 (discussing the enforceability of delegation provisions).

10. *See Hayes*, 811 F.3d at 675–76 ("[W]e do not believe the arbitration agreements errant provisions are severable . . . an unenforceable provision cannot be severed when it goes the 'essence' of the contract."); *Gingras*, 922 F.3d at 126–28; *Williams*, 965 F.3d at 229; *Brice*, 13 F.4th at 837–38.

agreement to ensure a plaintiff can truly pursue their rights, rather than be forced into a rigged arbitration game.

This Comment will then recommend that future courts follow the example set by the Second, Third, and Fourth Circuits. Each found that agreements that waive a borrower's federal statutory rights are unenforceable. Additionally, this Comment will argue that should the Supreme Court take on a future appeal by the *Brice* plaintiffs, it should reject the Ninth Circuit's reasoning and bolster the prospective waiver doctrine. Finally, this Comment will set forth a framework to alter current FAA rules regarding arbitration between a company and a consumer.

II. UNDERSTANDING THE DICHOTOMY OF RESPECTING ARBITRATION AND PROTECTING CONSUMERS

A. The Basics of Arbitration and the FAA

Arbitration is a form of private dispute resolution in which two consenting parties agree to have a third party settle their dispute.[11] Rather than having a judge rule on a case in a courtroom, the third-party arbitrator acts as an impartial decision-maker, hearing the parties' claims and considering evidence behind closed doors before issuing awards.[12] Arbitrators are not bound by legal precedent and have great discretion in determining the outcome of the dispute.[13] They make decisions by "striking the fat but saving the heart" of court procedural rules.[14] Arbitration is known for being a simpler alternative to the judicial system; its procedures are more relaxed with limited discovery and fewer rules of evidence.[15]

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11. *See generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992).

12. *See* Wesley A. Sturges, *Arbitration — What Is It?*, 35 N.Y.U. L. REV. 1031, 1032–34 (1960) (providing simplified definitions of arbitration and pointing out its distinctions from litigation); *cf.* Amy. J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 KAN. L. REV. 1211, 1211–12 (2006) (recognizing that arbitration is a private, closed process, but it is not necessarily confidential).

13. *See* Sturges, *supra* note 12, at 1032 (emphasizing how arbitration is a "substitute for litigation in the courts" and how an arbitrator can disregard traditional rules that govern the courtroom).

14. Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751, 1755 (1994) (quoting W. Willard Wirtz, *Due Process of Arbitration*, 11 PROC. NAT'L ACAD. ARB. 1, 13 (1958)).

15. *See* E. Norman Veasey, *The Conundrum of the Arbitration vs. Litigation Decision*, AM. BAR ASS'N (Dec. 15, 2015), https://www.americanbar.org/groups/business_law/publications/blt/2015/12/07_

Mandatory arbitration agreements, or pre-dispute agreements, stipulate that the parties agree to settle any dispute through arbitration.[16] In the consumer context, mandatory arbitration clauses are often included in the fine print of a purchase agreement or written into boilerplate terms and conditions, and frequently go unnoticed by consumers.[17] One party typically drafts these mandatory arbitration agreements, with the other party agreeing to those rules with little to no negotiation of the contract.[18] The drafting party specifies who or which agency shall arbitrate any dispute that arises.[19] That party may also include a choice of law clause in the arbitration agreement specifying what law will govern an arbitration proceeding.[20]

Many drafting parties expressly name an independent institution such as the American Arbitration Association ("AAA") or the Judicial Arbitration and Mediation Services ("JAMS") to conduct arbitration.[21] The institution then sets forth a process for choosing an arbitrator with industry experience and determines which administrative and procedural rules will apply during arbitration.[22] Arbitral institutions make arbitration easier to navigate by providing a level of uniformity and predictability.[23] Although utilizing an

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16. Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 12–13 (2006) (explaining that arbitration agreements can be formed pre-dispute, post-dispute, or through court mandate).

17. Stone & Colvin, *supra* note 3 (asserting that many consumers that are a party in a mandatory arbitration agreement "do not realize that they exist or understand their impact.").

18. *See* Ryan Miller, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed after Concepcion and American Express*, 32 GEO. J. LEGAL ETHICS 793, 795–96 (2019) (claiming that "[c]onsumers who are unsatisfied with the terms of a given agreement have only two options: forgo purchasing the product or service entirely, or suck it up and accept the terms, regardless of how odious they may be").

19. *See* Mindy R. Hollander, *Overcoming the Achilles' Heel of Consumer Protection: Limiting Mandatory Arbitration Clauses in Consumer Contracts*, 46 HOFSTRA L. REV. 363, 365–66 (2018).

20. Matthew Savare, *Clauses in Conflict: Can an Arbitration Provision Eviscerate a Choice-of-Law Clause*, 35 SETON HALL L. REV. 597, 601–02 (2005).

21. Robert L. Ebe, *Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 85 (2002) (detailing what these institutions do and how rules governing arbitration are established).

22. *See id.* (framing how these institutions' rules guide the arbitration process from gathering evidence to hearing testimony).

23. *See* Daly, *supra* note 16, at 21 (describing how arbitral institutions "are easy to access, have time tested rules, maintain lists of qualified and experienced arbitrators, and have qualified staff to assist and to answer questions").

institution may simplify the process, it also drives up the costs of arbitration.[24]

At its best, arbitration can be a cheaper, faster, and more flexible alternative than going to court. Arbitration can result in fair results, and studies have shown that the process can even favor the "little guy," whether it be a disgruntled employee or a wronged customer.[25] However, at its worst, mandatory arbitration's lack of judicial safeguards can tilt the scales towards the party imposing arbitration, particularly in cases involving a consumer and a company.[26] One party is able to dictate who the arbitrator is and choose the forum, limiting discovery and hiking up the costs to disadvantage their opponent.[27] In many cases, the right to appeal or review the decision is limited.[28] Furthermore, the ins and outs of arbitration go virtually unknown as the process is ambiguous and under a "veil of secrecy," leaving the public in the dark regarding a company's wrongdoing.[29]

In 1925, Congress enacted the Federal Arbitration Act ("FAA") in response to widespread hostility against the judiciary.[30] In its consideration of the FAA, Congress acknowledged the benefits arbitration brings through reducing the costliness and delays of disputing a claim in court.[31] The FAA makes written agreements to arbitrate in commercial contracts "valid, irrevocable, and enforceable" except where there would be grounds for revoking the contract in law or in equity.[32] Congress purposefully crafted the FAA to put arbitration agreements on equal footing with any other

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24. *Id.* at 21–22. *See generally* Ezgi Babur von Schwander, *Costs and Reduction of Costs in Arbitration*, CHAMBERS & PARTNERS (Dec. 26, 2017), https://chambers.com/articles/costs-and-reduction-of-costs-in-arbitration (providing further detail as to the administrative fees required through institutional arbitration but not ad hoc arbitration).

25. *See* NAM D. PHAM & MARY DONOVAN, NDP ANALYTICS, FAIRER, FASTER, BETTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 4 (2019); NAM D. PHAM & MARY DONOVAN, NDP ANALYTICS, FAIRER, FASTER, BETTER II: AN EMPIRICAL ASSESSMENT OF CONSUMER ARBITRATION 4 (2020).

26. *Cf.* Szalai, *supra* note 1, at 246–47 (recognizing a current lack of meaningful consent, fair procedures, and quality standards for the way arbitration is conducted).

27. Stone & Colvin, *supra* note 3, at 4.

28. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 10) (stating that arbitration "shall be valid, irrevocable, and enforceable").

29. *See* H.R. REP. NO. 116-204, at 5 (2019).

30. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

31. H.R. REP. NO. 68-96, at 2 (1924).

32. United States Arbitration Act § 2.

binding contract and with the intent of making parties fulfill the promises they made.[33]

In setting arbitration agreements on equal footing with any other contract, the FAA also allows a court to strike down an arbitration agreement for the same reasons it would any other contract.[34] For example, if the terms of an agreement unreasonably favor a party and the adverse party lacked a meaningful choice, a court may consider that arbitration agreement to be unconscionable and thus unenforceable.[35]

For over fifty years, courts interpreted the intent of the FAA as enabling "merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes."[36] During this period, the Supreme Court applied the FAA to a narrow set of cases, such as those involving a disagreement between a business and trade association or two businesses.[37] The Court also narrowly interpreted the FAA to control commercial cases involving federal law that were brought in federal courts.[38]

B. Expansion of the FAA and the Development Toward Deference

In the 1980s, the Supreme Court drastically expanded the FAA's reach through a flurry of decisions.[39] First, the Supreme Court asserted that the FAA applies to contractual disputes brought in state court so long as the

33. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219–20 (1985) (examining the legislative history of the FAA); Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 443–44 (2006); *see also* H.R. REP. NO. 68-96, at 1 (expressing that "[a]rbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement").

34. United States Arbitration Act § 2.

35. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (describing how "[the FAA's] saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" (citation omitted)).

36. Epic Sys. Corp. v. Lewis, 138 U.S. 1612, 1643 (2018) (Ginsburg, J., dissenting); *see* 65 CONG. REC. 1931 (1924) (statement of Rep. Graham) (emphasizing that the FAA was understood to only enforce agreements in commercial and admiralty contracts).

37. *See* Stone & Colvin, *supra* note 3, at 7.

38. *See* Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, J. DISP. RESOL., Spring 2016, at 117 115, 117.

39. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1 (1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

dispute involved interstate commerce.[40] Additionally, the Supreme Court established that the FAA supersedes and preempts any conflicting state law.[41] Finally, the Court found that the FAA could compel arbitration in not only contractual disputes but also statutory disputes, from issues arising from antitrust law to those involving employment law, and pretty much anything in between.[42] During this period of FAA expansion, the Supreme Court also adopted a presumption in favor of arbitration, finding that courts should resolve all doubts in favor of arbitration when parties dispute an arbitration clause's validity.[43]

The use of delegation clauses rose as a result of this presumption in favor of arbitration. A delegation clause allows the drafting party to not only mandate arbitration, but to also empower the arbitrator to decide whether there is a dispute subject to arbitration in the first place.[44] Drafting parties often include a delegation clause in arbitration agreements asserting that the question of arbitrability, that is, the question of who should decide whether a dispute is to be settled through arbitration, goes to the arbitrator.[45] Even if a party's arbitration bid is "wholly groundless," a court cannot override the delegation clause and take on the issue of arbitrability itself if the parties ostensibly agreed to allow the arbitrator to make the call.[46]

For a court to enforce a delegation clause, the clause itself must meet

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40. *See Southland Corp.*, 465 U.S. at 14–16 (reasoning that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements").

41. *See id.*; *see also* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 7 (2017).

42. *See Mitsubishi Motors*, 473 U.S. at 628–34; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30–34 (1991).

43. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983); *Southland Corp.*, 465 U.S. at 10 (declaring that the FAA established "a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

44. *See* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648–49 (1986); *see also* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98, 102–05 (2012) (allowing an arbitrator to decide questions regarding the arbitrability of claims involving statutory rights).

45. *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68–70 (2010) (clarifying that a delegation clause is enforceable like any other contract unless a party specifically challenges the validity of the delegation clause).

46. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527–28 (2019).

certain criteria. The Supreme Court has held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[47] When there is such evidence delegating the issue of arbitrability to the arbitrator, courts should only set aside the arbitrator's decision in narrow circumstances, providing the arbitrator a great deal of freedom and flexibility.[48] Furthermore, if a plaintiff wishes to challenge the validity of an arbitration agreement, the plaintiff must specifically attack the delegation clause.[49]

This shift towards deference, as the Court's enforcement of delegation clauses demonstrates, puts the issues in the hands of the arbitrators and allows for efficient resolution of matters without the back-and-forth of the courts. Thus, to preserve the efficiencies of arbitration, the FAA restricts the grounds on which a court can review and/or vacate an arbitral award.[50] Once an arbitrator makes an award determination, the decision is final with only a slim opportunity to appeal the decision on its merits.[51] The FAA does not allow for judicial review of an arbitrator's mistakes of law or fact, and the right to appeal through the judicial system is extremely limited.[52]

Under the FAA, a court may only vacate an arbitration agreement when the process has been "tainted in certain specific ways."[53] The FAA outlines these specific situations as where an award was the product of corruption, fraud, or undue means; where there was evident partiality or corruption; and/or where the arbitrator was guilty of misconduct or of exceeding their powers.[54] Courts have unevenly applied a fifth ground for vacation —

47. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs.*, 475 U.S. at 649) (concluding that two parties did not clearly and unmistakably agree to delegate arbitrability where one objected to the arbitrator's jurisdiction and binding authority over them).

48. *See id.* at 942–43 (referencing the policy of respecting the parties' originally agreed upon terms).

49. *See Rent-A-Center, W., Inc.*, 561 U.S. at 71–72.

50. *See* Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, 883-85 (1925) (codified as amended in scattered sections of 9 U.S.C.).

51. *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 125–26 (2002).

52. *See* Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 586 (2008); *see also* PowerAgent Inc. v. Elec. Data Sys. Corp., 358 F.3d 1187, 1193 (9th Cir. 2004) (contending that a court's review is "'both limited and highly deferential' and an arbitration award may be vacated only if it is 'completely irrational' or 'constitutes manifest disregard of the law'" (quoting Coutee v. Barrington Cap. Grp., 336 F.3d 1128, 1132-33 (9th Cir. 2003))).

53. *See* Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990).

54. *See* Federal Arbitration Act §10; Wilko v. Sawn, 346 U.S. 427, 436–37 (detailing how the manifest disregard of law ground for vacating an award originated in

manifest disregard of law — after the Supreme Court referred to the FAA's listed situations as the "exclusive" grounds for vacation.[55] The FAA "carries no hint of flexibility" in judicial confirmation of awards.[56] This deference to arbitration empowers the drafting party (usually a corporation) while leaving the consumer very little recourse.

C. Consumer Protections and the Lack Thereof

Consumer protections from arbitration agreements that heavily favor the drafting party are minimal.[57] One supposed protection is the effective vindication doctrine, which represents the notion that a plaintiff must have an actual ability to pursue their federal statutory rights, whether it be through arbitration or through the court system.[58] Although originally the Supreme Court's dicta in 1985, later courts have often recognized and relied on this doctrine.[59] The Supreme Court emphasized that the effective vindication doctrine is potentially violated in situations where the cost of arbitration makes seeking relief impracticable and where a plaintiff waives their right to pursue federal statutory remedies.[60]

The Supreme Court has rarely found costs to be so prohibitive that the agreement must be invalidated. When the costs of consumer arbitration fall solely on one party, it is very possible that a consumer who "simply cannot afford the fees attendant to filing and prosecuting a claim, or because the costs of bringing a claim outweigh the benefits of any potential remedies"

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dicta: "the interpretations of the law by arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation"); *see also PowerAgent Inc.*, 358 F.3d at 1193.

55. *Hall Street Assocs.*, 552 U.S. at 587; *see also* Stuart M. Boyarsky, *The Uncertain Status of the Manifest Disregard Standard One Decade After Hall Street,* 123 DICK. L. REV. 167, 167–68 (2018).

56. *Hall Street Assocs., LLC*, 552 U.S. at 587.

57. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233–34 (2013) (showing how an arbitration agreement that waives class arbitration is not in violation of a congressional command or antitrust laws by preventing a class arbitration route for individual plaintiffs); Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009) (establishing that an arbitration agreement cannot waive federally protected civil rights outright).

58. *See* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 377 (2014).

59. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1984); *Am. Express Co.*, 570 U.S. at 232-33; Szalai, *supra* note 38, at 125; *see, e.g.,* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1990).

60. *See Mitsubishi Motors Corp.,* 473 U.S. at 637; *Am. Express Co.*, 570 U.S. at 235.

will choose not to proceed.[61] However, courts have found that high costs that outweigh the benefit of arbitrating an issue do not take away a plaintiff's ability to pursue effective vindication.[62] For consumer access to a forum to be considered impracticable and potentially lead to invalidation of an otherwise enforceable arbitration agreement, fees generally have to be absurdly high as to constitute an undue burden on the plaintiff.

Courts have declined to view class action waivers as a violation of the effective vindication doctrine although the allowance of class action waivers exacerbates the cost of access issue by sometimes denying the consumer a practical remedy following wrongdoing.[63] Small claims are less threatening to corporations, thus providing less incentive for corporate responsibility.[64] Furthermore, a plaintiff having to act alone is unlikely to bring a claim against a company if the amount in controversy is less than the costs of bringing the claim.[65]

Thus, arbitration agreements often include clauses that prevent plaintiffs from jointly litigating disputes through class actions, and consumer agreements are no exception.[66] The Supreme Court confirmed in a landmark decision, *AT&T Mobility LLC v. Concepcion*,[67] that companies can prohibit consumers from joining class action suits, forcing consumers to bring their claims individually instead.[68]

In response, the Consumer Financial Protection Bureau ("CFPB") in 2017 attempted to implement a rule to ban companies from using mandatory arbitration clauses to prevent class actions.[69] However, the

61. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 L. & CONTEMP. PROBS. 133, 134 (2004).

62. *E.g.*, *Am. Express Co.*, 570 U.S. at 236.

63. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (quoting Scalia, J., stating "[t]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim").

64. *See* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 183–202 (Vand. U.L. Sch., Working Paper No. 17-40 2018).

65. James P. Nehf, *The Impact of Mandatory Arbitration on Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1706 (2017).

66. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), § 8.1 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

67. 563 U.S. 333 (2011).

68. *Id.* at 344.

69. Arbitration Agreements Rule, 82 Fed. Reg. 33210 (proposed July 19, 2017).

legislative and executive branches thwarted this effort.[70] Requiring the availability of class lawsuits would run counter to the fundamental attributes of efficiency touted by the FAA; however, allowing class action waivers disproportionately favors large companies.[71]

Although courts have not generously applied the effective vindication doctrine, the concept has taken root in the prospective waiver doctrine.[72] The prospective waiver doctrine derives from Congress's intent to prevent parties from relinquishing their rights during the pre-dispute stage.[73] If an arbitration agreement equates to an express waiver of federal statutory rights, a plaintiff can no longer effectively vindicate their claim.[74] The Supreme Court has established that the prospective waiver doctrine covers arbitration agreements that in practice "forbid[] the assertion of certain statutory rights."[75]

D. The Brice *Decision and its Clash with Sister Circuits*

The friction between the deference towards arbitration and the consideration of effective consumer protection is represented by litigation stemming from increasingly common predatory tribal payday loan schemes.[76] In recent years, some payday lenders have affiliated with a Native American tribe to evade consumer protections laws in what has become known as "rent-a-tribe" schemes.[77]

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70. Revocation Notice, 82 Fed. Reg. 55500 (Nov. 22, 2017) (announcing that the Arbitration Agreements Rule is removed from the CFR following Congressional action).

71. *See AT&T Mobility LLC*, 563 U.S. at 344 (emphasizing that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA"); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (asserting that class action waivers allow corporations to "exculpate themselves from liability for small-value claims").

72. Joseph R. Brubaker & Michael P. Daly, *Twenty-Five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution: Mitsubishi's Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. MIAMI L. REV. 1233, 1239–40 (2010).

73. Thomas J. Lilly Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine After American Express v. Italian Colors Restaurant?*, 61 WAYNE L. REV. 301, 307, 318–19 (2016) (referencing how a party waiving statutory rights encourages violations of the law with wrongdoers knowing they can act with impunity).

74. Brubaker & Daly, *supra* note 72, at 1233–34.

75. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

76. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 825 (2014) (Thomas, J., dissenting) ("In the 16 years since *Kiowa*, tribal commerce has proliferated, and the inequities engendered by unwarranted tribal immunity have multiplied.").

77. Jayne Munger, *Crossing State Lines: The Trojan House Invasion of Rent-a-*

In these situations, consumers typically borrow a certain dollar amount and then must repay the loan at triple-digit interest rates within a few months, trapping borrowers in a cycle of debt.[78] Online payday loans are often targeted at vulnerable, low-income populations and prey on those who are unlikely to be able to pay back their loan in full.[79] The predatory nature of these loans has led to widespread state consumer protection efforts, with most states beginning to regulate loan terms, amounts, costs, fees, annual percentage rates, and the number of loans a person can take out.[80]

The process some lending companies use to sidestep state consumer protection laws is two-fold. First, a company partners with a tribe to claim sovereign immunity by providing the investment capital to form an online payday business, running the operation from behind the scenes.[81] Tribes are self-governed and generally immune from state laws.[82] This immunity can extend to companies that are considered an "arm of the tribe," but the Supreme Court has not established a test for how lower courts should make this determination.[83] Second, once untouchable by state law, these companies then dictate through choice of law clauses that arbitrators must

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Bank and Rent-a-Tribe Schemes in Modern Usury Law, 87 GEO. WASH. L. REV. 468, 477–81 (2019).

78. *See* Gingras v. Think Fin. Inc., 922 F.3d 112, 117 (2d. Cir. 2019) (referencing how loan borrowers often have to take new loans to pay off the predatory loans).

79. *See* Petrovich, *supra* note 4, at 332; *CFPB Finalizes Rules to Stop Payday Debt Traps*, CFPB (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/; Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, AMERICAN PROGRESS (Aug. 02, 2016), https://americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses/.

80. Petrovich, *supra* note 4, at 333.

81. *Id.* at 334; *see also* King, *supra* note 4, at 127.

82. Petrovich, *supra* note 4, at 334.

83. *Id.* at 336 ("Although courts may use the factors in different ways, they normally look to some combination of these factors to determine whether a tribe's immunity protects a business entity: (1) '[w]hether a judgment against the tribal entity will reach the tribe's assets,' (2) '[w]hether the tribal entity has the power to bind the tribe's assets or to obligate tribal funds,' (3) '[w]hether the tribe and the tribal entity are closely linked through governance structure and other characteristics,' (4) '[w]hether federal Indian law policies intended to promote tribal self- determination would be furthered by extending immunity to the entity,' (5) '[w]hether the entity is organized for governmental or for 'commercial' purposes,' (6) '[w]hether the entity holds title to property in its own name,' and (7) '[w]hether the entity is legally separate and distinct from the tribe.'" (KAREN J. ATKINSON & KATHLEEN M. NILES, OFFICE OF INDIAN ENERGY AND ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK A-1 (2008))).

exclusively apply tribal law during arbitration.[84]

Tribal law lacks the protections and remedies otherwise available to a consumer.[85] Although each Indian nation has its own set of laws, very few have chosen to adopt consumer protections like state usury laws or the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), leaving this area in tribal law largely undeveloped.[86] Many tribes also lack the regulatory mechanisms necessary to prevent a predatory payday lending company from claiming the protection of tribal sovereignty.[87]

The facts of *Brice* exemplify the situation detailed above. Plain Green, an online lender associated with the Chippewa Cree tribe, offered low-dollar, high-interest loans over the internet.[88] The plaintiffs obtained payday loans that carried interest rates up to nearly 450%, more than four hundred times the legal limit.[89] Although these loans did not abide by state and federal lending laws, the defendants attempted to avoid liability by asserting tribal sovereignty and choosing tribal law for its contracts.[90]

The contracts for these loans contained arbitration agreements with choice of law provisions that dictate that a consumer irrevocably consents to the exclusive jurisdiction of the Tribal courts and that the loan is governed by the laws of the tribe, not federal and state law.[91] Additionally, and most important to the analysis of the case, the arbitration agreement itself stated that "[t]he arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein" and that "'[t]he arbitrator has the ability to award all remedies available under Tribal Law, whether at law or in equity, to the prevailing party.'"[92]

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84. *See* Gingras v. Think Finance, Inc., 922 F.3d 112, 126–27 (2d. Cir. 2019); Hayes v. Delbert Servs. Corp. 811 F.3d 666, 675.

85. *See* FIRST NATIONS DEVELOPMENT INSTITUTE, BORROWING TROUBLE: PREDATORY LENDING IN NATIVE AMERICAN COMMUNITIES, 23, 29 (2008) (stating that of all the Indian nations' codes possessed at the National Indian Law Library at the Native American Rights Fund, only seven houses some sort of sections on consumer protection laws).

86. *See id.* at 6 (providing possible explanations for why this is, including how critical issues like poverty and housing overshadow the consumer protection and jurisdictional confusion).

87. *Id.* at 7.

88. Brice v. Plain Green LLC, 13 F.4th 823, 829-33 (9th Cir. 2021).

89. Brief for Petitioner at 1–3, Brice v. Plain Green LLC, 13 F.4th 823 (2021) (No. 19-15707).

90. *See id.* at 37–38.

91. *Brice*, 13 F.4th at 842–43.

92. *Id. at* 842.

The loan contract also contained a delegation clause that required arbitration of "a dispute includ[ing] any issue concerning the validity, enforceability, or scope of th[e] [a]greement or th[e] [a]greement to [a]rbitrate."[93] The agreement also instructed that the word "dispute" is meant to be given its broadest possible meaning.[94] The delegation clearly and unmistakably provides the arbitrator with the power to determine enforceability of the arbitration agreement.[95]

The plaintiff sued and the defendants moved to compel participation in tribal arbitration.[96] The district court denied the motion, finding that the contract and arbitration agreement functioned as a prospective waiver of rights.[97]

The facts of the case create a challenging order of analysis issue.[98] Typically, a delegation clause dictates that an arbitrator is the determiner of arbitrability and enforceability of an arbitration agreement and should be enforced if valid.[99] However, if an arbitration agreement acts as a prospective waiver of federal and statutory rights, it is unconscionable and thus unenforceable.[100] Does an agreement with a delegation clause effectively provide the arbitrator with the decision-making power to determine whether there is a prospective waiver of rights? Can the arbitrator even make such a determination if the agreement mandates that only tribal law be applied?

The Ninth Circuit reversed the district court's decision and compelled arbitration after deciding that the delegation clause specifically was enforceable because it was not, on its own, a prospective waiver of rights.[101] Viewing the delegation clause as controlling, the court found that the arbitrator, rather than a court, must decide whether the arbitration

93. *Id.* at 829.

94. *Id.*

95. *Id.*; *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

96. Brice v. Plain Green, LLC, 372 F. Supp. 3d 955 (N.D. Cal. 2019).

97. *See id.*

98. *See Brice*, 13 F.4th at 825 (referring to the situation at hand as a "brain twister").

99. *See* AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 648-49 (1986); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019); *First Options of Chicago*, 514 U.S. at 942.

100. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013).

101. *Brice*, 13 F.4th at 828–33.

agreement is unenforceable.[102]

The Ninth Circuit's decision hinged on the idea that the delegation clause was not unenforceable and was not a prospective waiver because the plaintiffs still maintained their rights to bring up their federal prospective waiver argument during arbitration.[103] The court based this determination on the fact that arbitrators can decide disputes arising under federal, state, or tribal law.[104]

The Ninth Circuit's decision departs from the reasoning employed by other circuit courts, each of which dealt with a fact pattern involving a tribal lending payday scheme like that of *Brice*.[105] Each of the courts refused to compel arbitration, instead finding merit in the plaintiffs' prospective waiver arguments regardless of the order of analysis employed.[106]

In *Gingras v. Think Finance*,[107] the Second Circuit recognized that the plaintiffs attacked the delegation clause, which opened the door to a federal court deciding the issue of arbitrability.[108] The court then found the contract's arbitration agreement unenforceable because it was "designed to avoid federal and state consumer protection laws" and acts to "wholly foreclose borrowers from vindicating their rights."[109]

In *Williams v. Medley Opportunity Fund II*,[110] the Third Circuit found contracts like the one in *Brice* "require[] a borrower to prospectively waive claims based on any other law."[111] Although the order of analysis and enforceability of the delegation clause was not the focus of the court's opinion, it did note that expressly forbidding an arbitrator from relying on any federal statutory law would render a plaintiff's federal statutory claim

102. *Id.* at 830.

103. *See id.* at 832.

104. *See id.* at 838.

105. *See generally* Hayes v. Delbert Servs. Corp., 811 F.3d 666 (4th Cir. 2016); Gingras v. Think Fin., Inc., 922 F.3d 112 (2nd Cir. 2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229 (3rd Cir. 2020); *Brice*, 13 F.4th at 823, 829-33.

106. *See Hayes*, 811 F.3d at 668; *Gingras*, 922 F.3d at 128; *Williams,* 965 F.3d at 233.

107. 922 F.3d 112 (2d Cir. 2019).

108. *See id*. at 117.

109. *See id.* (concluding that an arbitration agreement that prohibits a plaintiff from pursuing federal statutory remedies is not truly neutral dispute resolution against prior Supreme Court rulings).

110. 965 F.3d 229 (3d Cir. 2020).

111. *Id*. at 241.

obsolete before arbitration even began.[112]

In *Hayes v. Delbert*,[113] the court focused on the arbitration agreement as a whole and found that the agreement "flatly and categorically renounce[d] the authority of the federal statutes to which it is and must remain subject."[114] The court did not specifically address the enforceability of the delegation clause.[115] In subsequent cases, the court looked at delegation clauses and made the determination that a party may rely on the same arguments it employs to contest the enforceability of the entire agreement in challenging the delegation clause.[116]

Although these decisions are not binding on the Ninth Circuit, they represent a mainstream interpretation and application of the prospective waiver doctrine much different than that demonstrated through *Brice*.[117]

III. WHY THE CHICKEN AND THE EGG MAY BE ONE AND THE SAME

The idea that predatory payday lenders can team up with tribes, purposefully break consumer protection laws, and leave plaintiffs with no legitimate recourse to have their claims heard undermines the judicial system and creates a dangerous avenue for wrongdoing.[118] Whether a court can address a prospective waiver claim when a clear delegation clause is written into an arbitration agreement has resulted in contention among the Circuit Courts of Appeals, as analyzed below.[119]

The circuit courts' differing interpretations of similar fact patterns yield confusion and uncertainty as to how future courts should handle this now common issue.[120] Arbitration agreements with a potential prospective

112. *See id.*

113. 811 F.3d 666 (4th Cir. 2016).

114. *See id.* at 675.

115. *See id*. at 666.

116. *See* Gibbs v. Haynes Invs., LLC, 967 F.3d 332, 339 (4th Cir. 2020); Dillon v. BMO Harris, N.A., 856 F.3d 330, 333 (4th Cir. 2017).

117. Brice v. Plain Green, LLC, 13 F.4th 823, 829–33 (9th Cir. 2021).

118. *See Hayes*, 811 F.3d at 674 (concluding that "[t]he just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce"); *see also* Petrovich, *supra* note 4, at 328–30.

119. *See Hayes*, 811 F.3d at 673–74; Gingras v. Think Fin., Inc., 922 F.3d 112, 126 (2nd Cir. 2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 237 (3rd Cir. 2020); *Brice*, 13 F.4th at 829–33.

120. *See* Petrovich, *supra* note 4, at 330 (contending that in 2010 tribal payday lenders made up more than 35 out of 300 payday lenders and the number of tribal payday lenders could eventually climb to 400); *Gingras*, 922 F.3d at 126 (stating that the *Gingras* case "and the tribe-payday lending partnership it challenges, is not unique").

waiver issue present a messy, complex order of analysis issue when paired with a delegation clause.[121] Courts have two competing prerogatives: upholding the terms of the arbitration agreement that dictates delegation and reinforcing a plaintiff's right to have their federal statutory claim heard.[122]

There are several reasons why courts should uniformly apply the prospective waiver doctrine in cases in which the defendant's arbitration agreement dictates that the arbitrator only apply tribal law. First, applying tribal law exclusively during arbitration would render a plaintiff's federal statutory rights obsolete — violating the prospective waiver doctrine.[123] Second, an arbitrator cannot effectively arbitrate a federal statutory rights claim if the arbitrator cannot apply the law from which the claim is derived.[124] Third, enforcing delegation clauses and compelling arbitration when rights are prospectively waived through the arbitration agreement results in a longer and more costly process, counterintuitive to the very goal of arbitration.[125]

With the FAA's far reach and vast limitations, states have to enforce consumer protection laws, and courts must properly balance arbitration considerations and protective measures.[126] Given the Court's limited interpretation of effective vindication, the prospective waiver doctrine is one of the only remaining hurdles to companies steamrolling consumers

121. *Brice*, 13 F.4th at 825 (referring to the situation at hand as a "brain twister").

122. See Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013).

123. *See Mitsubishi,* 473 U.S. at 637 ("In the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy."); *Am. Express Co.*, 570 U.S. at 235-36; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 71 (2010); Hayes v. Delbert Servs. Corp., 811 F.3d 666, 673–74 (2016); Gingras v. Think Fin., Inc., 922 F.3d 112, 112 (2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 229 (2020).

124. *See Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 112; *Williams*, 965 F.3d at 237; Dillon v. BMO Harris, N.A., 856 F.3d 330, 336 (2017); *Rent-A-Center*, 561 U.S. at 71; *Contra* Brice v. Plain Green, 13 F.4th 823, 842 (2021).

125. *See* Daly, *supra* note 16, at 10–11.

126. Brubaker & Daly, *supra* note 72, at 1235 ("When doing so, these courts have engaged in a delicate balancing act of respecting the expectations of business partners in international commerce while ensuring that the contractually selected forum would protect the public policy concerns addressed by the relevant federal statutes."); *see* Stone & Colvin, *supra* note 3, at 26–27; Jon O. Shimabukuro & Jennifer A. Staman, CON. RSCH. SERV., R44960 MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT (2017).

into relinquishing their rights, often without even knowing they are doing so.[127] This split produces a judicial system that unevenly applies the law, which leads to forum shopping and raises questions of fundamental fairness.[128] Ultimately, only the Supreme Court can settle the split.

A. Addressing a Prospective Waiver Claim

Without a prospective waiver of federal statutory rights, there is no order of analysis issue for a court to address. In cases analogous to *Brice*, the first question a court must answer is whether a choice of law clause dictating that an arbitrator only apply tribal law constitutes a prospective waiver of federal statutory rights.

Arbitration agreements stipulating that an arbitrator may only apply tribal law act as a prospective waiver.[129] Because they wholly foreclose a plaintiff from vindicating federal and state rights, and because tribal law may not hold the same rights or remedies, these types of arbitration agreements are unenforceable.[130]

First, arbitration agreements that dictate the application of tribal law are purposefully designed to circumvent federal and state consumer protection laws.[131] The Supreme Court previously stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and

127. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337–38 (2011); Thomas J. Lilly, *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine After American Express v. Italian Colors Restaurant?*, 61 WAYNE L. REV. 301, 307, 318–19 (2016).

128. Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CA. L. REV. 989, 997 (2020) (explaining the threats circuit splits pose and quoting John Jay's assertion that "we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection[s].").

129. *See Hayes v. Delbert Servs. Corp.*, 811 F.3d at 673–74; *Gingras v. Think Finance, Inc.*, 922 F.3d at 126; *Williams v. Medley Opportunity Find II, LP*, 965 F.3d at 242; *Dillon*, 856 F.3d at 335. *Contra* Brice v. Plain Green LLC, 13 F.4th 823, 842 (9th Cir. 2021).

130. *See Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 126–27; *Williams*, 965 F.3d at 241–42; *Dillon*, 856 F.3d at 335; *see also Brice*, 13 F.4th at 832 (conceding that "to assume that the Tribal Lenders and Investors sought to avoid the application of federal law is not absurd given the nature of these loans and the history of these entities").

131. *See* Petrovich, *supra* note 4, at 328–29 (exploring how the tribal payday lending scheme only began to develop after states began regulating the payday lending industry and implementing consumer protection laws).

deterrent function."[132] The Court expressed it more clearly by emphasizing that a case involving an arbitration agreement "forbidding the assertion of certain statutory rights" would be struck down by the prospective waiver doctrine, although the case at hand did not fall into such a category.[133]

As the Second, Third, and Fourth Circuits have all recognized, the fact patterns of arbitration agreements governed solely by tribal law essentially create "[w]ith one hand, . . . [a] procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away."[134] How can an arbitration agreement purport to provide federal and statutory remedies while barring the application of federal and state law?[135]

The choice of law clause in the *Brice* arbitration agreement is no different than those examined by the sister courts.[136] It clearly states that "[t]he arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein."[137] The other terms of the Agreement are just as limiting, if not more limiting, and even explicitly state that the contract is not subject to or governed by any state or federal laws.[138]

Furthermore, as the Second Circuit noted, "[t]ribal law provides no guarantee that federal and state statutory rights could be pursued, much less vindicated, in this arbitral forum."[139] Applying only tribal law during arbitration does not just make it more difficult to provide a statutory remedy, but it can make it impossible by eliminating the right to pursue that remedy effectively.[140] Tribal law differs greatly from federal and state law, and most tribal nations do not even have consumer protection laws or a RICO equivalent.[141] Without consumer protection laws on the books,

132. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985); *see also Am. Express Co.*, 570 U.S. at 235 (quoting *Mitsubishi* in its discussion of the effective vindication doctrine).

133. *Am. Express Co.*, 570 U.S. at 236 (exemplifying how lower courts should view and apply the prospective waiver doctrine).

134. *Hayes*, 811 F.3d at 673–74; *see Gingras*, 922 F.3d at 126–27; *Williams*, 965 F.3d at 242; *Dillon*, 856 F.3d at 335.

135. *See Williams*, 965 F.3d at 240 (purporting that "[b]ecause the arbitration agreement mandates that only tribal law applies in arbitration, federal law does not.").

136. *See* Brice v. Plain Green, LLC, 13 F.4th 823, 828–32 (9th Cir. 2021); *Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 126–27; *Williams*, 965 F.3d at 238–41.

137. *Brice*, 13 F.4th at 842.

138. *See id.* at 842–43.

139. *Gingras*, 922 F.3d at 127.

140. *See id.*; Dillon v. BMO Harris Bank, N.A., 856 F.3d 330, 336 (4th Cir. 2016).

141. *See* FIRST NATIONS DEV. INST., BORROWING TROUBLE: PREDATORY LENDING IN NATIVE AMERICAN COMMUNITIES 29 (2008).

these predatory lending companies have not broken any tribal laws and the plaintiff is not owed any remedy. Even if tribal law incorporates some rights and remedies available through federal and state law, its substance is irrelevant to the prospective waiver discussion.[142] An alternative remedy is not *the* remedy promised through federal and state law.[143]

Finally, opponents to the prospective waiver doctrine and its application, as well as the Ninth Circuit, question the validity of the prospective waiver doctrine. The Ninth Circuit itself has recognized and applied this principle, striking down an arbitration clause because it required a party to surrender certain rights granted through federal law.[144] Although the prospective waiver doctrine originated through Supreme Court dicta, the court also overtly recognized it, even outlining the types of situations to which it would apply.[145] The fact that the Supreme Court has not taken on a case in which applying the prospective waiver doctrine would be appropriate does not unravel the words of the court. The circumstances in which a predatory payday company purposefully denies consumers federal and state rights through an arbitration agreement perfectly encapsulates the situation that the Court saw as requiring the prospective waiver doctrine's protection.[146]

B. To Delegate or Not to Delegate: Who Decides the Prospective Waiver Issue

Assuming the requirement that an arbitrator may only apply tribal law creates a prospective waiver issue, the question then transforms into whether the arbitrator or court should address that issue. Respecting a delegation clause in an arbitration agreement and compelling arbitration is only appropriate when the court doing so provides the plaintiff with a

142. *See Gingras*, 922 F.3d at 126–27; *Dillon*, 856 F.3d at 336.

143. *See Dillon*, 856 F.3d at 336; Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 242 (3d Cir. 2020) (stating that "the question is whether a party can bring and effectively pursue the federal claim — not whether some other law is a sufficient substitute.").

144. *See* Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1247–48 (9th Cir. 1994) (considering a case in which an arbitration clause violated the Petroleum Marketing Practices Act by compelling the surrender of statutory mandated protections as a condition of obtaining franchise agreements).

145. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985); *see also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–37 (2013).

146. *Am. Express Co.*, 570 U.S. at 236 (referring to the prospective waiver doctrine and stating "[t]hat [it] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights").

genuine avenue to have their prospective waiver issue heard.[147]

A delegation clause introduces threshold questions regarding an arbitration agreement's enforceability in the hands of the arbitrator.[148] If an arbitration agreement includes a delegation clause, a plaintiff must specifically attack the delegation clause with a challenge to its validity, and not necessarily the validity of the entire arbitration agreement.[149] However, the attack on the delegation clause and the attack on the arbitration agreement may be one in the same.[150]

Enforcing a delegation clause and compelling arbitration acts as a prospective waiver of the plaintiff's federal statutory remedies in itself.[151] The different cases handled by the Ninth Circuit and its sister courts all dealt with choice of law clauses that would effectively prevent an arbitrator from considering the state and federal law necessary to settle a dispute regarding a prospective waiver claim.[152] A district court's decision sums up the problem stating that: "[i]n 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."[153] In these cases, the delegation clause prospectively waives the plaintiff's right to pursue relief and thus is unenforceable in nature, leaving the court to then turn to the enforceability of the entire arbitration agreement coming to that same conclusion.

The Ninth Circuit, however, contends that "[t]he plain language of the delegation provision does not foreclose the arbitrator from considering enforceability disputes based on federal law."[154] By examining the

147. *See Mitsubishi,* 473 U.S. at 637; *Am. Express Co.*, 570 U.S. at 235–36; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 71 (2010); Hayes v. Delbert Services Corp., 811 F.3d 666, 673–74 (4th Cir. 2016); *Gingras*, 922 F.3d at 126–27; *Williams*, 965 F.3d at 241–42.

148. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019).

149. *See Rent-A-Center*, 561 U.S. at 70–71 (declining to intervene where the basis of challenge was to the arbitration agreement and not the delegation clause itself).

150. *See id.* (explaining that, in some cases, the alleged fraud that induces the whole contract equally induces the agreement to arbitrate); *see, e.g.*, *Hayes*, 811 F.3d at 673–74; Gingras v. Think Fin., Inc., 922 F.3d 112, 126–27 (2d Cir. 2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 229 (3d Cir. 2020); Dillon v. BMO Harris Bank, N.A., 856 F.3d 330, 336 (4th Cir. 2016).

151. *See Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 112; *Williams*, 965 F.3d at 229; *Dillon*, 856 F.3d at 336.

152. *See Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 126–27; *Williams*, 965 F.3d at 242; Brice v. Plain Green, LLC, 13 F.4th 823, 829–833 (9th Cir. 2021).

153. Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 786 (E.D. Pa. 2016).

154. *Brice*, 13 F.4th at 830.

delegation clause in a vacuum and ignoring the controlling terms of the arbitration agreement, the court asserted that the delegation clause would not preclude a plaintiff from bringing a prospective waiver claim in front of an arbitrator. Even if that is true, the arbitrator has both hands tied behind his back; the arbitrator cannot examine the law to rule on a prospective waiver claim, making it likely that the arbitrator would uphold the arbitration agreement.[155]

A plaintiff having the ability to raise a claim in vain does not constitute the "right to pursue" promised to a plaintiff through Supreme Court cases.[156] The Ninth Circuit erroneously views the delegation clause as a limitation that may diminish the arbitrator's ability to decide on a prospective waiver issue but not foreclose it.[157] Rather, the court must consider the delegation clause within the broader context of the arbitration agreement, taking into account the other choice of law clauses asserting that the arbitrator must only apply tribal law.[158] When taking into account the parameters set forth by the arbitration agreement, it is clear that the only way an arbitrator could effectively and fairly decide the plaintiff's prospective waiver claim is by ignoring the terms of the arbitration agreement completely.

Referring a prospective waiver claim to an arbitrator not only sets a plaintiff up for failure during the arbitration process but makes it even more difficult for a plaintiff to receive the relief or remedy owed to them through the judicial system.[159] The Ninth Circuit recognizes that delegating a prospective waiver claim to the arbitrator can ultimately result in one of three outcomes: (1) the parties returning to court because the arbitrator was

155. *Williams*, 965 F.3d at 243 n.14 (explaining that "[q]uite possibly, the arbitrator would uphold the arbitration clause, because there would be no principle of federal law standing the in the way" (quoting Ryan v. Delbert Servs. Corp., No. 5:15-cv-05044, 2016 U.S. Dist. LEXIS 121246, at *5 (E.D. Pa. Sept. 8, 2016))).

156. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 605, 636–37 (1985); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013).

157. *Brice*, 13 F.4th at 831 (quoting in part Justice Kagan's dissent in *Am. Express Co.*).

158. *See id*. at 825, 828–29 (quoting the choice of law clauses in the agreement); Jennifer M. Duplissey & Karla F. Pizarro, *Canceling the Word "Shall" in Leases, Contracts and Legal Forms*, HOLLAND & KNIGHT LLP (June 7, 2021) https://www.hklaw.com/en/insights/publications/2021/06/canceling-the-word-shall-in-leases-contracts-and-legal-forms#:~:text=Continuing%20to%20use%20the%20word,word%20shall%20to%20avoid%20ambiguity (pointing out that the word "shall" has been used for generations to create a mandatory obligation where a person or party must carry out a certain action).

159. *See* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 587 (2008).

unconvinced of the plaintiff's prospective waiver claim (the most likely option given the choice of law limitations); (2) the plaintiff returning to court because the arbitrator sidestepped the choice of law clauses and found the arbitration agreement to be a prospective waiver of rights; or (3) the parties returning to court because the arbitrator recognized that they cannot consider a prospective waiver claim due to the choice of law limitations.[160]

These alternatives share a commonality: the parties *returning* to court for litigation after initiating arbitration.[161] Congress passed the FAA into law on the premise that arbitration was a quicker and more cost-effective way for parties to have their disputes settled.[162] These features spurred the movement towards an expansion of arbitration and could even be the basis for parties agreeing to arbitrate in the first place.[163] The convoluted path to dispute resolution the Ninth Circuit proposes undermines the essential goals of arbitration, leaving a plaintiff to spend double the time and pay double the costs.[164]

More importantly, the limitations on the extent to which a court may review a granted arbitration award would make a plaintiff's opportunity for successful relief through litigation an uphill battle.[165] The Ninth Circuit concludes that the "worst-case scenario is that an arbitrator *may* prevent Borrowers from presenting their federal claims and, if so, Borrowers *will* have the opportunity to object to a court . . . and ask that any award be vacated."[166] Yet in the footnote to that same sentence, the Ninth Circuit recognizes the limited and highly deferential nature of a court's back-end review of an arbitration award, a standard set by the Court itself.[167]

The FAA provides exclusive bases for a court to vacate an arbitration award, and a court cannot do away with an arbitrator's decision just because it disagrees with the arbitrator's reasoning or interpretation of the law.[168] The FAA's reasons for vacation include an arbitrator having a

160. *Brice*, 13 F.4th at 837.

161. *See id.*

162. *See* H.R. REP. NO. 68-96, at 1 (1924).

163. *See* Daly, *supra* note 16, at 10–11 (stating that "the mantra of arbitration is: quick, efficient, economical, and fair resolution of disputes").

164. *See id.*; *Brice*, 13 F.4th at 837.

165. *See* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 582–84 (2008); Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990); *see also* PowerAgent Inc. v. Elec. Data Sys. Corp., 358 F.3d 1187, 1193 (9th Cir. 2004).

166. *Brice*, 13 F.4th at 837.

167. *Id.*; *see also PowerAgent Inc.*, 358 F.3d at 1193.

168. *See Hall St. Assocs.*, 552 U.S. at 583–84.

serious conflict of interest; the arbitration award being procured by corruption, fraud, or undue means; or an arbitrator being guilty of misconduct or exceeding their powers.[169] Only allowing a plaintiff to seek relief for their prospective waiver claim after an award is issued places that plaintiff in a position where they must attempt to squeeze their claim into one of these exclusive reasons for vacation.[170]

As scenarios like *Brice* exemplify, the court should not wait and see whether an arbitrator goes rogue and applies laws that they are forbidden to consider under the terms of the arbitration agreement. The "right to pursue" a federal statutory right must allow a plaintiff the opportunity to have their claim decided on its merits and the opportunity to do so effectively.[171] Congress did not intend for this "right to pursue" federal statutory rights to be granted through both arbitration *and* litigation, which is why the law instructs courts to give so much deference to the arbitral decision.[172]

C. Ramifications of the Split and the Need for Supreme Court Guidance

The Ninth Circuit's decision and the split it creates have consequences that extend far beyond the unjust result that falls on Brice and the other plaintiffs in *Brice*.

First, it is important to note the limitations on consumer protection laws already at play before discussing how the Ninth Circuit's decision exasperates the fairness issues that some scholars believe are inherent in the current interpretation of the FAA.[173] The FAA preempts state law that conflicts with it.[174] In its interpretation of the FAA, the Supreme Court has

169. 9 U.S.C.A. § 10 (West 2002).

170. *See Hall St. Assocs.*, 552 U.S. at 584.

171. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013); *see* Hayes v. Delbert Servs. Corp., 811 F.3d 666, 674 (4th Cir. 2016); Gingras v. Think Fin., Inc., 922 F.3d 112, 127 (2d Cir. 2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 241–42 (3d Circ. 2020); Dillon v. BMO Harris Bank, N.A., 856 F.3d 330, 336 (4th Cir. 2017).

172. *Am. Express Co.*, 570 U.S. at 235–36; *see* H.R. REP. NO. 68-96, at 1 (1924).

173. Stone & Colvin, *supra* note 3, at 3 (referring to the general trends in arbitration law as giving "corporations a 'get out of jail free' card for all potential transgressions" and "undermining decades of progress in consumer and labor rights").

174. *See* Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984); JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT (2017) (explaining that "the [Supreme] Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements" based on its

concluded that although "states may regulate arbitration agreements under laws governing the validity, revocability and enforceability of contracts generally, state requirements that expressly target these agreements and that disfavor or interfere with arbitration are generally preempted by the federal act."[175]

More broadly, state laws and regulations are not applicable to Native American tribes because of tribes' inherent, natural sovereignty.[176] In tribal lending cases, the payday lending company takes on a role as an "arm" of the tribe by shielding its practices from being subject to a state's laws and regulations, which in turn leaves consumers without any sort of remedy for their state claim.[177] The effect of these state regulatory limitations is that only federal laws regulating these tribal payday lending companies offer even a possibility of protecting consumers from being taken advantage of during the arbitration process.[178]

The Ninth Circuit's decision to allow the delegation of enforceability when doing so waives a plaintiff's federal statutory rights makes that possibility of protection much less attainable for Brice and likely many future Ninth Circuit plaintiffs.[179] This circuit court split could lead to prolific forum shopping by tribal predatory payday lending companies seeking to enforce their arbitration agreements acting as an "integrated scheme to contravene public policy."[180] Many of these companies advertise and provide services to people all over the country.[181] As the drafter of the arbitration agreement, the choice of forum falls squarely on these predatory companies with the consumer simply taking it or leaving

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interpretation of the Supremacy Clause of the U.S. Constitution).

175. JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 11 (2017).

176. Seielstad, *supra* note 5, at 674.

177. *See* Munger, *supra* note 77, at 478–79 (providing the example of state usury laws regulating how high an interest rate may be without being considered a violation of state law).

178. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013).

179. *See* Brice v. Plain Green, LLC, 13 F.4th 823, 838 (9th Cir. 2021) (compelling arbitration despite the plaintiff having little opportunity to be made whole, which in turn would disincentivize other plaintiffs from even trying to have their claims heard).

180. *See* Hayes v. Delbert Servs. Corp., 811 F.3d 666, 676 (4th Cir. 2016) (quoting Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994)).

181. *See* Munger, *supra* note 77, at 478 (explaining that "the lender markets, advertises, and provides funds for the service, then the tribal entity originates the loan to the borrower, which can be done nation-wide over the internet, and subsequently sells the loan to the lender according to a prior arrangement").

it.[182]

The Ninth Circuit's interpretation of the prospective waiver doctrine and the potential for an influx of tribal lending companies' forum shopping may deter a plaintiff from pursuing a federal statutory claim or remedy all together. It is important to note that, although not at issue in the *Brice* case or the analogous cases discussed, many arbitration agreements in tribal payday lending contracts contain class waivers.[183] A single plaintiff would likely have to handle the costs of arbitrating and litigating a claim in vain, further insulating the bad actors from any sort of meaningful consequences.[184] This impact is not just theoretical, considering many of the tribal payday lending cases are filed against many of the same defendants.[185]

IV. REINFORCING THE PROSPECTIVE WAIVER DOCTRINE AND IMPLEMENTING GREATER PROTECTIONS AGAINST WRONGDOING

Former Supreme Court Chief Justice Warren Burger once contended that "[our] [legal] system is too costly, too painful, too destructive, too inefficient for a truly civilized people."[186] Arbitration provides a strong alternative to many of the problems our judicial system faces. However, as companies use arbitration in ways Congress did not originally intend, the legislative branch should prune arbitration law to adapt to changing norms by implementing prudent and necessary consumer protections consistent with the aims of the FAA on a micro- and macro-level. The recommendations outlined below attempt to curtail the effects of bad actors

182. *See* Ryan Miller, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After* Concepcion *and* American Express, 32 GEO. J. LEGAL ETHICS 793, 796 (2019).

183. *See* Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, § 10.1 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding that out of all the payday loan arbitration agreements it examined, 88.7% of the arbitration agreements contained provisions waiving class actions).

184. *See* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 68–69 (2015) (Ginsburg, J., dissenting) (stating that the class action waiver "decisions have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws").

185. *See Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 127; *Williams*, 965 F.3d at 243; *Dillon*, 856 F.3d at 336; Brice, 13 F.4th at 842 (Fletcher, J., dissenting) (reflecting how these cases are filed against the same defendants).

186. *See* Daly, *supra* note 16, at 10 (quoting Chief Justice Burger while discussing the objectives of arbitration).

abusing arbitration without metaphorically "throwing the baby out with the bathwater."

With the rising prevalence of tribal predatory payday lending schemes, the judicial and legislative branches of government should take action to stop bad actors from limiting a plaintiff's recourse.[187] First, the judicial system should evenly apply the prospective waiver doctrine in accordance with the Second, Third, and Fourth Circuit court decisions and the Supreme Court should grant a petition for certiorari if the *Brice* plaintiffs request one.[188]

Additionally, the judicial system should take a stricter and more uniform approach in determining whether or not a business is truly a tribal entity that can assert tribal sovereignty. Not all courts have adopted "arm of the tribe" tests, and existing tests vary.[189] In general, these tests look to see if an entity is closely affiliated with and promotes economic development for a tribe.[190] Collectively, the courts should standardize and expound on the test, taking into greater account a tribe's actual involvement in the dealings and decision-making of the entity. If the courts implemented this measure, they would find many companies are using a tribe as no more than a front, like the one in *Brice*.[191]

However, the judicial system is limited to solely interpreting the constructs Congress sets. Congress could draft legislation to bolster existing consumer protection laws at the federal level. The FAA does not preempt federal law, as it does state legislation.[192] Given that the prospective waiver doctrine is rooted in public policy and that courts have struggled to apply the doctrine given the lack of Supreme Court precedent using the doctrine to overturn an arbitration agreement, codifying the doctrine is a strong option that Congress should consider in resolving the issue *Brice* presents.[193]

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187. *See* Petrovich, *supra* note 4, at 329 (noting that "[w]ithout federal regulation addressing this issue, tribal companies can evade laws applicable to other payday lenders while state regulators are powerless to stop them").

188. *See Gingras*, 922 F.3d at 112; *Williams*, 965 F.3d at 229; *Hayes*, 811 F.3d at 673–74; *Dillon*, 856 F.3d at 336; *Brice*, 13 F.4th at 841–42.

189. *See* King, *supra* note 4, at 123 (detailing the general gist of the test used by some federal circuit courts and state supreme courts).

190. *Id.*

191. *See Hayes*, 811 F.3d at 673–74; *Gingras*, 922 F.3d at 112; *Williams*, 965 F.3d at 229; *Dillon*, 856 F.3d at 336; *Brice*, 13 F.4th at 842.

192. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); Stone & Colvin, *supra* note 3, at 25.

193. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985); Brubaker & Daly, *supra* note 72, at 1234 (asserting that the prospective waiver

Congress should not act to eliminate the use of certain arbitration agreements and instead should focus on regulating and ensuring the fairness of those agreements. The Forced Arbitration Injustice Repeal Act, or the FAIR Act, which passed the House of Representatives in 2022, would unilaterally make mandatory arbitration agreements in employment, consumer, antitrust, and civil rights disputes unenforceable.[194] From a practical standpoint, given the vast amount of mandatory arbitration agreements in these types of contracts, the judicial system could not withstand the additional pressure this legislation would cause.[195]

V. CONCLUSION

The Ninth Circuit's interpretation of and failure to enforce the prospective waiver doctrine leaves vulnerable plaintiffs with no recourse, no meaningful avenue for having their claim considered, and no true "right to pursue" the rights owed to them by federal law.[196] Its sister courts recognize that even if an arbitration agreement houses a delegation clause, if the delegation of the question of enforceability to an arbitrator disposes of a plaintiff's opportunity to have a federal right effectively considered, the delegation clause and the broader arbitration agreement are unenforceable.[197]

The FAA was intended to instruct courts to enforce valid agreements, not to allow companies to draft purposefully iniquitous contracts that take away a consumer's rights, "gam[ing] the entire system."[198] Allowing

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doctrine has "resulted in praise, criticism, and confusion over the past twenty-five years").

194. Forced Arbitration Injustice Repeal Act or FAIR Act, H.R. 963, 117th Cong. § 1 (2021); *see also* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, H.R. 4445, 117th Cong. § 1 (2021) (ending forced arbitration in workplace sexual assault and harassment cases and passing through the House and Senate).

195. *See* Szalai, *supra* note 1, at 238; Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS (Jan. 30, 2020) https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/.

196. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013); *Brice*, 13 F.4th at 838.

197. *See* Hayes v. Delbert Services Corp., 811 F.3d 666, 673–74 (2016); Gingras v. Think Finance, Inc., 922 F.3d 112, 112 (2019); Williams v. Medley Opportunity Find II, LP, 965 F.3d 229, 229 (3d Cir. 2020); Dillon v. BMO Harris Bank, N.A., 856 F.3d 330, 336 (4th Cir. 2017).

198. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); *Hayes v. Delbert Services Corp.*, 811 F.3d at 674, 676 (asserting that when Congress passed the FAA, arbitration was intended to be a just and efficient system of arbitration).

companies to draft contracts that cast out a consumer's federal rights jeopardizes the legitimacy of arbitration as a means to fairly resolve disputes.[199] As companies continue to use arbitration in consumer contexts, getting further away from the original parameters of the FAA, the judicial system must pair the expansion of arbitration with consumer protection considerations.[200]

199. *See Hayes*, 811 F.3d at 676.

200. Epic Sys. Corp. v. Lewis, 138 U.S. 1612, 1643 (2018) (Ginsburg, J., dissenting); *see* 65 Cong. Rec. 1931 (1924); *see also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 324 (2013) ("[O]ver the years the Act has been transformed by the Supreme Court through constant expansion into an expression of a 'federal policy' favoring arbitration, whether it involves a bilateral business dispute or not"); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). *See generally* Stone & Colvin, *supra* note 3.