RECORD NOS. 19-1258(L), 19-1267

In The
United States Court of Appeals
For The Fourth Circuit

ROYCE SOLOMON, individually and on behalf of all others similarly situated; JODI BELLECI, individually and on behalf of all others similarly situated; MICHAEL LITTLEJOHN, individually and on behalf of all others similarly situated; GIULIANNA LOMAGLIO,

Plaintiffs – Appellees,

v.

AMERICAN WEB LOAN, INC.; AWL, INC.; MACFARLANE GROUP, INC.; MARK CURRY; SOL PARTNERS,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS

BRIEF *AMICUS CURIAE* OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL, THE CENTER FOR INDIVIDUAL FREEDOM, AND THE AMERICAN CONSUMER INSTITUTE IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1258 and 19-1267 Caption: Solomon et al. v. American Web Loans, Inc. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Legislative Exhange Council, the Center for Individual Freedom, and
(name of party/amicus)

the American Consumer Institute

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Elizabeth C. Burneson Date: 8/27/19

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

****

I certify that on 8/27/19 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Elizabeth C. Burneson (signature) 8/27/19 (date)

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Identity of Party *amicus curiae* and Authority to File

The American Legislative Exchange Council ("ALEC") is a nonprofit, tax-exempt corporation and is the nation's largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States. ALEC works to advance limited government, free markets and federalism at the state level through a nonpartisan public-private partnership of America's state legislators, members of the private sector and the general public.

ALEC has an interest in advancing free markets. Contracts, the right to contract, and the expectation that courts will honor the parties' intentions are essential for the continued vibrancy of the free market. Arbitration is a matter of contract. When a court fails to honor the parties' intent to submit disputes to an arbitrator, the purpose and intent of the Federal Arbitration Act may be frustrated and the free markets may be harmed if the failure to honor the intent is contrary to established precedent.

The Center for Individual Freedom ("CFIF"), with over 300,000 supporters and activists across the United States, is a non-partisan, non-profit 501(c)(4) organization established in 1998 for the advocacy and defense of constitutional rights and the principle of rule of law.

As such, CFIF maintains an interest in the instant matter, which raises important issues of alternative dispute resolution, enforcement of contract terms freely and mutually bargained, federalism, free markets, adherence to United States Supreme Court precedent and vindication of federal arbitration statutes.

The American Consumer Institute ("ACI") is a 501(c)(3) nonprofit educational and research institute with a mission to identify, analyze, and protect the interests of consumers in various matters. Recognizing that consumers' interests can be variously defined and measured, and that numerous parties purport to speak on behalf of consumers, the goal of ACI is to bring to bear the tools of economic and consumer welfare analyses as rigorous as available data will allow, while taking care to assure that the analyses reflect relevant and significant costs and benefits of alternative courses of governmental action. ACI is interested in this matter because arbitration agreements can play an important role in the free market that results in cost-savings to consumers and taxpayers.

Pursuant to Fed. R. App. Pro. 29(a)(2), all parties have consented to the filing of this brief.

Authorship and Financial Disclosures

Counsels for ALEC, CFIF, and ACI authored this brief. They received no money to fund preparing or submitting the brief from any person or party affiliated with this case.

I. Issue Presented

ALEC, CFIF, and ACI as parties amicus curiae focus on the second question raised by the Appellant's Opening Brief, specifically:

- Whether the district court erred in refusing to compel arbitration of plaintiffs' claims.

II. Summary of Argument

The Federal Arbitration Act ("FAA") provides that "[a] written provision in any… contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction… shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (2019) (part of the FAA) (emphasis added).

Arbitration agreements play an important role in the free market system. Not only are arbitration agreements a matter of contract, they also lower costs, create efficiencies, unburden an often-overloaded judiciary, and result in cost savings that are passed down to consumers. Arbitration agreements can save parties, especially individuals, significant time and money. Arbitration moves the adversarial process from a publicly financed courtroom to a private forum, which saves both taxpayer funds and increases efficiency. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 755 (2001). The benefits of arbitration go beyond specific consumer-business relationships. Businesses enjoy cost-savings from the certainty of arbitration provisions and often pass those savings onto consumers. *See* Stephen J. Ware, *Paying the Price of Process: Judicial*

Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 91-93 (hereafter "Ware, *Paying the Price of Process*").

In this case, the defendants offer short-term loans. *See e.g.*, Appellant's Opening Br.15. The loan agreements included arbitration clauses. *Id*. The arbitration clauses submitted the threshold question of arbitrability to the arbitrator, included choice-of-law provisions, allowed borrowers to select either the American Arbitration Association (AAA) or JAMS, the Resolution Experts (JAMS), as the arbitration facilitators. *Id.* at 15-18, 60.

The district court denied the motion to compel arbitration citing several grounds:

1. The arbitration agreement is unconscionable for the same reasons set forth in *Hayes v. Delbert Servs. Corp*, 811 F.3d 666 (4th Cir. 2016) and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017);

2. The defendants are not arms of the Tribe as set forth in the contract document;

3. The contract adopts the federal ESIGN statutes in support of electronic signatures, yet seeks to exclude federal and state law; and

4. There is a clear conflict between the functioning of the arbitration clause and a provision in the promissory note, creating a clear conflict of interest for a tribal arbitration process.

See Op. and Order I 43, 46-48.

In explaining its decision denying the motion to compel arbitration, the district court relied primarily on two cases, *Dillon* and *Hayes*. This Circuit decided both of these cases before the Supreme Court's recent trio of FAA-related opinions. At least two of the Supreme Court's decisions directly impact the reasoning in *Dillon* and *Hayes*, either narrowing or completely overturning the holdings. Digging a bit further, *Dillon* relied on *Hayes*. *Hayes*, in turn, relied heavily on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985).

The district court, in invalidating the arbitration agreements, determined that the agreements required the plaintiffs to waive federal civil or statutory rights. This is the wrong standard. In *Mitsubishi Motors*, the Supreme Court compared *statutes* with an eye toward whether Congress expressed the intent that the statute the plaintiffs cited limits the FAA. If the statute the plaintiffs cite does not express a clear intent to limit the FAA, the court must uphold the arbitration agreement. *Mitsubishi Motors*, 473 U.S. at 627-628.

The Supreme Court's three recent FAA-related decisions are *Lamps Plus, Inc. v. Varela*, *Henry Schein, Inc. v. Archer and White Sales, Inc.*, and

Epic Systems Corporation v. Lewis (citations below). The order in *Solomon* did not incorporate these recent decisions. *Henry Schein* and *Epic Systems* are particularly relevant. In *Henry Schein*, the Supreme Court determined that federal courts could not circumvent arbitration when the agreements in question required the threshold question of arbitrability to be submitted to arbitration. In *Epic Systems*, the Court interpreted the savings clause of the FAA as applying only to those defenses that are available to the contract as a whole, such as unconscionability.

III. Argument

The district court likely erred when it denied American Web Loan's Motion to Compel Arbitration. The FAA, 9 U.S.C. §§ 1-16 (2019), "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). As a matter of contract, courts must "enforce [arbitration agreements] according to their terms." *Id*. Courts have very few grounds upon which to invalidate arbitration agreements. Recent Supreme Court cases have limited those grounds to allegations that would invalidate the entire agreement. *E.g. Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1622 (2018); *see also*, *Concepcion*, 563 U.S. at 339. In addition to being matters of contract, arbitration agreements play important roles in free markets, with increased efficiencies and cost-savings.

Supreme Court cases decided since the precedents on which the district court relied should lead this Court to reverse the district court.

A. The Benefits of Arbitration Agreements.

Litigation can be expensive and time consuming.[1] Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J. L. & Pub. Pol. 549, 580 (2008). Parties, as part of the underlying contract, may agree to forego litigation, submitting disputes instead to a private forum. Private forums can lead to cost-savings and greater time-efficiencies for both businesses and individuals.

First, arbitration agreements move the dispute resolution process from public forums—courtrooms—to private forums. *E.g.* Ware, *Paying the Price*, 2001 J. Disp. Resol. at 89-90. Private forums offer a number of advantages for both the business and the individual. The advantages are both procedural and fiscal. *E.g.* Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. at 708-715; and Rutledge, *Whither Arbitration?*, 6 Geo. J. L. & Pub. Pol. at 580. Parties can select their own arbitrators, rather than being subjected to random assignments prevalent in courts. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. at 708-715. Parties can reduce litigation costs

[1] "For every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims." Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J. L. & Pub. Pol. 549, 580 (2008) (Quoting the Dunlop Commission Report).

through time savings. *Id*. Individuals can achieve resolutions of their claims faster through arbitration rather than litigation. Ware, *Paying the Price of Process*, 2001 J. Disp. Resol. at 90. Individuals and businesses can "resolve disputes 'according to a nationally uniform set of procedures,'" resulting in greater efficiencies and savings. *Id*.

Second, businesses pass the savings they realize to consumers. According to Stephen Ware, the savings flow from "a basic principle of economics, the *rate-of-return equalization principle*." *Id*. at 91 (emphasis original). The rate-of-return equalization principle works because:

> [i]n a market economy, characterized by freedom of entry and exit there will be a tendency for the after-tax rate of return on investment to move toward a uniform rate, the competitive or normal-profit return. Neither abnormally high nor abnormally low after-tax returns will persist for long periods of time… [This] principle implies that whatever increases an industry's profits ultimately attracts additional capital to that industry, causing an increase in that industry's output and therefore a reduction in its price."

Id. at 91-92. Thus, the certainty that industries recognize, and the cost-savings they realize, are likely passed on to consumers as a whole.

Third, arbitration agreements play an important role in the free market. And the free market plays an important role in constraining arbitration agreements. As noted by Professor Drahozal, "[a]rbitration clauses are most problematic when market constraints on opportunistic behavior are least

effective. The interest of businesses in protecting their reputations reduces the likelihood of corporate opportunism, and arbitration institutions have strong incentive to promote the fairness of the arbitral process." Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. at 771-772.

B. The District Court Failed to Consider the Supreme Court's Recent Trio of Cases Requiring Strict Application of Arbitration Agreements.

Over the past couple of terms, the Supreme Court has decided cases requiring federal courts strictly to adhere to the terms of arbitration agreements. Each decision has overturned circuit court precedents or other efforts to broaden judge-created exceptions to the FAA. In 2019, the Court decided *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 and *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, and in 2018 it decided *Epic Systems Corporation v. Lewis*, 138 S.Ct. 1612.

These three cases form much of the basis for the arguments in this brief. As such, it is worthwhile to summarize them and briefly address how each impacts this case. Notably, the district court did not address these decisions and did not discuss how they impact *Dillon* and *Hayes*.

1. Henry Schein, Inc. v. Archer.

In *Henry Schein*, the Supreme Court answered the question of whether a trial court could hear the merits of a case when an arbitration agreement required the threshold question of arbitrability to be submitted to the

arbitrator. 139 S.Ct. 524, 527-28. Before reaching its conclusion, the Supreme Court noted that some Circuits tried to circumvent arbitration agreements by determining that the "argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.'" *Id.* at 528.

While the "wholly groundless" argument for avoiding arbitration agreements is different than in this case, the principle issues—the interpretation of arbitration agreements and whether judicially created exceptions to the FAA exist—are the same as this case. Quoting *Rent-A-Center*, the Supreme Court noted that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Id*. at 529 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010)). The Supreme Court stated that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id*. That is to say, under *Henry Schein*, where an arbitration agreement submits the threshold question of arbitration to the arbitrator, the trial court has no option but to strictly interpret the contract's provisions. "We have held that a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator, 'even if it appears to the court to be frivolous.'" *Id*. at 529 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986)).

When looking at the arbitration agreement in this case, it provides that "*any* dispute related to this agreement will be resolved by binding arbitration." Opening Br. for Appellants 60 (emphasis original). The trial court denied the motion to compel arbitration, determining the threshold question of arbitrability, instead of enforcing the terms of the agreement.

Not only did the district court not enforce the terms of the agreement, its Opinion and Order does not address *Henry Schein*.

2. *Epic Systems, Corp. v. Lewis.*

The Supreme Court in *Epic Systems* held that:

> [T]he savings clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. The clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

138 S.Ct. at 1622 (internal citations omitted).

The only defenses available to one challenging an arbitration agreement are those defenses that would invalidate the entire contract. Justice Thomas, concurring, stated that as he had "previously explained, grounds for revocation of a contract are those that concern 'the formation of the arbitration agreement.'" *Id.* at 1632 (Thomas, J., concurring) (internal

citations omitted).[2] Those defenses include unconscionability, duress, or fraud. *See id*. at 1622.

Despite the holding in *Epic Systems*, the district court denied the Motion to Compel Arbitration citing several grounds. When it denied the Motion to Compel Arbitration, the district court determined the threshold question of arbitrability and applied a defense that "appl[ies] only to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.*

If an arbitration agreement delegates the threshold question of arbitrability to the arbitrator, a court can only determine whether the overall contract should be set aside because of a contractual formation defense alleged by the plaintiff. When a court sets aside an arbitration agreement for any reason other than contractual formation defenses, it has engaged in a public policy determination. Public policy arguments do "not concern whether the contract was properly made." *Id*. at 1633 (Thomas, J., concurring). Because public policy arguments do not involve contractual formation defenses, the savings clause does not apply.

[2] Justice Thomas has written extensively on the savings clause of the FAA. He has authored numerous concurring opinions, but his most extensive concurrence is in *Concepcion*. 563 U.S. at 352-357 (Thomas, J., concurring).

In this case, the district court did not incorporate *Epic Systems* into its decision or follow the case's precedent. Instead, it invalidated the arbitration agreement on grounds other than a defense to the formation of a contract – *to wit*, (i) that the arbitration agreement fails for the same reasons as those in *Hayes* and *Dillon*, (ii) the defendants are not arms of the Tribe, (iii) the contract was internally inconsistent, and (iv) there was a conflict between the arbitration clause and promissory note. Op. and Order I 47-48. Since none of these factors go to the formation of the contract and because the agreement requires "any" dispute arising from it to be submitted to arbitration, the district court should have respected the agreement of the parties and compelled arbitration.

3. *Lamps Plus, Inc. v. Varela.*

The final case, although not as relevant to the dispute as *Henry Schein* or *Epic Systems*, does discuss important principles applicable to this case. In *Lamps Plus*, the Supreme Court decided whether class arbitration is available as a remedy where an arbitration agreement is silent on the matter. *Lamps Plus*, 139 S.Ct. at 1412. The Ninth Circuit applied California contract law to the arbitration agreement, construed the ambiguity resulting from silence against the drafter (the defendant), and allowed the plaintiffs to arbitrate their claims as a class. *Id.* at 1413.

The Supreme Court reversed, ruling that silence is not evidence of consent, as required by contract law, noting that "[n]either silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." *Id.* at 1417.

Of particular relevance to this case is the Court's discussion regarding consent:

> Consent is essential under the FAA because arbitrators wield only the authority they are given. That is, they derive their "powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: "to give effect to the intent of the parties."

Id. at 1416 (internal citations omitted).

The parties in this case agreed to arbitrate their claims, including the threshold question of arbitrability. That is, the parties consented to arbitration, not judicial review. The arbitrators—specifically those affiliated with either AAA or JAMS—are fully empowered to review and decide the issues according to "Tribal Law and such federal law as is applicable under the Indian Commerce Clause." Opening Br. of Appellants 16.

Because the district court evaluated the policy of submitting to Tribal law and federal laws applicable under the ICC, it failed to "give effect to the intent of the parties." The district court also failed to analyze the case pursuant to the Supreme Court's precedent in *Lamps Plus*.

C. Epic Systems and Henry Schein Likely Overruled the Dicta the District Court Relied on from Hayes and Dillon, and the District Court Did Not Conduct the Two-Step Analysis Required by Mitsubishi Motors.

In *Mitsubishi Motors*, the Supreme Court endorsed a two-step inquiry when analyzing statutory questions at issue in arbitration clauses. The two-step analysis may be appropriate when the plaintiff asks the court to set aside an arbitration agreement as conflicting with specific federal statutory rights. The inquiry requires the trial court first to determine "whether the parties' agreement to arbitrate reached the statutory issues" and then, second, to consider "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors*, 473 U.S. at 628.

In this case, the plaintiffs brought claims under various federal statutes, including Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Truth in Lending Act, and the Electronic Funds Transfer Act. *See* Appellants' Opening Br. 18. Though the complaint implicated federal statutes, the district court summarily concluded that the agreement unambiguously "attempt[ed] to

apply tribal law to the exclusion of federal and state law." Op. and Order I 43 (quoting *Dillon*, 856 F.3d at 336). The Court did not ask whether the arbitration agreement, which provided that it was "governed only by Tribal Law and such federal law as is applicable under the Indian Commerce Clause," reached the statutory issues. Appellant's Opening Br. 16.

Only after answering the question in the affirmative may the court proceed to the next inquiry: whether legal constraints external to the parties' agreement foreclose the arbitration of those claims. After reminding parties that "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," the Court placed a small limitation on the application of the FAA:

> That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act, *it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be unenforceable*.

Mitsubishi Motors, 473 U.S. at 627 (emphasis added).

Once a court determines that the arbitration agreement implicates statutory issues, it must analyze the federal statutes cited. Only in instances of congressional intent to exclude the statutory provisions from arbitration can a

court refuse to enforce the arbitration agreement. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id*. at 628.

The Court in *Dillon* may have misapplied Supreme Court precedent from *Mitsubishi Motors*. The specific provision cited by the district court states, "the Supreme Court has recognized that arbitration agreements that operate 'as a prospective waiver of a party's right to pursue statutory remedies' are not enforceable because they are in violation of public policy." *Dillon*, 856 F.3d at 334. The Dillon Court then cited a string of cases including *Mitsubishi Motors*, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). *Id.* at 333.

First, the pinpoint cite for *Mitsubishi Motors* is 473 U.S. at 637, n.19. The text of the opinion before footnote 19 discusses the application of U.S. antitrust law in a foreign arbitral forum. 473 U.S. at 637. The parties in the case agreed to arbitrate "a defined set of claims [including] those arising from the application of American antitrust law." *Id.* The footnote discusses clauses of the arbitration agreement the Court ultimately upheld, claims by parties

amicus, and admissions by party counsels. *Id.* at 637, n. 19. Then the Court stated,

> [N]or need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. *We merely note that 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 for antitrust violations, we would have little hesitation in condemning the agreement as against public policy*.

Id. (Emphasis added).

The key in *Mitsubishi Motors* is that the Court determined the parties' arbitration agreement encompassed the antitrust claims. The Court was convinced that the arbitral forum would adequately protect the parties and it was part of their bargained for exchange.

Similarly, the pinpoint cite for *American Express* in *Dillon* is 133 S.Ct. at 2310.[3] *Dillon*, 856 F.3d at 333. On page 2310, the American Express Court noted that "[r]espondents invoke a judge-made exception to the FAA which, they say… [allows] courts to invalidate agreements that prevent 'effective vindication' of a federal statutory right." 133 S.Ct. at 2310. Continuing, the Court stated that "[t]he 'effective vindication' exception to which respondents allude originated *as dictum* in *Mitsubishi Motors*… Subsequent cases have

[3] Since *Dillon* was released the official U.S. Reporter released its version. The cross-reference would be 570 U.S. at 236.

similarly asserted the existence of an 'effective vindication' exception, but we have similarly declined to apply it to invalidate the arbitration agreement at issue. And we do so again here." *Id.* (Emphasis added.)

What *Dillon* claims as Supreme Court precedent is merely dicta. The Supreme Court has never concluded that a "prospective waiver of a party's right to pursue statutory remedies" renders an arbitration agreement unenforceable.

The question also remains whether the Supreme Court's recent decision in *Epic Systems* effectively overruled the dicta in *Mitsubishi Motors*. In part, the answer would appear to be "yes." In part, *Epic Systems* would appear to be wholly consistent with the prior decision. *Epic Systems* appears to endorse the two-step inquiry announced in *Mitsubishi Motors*.

In *Epic Systems*, the Court answered the question of whether the National Labor Relations Act conflicted with the FAA. 138 S. Ct. at 1619. According to the Court, the answer is, "no." *Id.* The court acknowledged the plaintiffs' challenge to the FAA involved another federal statute but stated that the "argument faces a stout uphill climb." *Id.* at 1624. The standard the plaintiffs must establish and the analysis the district court must conduct, when alleging a "legal constraint external" to the arbitration agreement is significant:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not "at liberty to pick and choose among congressional enactments" and must instead "strive to give effect to both." A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. The intention must be "clear and manifest."

Id. (internal citations omitted). *Accord*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("'When two statutes are capable of co-existence,' however, 'it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' There is no conflict unless [the statute] by its own terms nullifies a foreign arbitration clause.") (internal citations omitted).

To the extent *Epic Systems* endorses the two-step analysis, it also seems to overrule the *dicta* in *Mitsubishi Motors* by requiring courts, upon a specific challenge by the plaintiffs, to analyze the text of the federal statutes allegedly conflicting with the FAA. If Congress, through the text of the statutes nullifies the FAA, courts must honor that intent. If, though, the text of the statute does not clearly displace the FAA, both are effective. Essentially, if the statutes can co-exist, the court must presume that the parties, through the arbitration agreement, intended on submitting those claims to the arbitrator.

Moving to *Hayes*, given recent Supreme Court cases, the decision is no longer good precedent. This case is also qualitatively different. *Hayes* is no

longer good precedent in that it provided that for an arbitrator to determine the threshold question of arbitrability, stating that "any agreement purporting to give a dispute over arbitration agreement is a 'question of arbitrability' and, in the normal course, it 'is undeniably an issue for judicial determination." 811 F.3d at 671 (internal citations omitted).

Henry Schein, as discussed above, strictly limits the authority of a court to determine the threshold question of arbitrability. First, the Supreme Court in *Henry Schein* recognized that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also the 'gateway questions of arbitrability…'" 139 S.Ct. at 529. Second, when the agreement assigns the threshold question to the arbitrator, a court "may not 'rule on the potential merits of the underlying' claim… 'even if it appears to the court to be frivolous.'" *Id*. (quoting *AT&T Technologies*, 475 U.S. at 649-650).

Second, in this case, the arbitration agreement provides that "'any dispute related to the agreement will be resolved by binding arbitration.' And 'dispute' encompasses 'any issue concerning the validity, enforceability, or scope of this Agreement to Arbitrate.'" Appellant's Opening Br. 15, 60-61 (internal ellipses omitted). In so doing, the agreement clearly delegates the threshold question to the arbitrator, depriving the district court of the

authority to determine the agreement's arbitrability under *Henry Schein* and *AT&T Technologies*.

Third, *Hayes* cites substantially the same standard as *Dillon* for permitting a court to set aside an arbitration agreement where it results in "a 'substantive waiver of federally protected civil rights." *Hayes*, 811 F.3d at 674. *Hayes*, though, does cite a slightly different case, which *Dillon* referenced: *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). As with the arguments asserting *Dillon* misapplied precedent, the *Hayes* court's reliance on *14 Penn Plaza* is also misplaced. Specifically, the page cited in *Hayes* provides that "although a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the [Collective Bargaining Agreement] allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" 556 U.S. at 273. Once again, the Hayes court referenced footnote 19 in *Mitsubishi Motors*, which for the reasons put forth above is likely no longer good law.

An important factual difference between this case and *Hayes* exists, too. The agreement in *Hayes* provided, among other things, that it was "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe" and the arbitration clauses provided that it was made "pursuant

to a transaction involving the Indian Commerce Clause of the Constitution… and shall be governed by the law of the Cheyenne River Sioux Tribe. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the Terms of this Agreement." *Hayes*, 811 F.3d at 669-670.

The agreement in this case requires the arbitrator to "apply Otoe-Missouri Law and the terms of this loan agreement" which include a provision limiting the applicable law to "Tribal Law and such federal law as is applicable under the Indian Commerce Clause." Appellant's Opening Br. 16. The agreement also provides for the "judicial review or confirmation of arbitral awards… 'in a Tribal court' with one basis for reversal being an error 'under Tribal Law.'" *Id*. The district court misconstrued the arbitration agreement stating, "Tribal law applies universally to the exclusion of Federal (and State) law…" Op. and Order I 47.

The factual difference between the two agreements allows the application of "federal law [that] is applicable under the Indian Commerce Clause." The district court never asked, "what federal laws may be applicable under the ICC." This, of course, would have required a rigorous analysis of the plaintiffs' claims, as "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

Returning to the *Mitsubishi Motors* two-step analysis, if the district court, *arguendo* had authority to determine the threshold question of arbitrability, it would need to examine RICO, the Truth in Lending Act, and the Electronic Funds Transfer Act[4] to see if they are "general Acts of Congress" or whether Congress intended to exempt Indians. The district court did not do so.

IV. Conclusion

Arbitration agreements play an important role in the free market. They provide cost and time savings for individuals and businesses. Individuals can spend less time arbitrating a claim compared to litigation. Businesses achieve a degree of certainty and cost-savings that accompany the certainty. Those cost-savings are often passed onto consumers. Likewise, the free market plays an important role promoting fairness within the arbitral system. Arbitration agreements and the free market work together to ensure consumers are protected, efficiencies and cost savings realized, and the judicial system—both federal and state—are less burdened.

[4] The district court may have implicitly acknowledged that the Electronic Funds Transfer Act is a law of general applicability when it noted that the agreements "adopt[ed] the Federal ESIGN statutes in support of electronic signatures' role in the enforcement of the loans." Op. and Order I 47.

A textualist reading of the FAA, *Henry Schein* and *Epic Systems* likely overrule footnote 19 in *Mitsubishi Motors*. Further, *Henry Schein* likely overrules *Hayes* to the extent that *Hayes* allows the district court to determine the threshold question of arbitrability. Ultimately, *Henry Schein* and *Epic Systems* likely overrule both *Hayes* and *Dillon* to the extent that they allow district courts to make policy judgments.

Footnote 19 in *Mitsubishi Motors* was dicta. The Supreme Court did not opine on the merits of whether the arbitration agreement effectively waived federal statutory rights. The opinion did, though, establish a two-step analysis that courts should conduct when plaintiffs allege that the arbitration agreement might waive the federal statutory rights. The district court did not conduct such an analysis, though such an analysis, by the terms of the arbitration agreement should have been reserved for the arbitrator.

Because the cases on which the district court relied are likely no longer good law, this Honorable Court should reverse the underlying opinion and compel the parties to arbitrate their claims.

Respectfully submitted, this 27th day of August, 2019.

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Pursuant to Rule 32(g)(1), the length of this brief was computed using a word limit. The rules limit parties *amicus curiae* to one-half the word length of a principle brief. Principle briefs are limited to 13,000 words. The word limit, therefore, for this brief is 6,500 words. Allowing for the excludable sections under Rule 32(f), this brief is 5,501 words.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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