No. 21-16209

IN THE

# United States Court of Appeals for the Ninth Circuit

CAREMARK LLC, ET AL.,

*Petitioners-Appellees*,

v.

CHICKASAW NATION, ET AL.,

*Respondents-Appellants*.

On appeal from the United States District Court for the District of Arizona, No. 2:21-cv-00574-PHX-SPL, Hon. Steven P. Logan

**BRIEF OF *AMICUS CURIAE***
**THE CHAMBER OF COMMERCE**
**OF THE UNITED STATES OF AMERICA**
**IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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October 8, 2021

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* the Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held corporation owns ten percent or greater ownership in the Chamber.

Date: October 8, 2021

*/s/ Mark Emery*
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## INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA") and the Supreme Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements, including agreements

[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

containing so-called "delegation" provisions, which compound the benefits of arbitration by assigning to arbitrators gatekeeping disputes such as those regarding the validity, enforceability, or applicability of an arbitration agreement. In the Chamber's experience, the business community has a broad and overarching interest in ensuring that the FAA is appropriately applied and that businesses and those with whom they deal can rely upon stable arbitration precedent.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Although appellants have raised a number of important issues, this appeal can be resolved narrowly under existing precedent. Delegation clauses—even those that refer disputes about arbitrability to arbitrators—are indisputably valid under the FAA. When parties agree to arbitrate whether their claims are arbitrable, "a court may not override the[ir] contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *cf. Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010). Nothing in the Recovery Act displaces that fundamental rule. *See, e.g.*, *Brice v. Haynes Investments, LLC*, --- F.4th ---, 2021 WL 4203337, at *2 (9th Cir. Sept. 16, 2021) ("*Brice I*") (statutory right to relief does not automatically override delegation clause); *Brice v. Sequoia Capital Ops., LLC*, 2021 WL 4220122, at *1 (9th Cir. Sept. 16, 2021) (memorandum) ("*Brice II*") (same). Accordingly, a straightforward application of precedent yields the conclusion that

because the parties here have agreed to a delegation clause, appellants' efforts to challenge the arbitration agreement must be resolved by an arbitrator, not a court.

*First*, the district court correctly concluded that, although cast as a contract-formation argument, appellants' challenge to the Provider Manual is an "enforceability" challenge addressed to whether "the agreement as a whole" is binding. 1-SER-4-5 (quotation omitted). The facts relevant to contract *formation* are all undisputed, and the district court appropriately addressed them, ultimately concluding that "the parties clearly … agreed" in their delegation clause that "an arbitrator must decide the threshold issue of arbitrability." 1-SER-3-4 (citing 1-ER-8). Thus, the issue the court allowed the arbitrator to decide is not a contract-formation issue; instead, it is whether the agreement reflected in the Provider Manual to arbitrate the claims they are pressing is sufficiently "clear" or "unequivocal" to be *binding*. 1-SER-4 (arbitrator will decide "whether the Nation [*i*]*s bound* by the arbitration agreement") (emphasis added); *see also* Appellants' Br. 29-36 (arguing that appellants are "not bound to arbitrate"). That is a challenge to the enforceability of the agreement to arbitrate, not a challenge to the agreement's existence. It is therefore the precise type of question the delegation clause commits to the arbitrator. For a court to resolve it instead would "render the delegation provision" the parties agreed to "a nullity." *Brice I*, 2021 WL 4203337, at *4.

*Second*, should the Court feel the need to address the issue at all, it should reject appellants' invitation to hold that no agreement to arbitrate Recovery Act claims—no matter how clear, fair, and bargained-for the agreement is—can ever be enforced. To begin with, as this Court recently reaffirmed, whether a statute forecloses arbitration is a prototypical example of an issue that a delegation clause like the one here commits to an arbitrator. *Id.* at *5-6. And even if the Court were to address appellants' contention, both this Court and the Supreme Court have repeatedly held that in the absence of "a clearly expressed congressional intention," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018), which is not present here, a statute's mere authorization of federal-court suits and discussion of federal-court procedures does not override the FAA. Nothing appellants say controverts that black-letter principle.

This case can therefore be resolved without addressing tribal sovereignty issues. The Chamber supports tribal sovereignty[2] and need not take any position

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[2] *See, e.g.*, U.S. Chamber Ltr. on FY22 Labor and HHS Appropriations, July 14, 2021, *available at* https://www.uschamber.com/letters-congress/us-chamber-letter-fy22-labor-and-hhs-appropriations ("The Chamber *supports* ... [a]dding a provision that respects tribal sovereignty by prohibiting funding for the enforcement of the National Labor Relations Act against any Indian tribe."); U.S. Chamber Ltr. on H.R. 4054, "Tribal Tax and Investment Reform Act," June 30, 2021, *available at* https://www.uschamber.com/letters-congress/us-chamber-letter-hr-4054-tribal-tax-and-investment-reform-act (supporting bipartisan legislation that "would put tribal sovereigns on an equal footing with how states currently operate for certain tax purposes pertaining to charities, child support enforcement, and adoptions, which would further promote economic development within Indian

on the question of how tribal sovereignty affects the arbitration clause at issue here. The delegation clause to which the parties agreed provides that an arbitrator, not a court, should determine whether the arbitration agreement is enforceable. Arbitrators are capable of resolving even important federal issues and routinely do so. Indeed, the entire purpose of a delegation clause is to ensure that such arguments will go to an arbitrator, and that the parties will not have to litigate them in court. The district court's judgment should be affirmed.

## ARGUMENT

### I. IT IS UNDISPUTED THAT THE PARTIES' AGREEMENT INCORPORATES A DELEGATION CLAUSE, AND THE DISTRICT COURT CORRECTLY ENFORCED THAT CLAUSE.

Appellants do not dispute that they signed a contract that incorporates a Provider Manual with an amendment process. Nor do they dispute that one amendment completed pursuant to that process was an arbitration clause, while another was a delegation clause committing to the arbitrator all questions regarding the arbitration agreement's validity, enforceability, and applicability. *See* 1-ER-8 (finding "clear and unmistakable" contractual agreement that "the arbitrator(s), not

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Country"); U.S. Chamber Ltr. Supporting H.R. 779, "Tribal Labor Sovereignty Act," May 17, 2019, *available at* https://www.uschamber.com/letters-congress/us-chamber-letter-supporting-hr-779-tribal-labor-sovereignty-act (urging representatives to support legislation that "would respect and promote tribal sovereignty by affirming the rights of tribal governmental employers to determine labor practices on their own lands").

the court, would decide the threshold issue of arbitrability"). Based on those undisputed facts, the court "deferred … to the arbitrator" the question whether the arbitration agreement to which appellants undisputedly agreed is sufficiently clear to be enforceable against them. 1-SER-4. Contrary to appellants' suggestion, the court did not "fail[] to address" the "threshold issue" whether the parties agreed to arbitrate that issue. *Cf.* Appellants' Br. 23. Instead, the court correctly found that the parties "clearly" agreed to the delegation clause, 1-ER-8, that appellants' enforceability challenges are directed to the broader agreement and do not impugn the delegation clause specifically, and that, pursuant to the delegation clause, those challenges to the broader agreement are for the arbitrator to resolve. 1-SER-4.

That analysis reflected a straightforward application of the FAA and relevant precedent. *See*, *e.g.*, *LeBoeuf v. NVIDIA Corp.*, 833 F. App'x 465, 466 (9th Cir. 2021) (where "the undisputed facts" demonstrate existence of "arbitration agreement," party's argument that it "did not enter into a valid arbitration agreement with respect to their claims" is for arbitrator). "The FAA … places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." *Rent-A-Center,* 561 U.S. at 67 (citing, *inter alia*, 9 U.S.C. § 2). As both the Supreme Court and this Court have repeatedly recognized, that "equal footing" guarantee encompasses agreements "to arbitrate gateway questions of arbitrability, such as whether the parties have agreed

to arbitrate and whether their agreement covers a particular controversy." *Id.* at 68-69 (citations and quotation marks omitted); *see also*, *e.g.*, *Brice I*, 2021 WL 4203337, at *4. "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70-71; *Brice I*, 2021 WL 4203337, at *4.

To the extent appellants contend that sending validity and enforceability questions to an arbitrator is "circular" (presumably because it involves enforcing a delegation clause before determining that the arbitration agreement that contains it is enforceable), courts—including this one—have unanimously rejected such arguments. As other courts of appeals have explained, what would be "circular" would be for *the court* to determine the enforceability of the broader agreement when the entire purpose of a delegation clause is to assign that precise question to the arbitrator. *See*, *e.g.*, *Commc'ns Workers of Am. v. AT&T Inc.*, 6 F.4th 1344, 1347-49 (D.C. Cir. 2021) ("[O]nce the parties subject some set of issues to an arbitrator for resolution, and once the parties clearly and unmistakably assign to an arbitrator the authority to decide whether disputes fit within that set of issues, the question whether a particular dispute is arbitrable is strictly for the arbitrator, not a court."); *Bossé v. N.Y. Life Ins. Co.*, 992 F.3d 20, 30 (1st Cir. 2021) (court may not

"consider for itself" the validity "of the arbitration agreement and delegation clause in order to determine whether the dispute should be submitted to the arbitrator"). This Court has made the same point in different words, squarely holding that the approach appellants propose is impermissible because it "would render the delegation provision a nullity." *Brice I*, 2021 WL 4203337, at *4. *Accord Commc'ns Workers*, 6 F.4th at 1348-49; *Bossé*, 992 F.3d at 30 (approach would render delegation clauses "meaningless"). In short, where "the parties' agreement provides for the arbitrator to decide" enforceability issues, "the court 'possesses no power' to address" those issues itself. *Commc'ns Workers*, 6 F.4th at 1348-49 (quoting *Rent-A-Center*, 561 U.S. at 70); *see also Brice I*, 2021 WL 4203337, at *4.

As this Court has further recognized, the sole exception to that well-established rule is one that does not apply here. That exception provides that where a party resisting arbitration lodges a challenge directed *specifically to the delegation clause*, the Court must resolve it before enforcing that clause. *See Rent-A-Center*, 561 U.S. at 71-76; *Brice I*, 2021 WL 4203337, at *4. But appellants have not offered—and have therefore forfeited—any argument directed specifically to the delegation clause. *See Rent-A-Center*, 561 U.S. at 75-76 n.5 (analogous argument forfeited). The grounds on which they resist the delegation clause all relate to the validity of the amendment process, which is an attribute of

the broader agreement, not of the delegation clause itself. *See*, *e.g.*, *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) (where party "challenges the contract on 'a ground that directly affects the entire agreement,'" issue is for the arbitrator, not the court) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). Indeed, if appellants' arguments are correct, they would invalidate the arbitration agreement "as a whole," rather than the delegation clause "specifically." *Rent-A-Center*, 561 U.S. at 71, 73; *see also*, *e.g.*, *Solymar Inv., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 998 (11th Cir. 2012) (arguments are "not specific to" challenged provision where, if successful, they would render broader agreement unenforceable). *Accord Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). The arguments therefore do not displace the delegation provision, and, accordingly, are for the arbitrator to resolve.

## II. APPELLANTS' RECOVERY ACT ARGUMENTS ARE NOT FOR THE COURT TO RESOLVE AND ARE MERITLESS IN ANY EVENT.

If this Court feels the need to address appellants' contention that the Recovery Act displaces all agreements to arbitrate, that contention should likewise be rejected. In addition to being wrong on the merits, appellants' argument raises the precise sort of question the delegation clause commits to the arbitrator.

### A. The Arbitrator, Not The Court, Must Determine Whether The Parties' Agreement To Arbitrate Recovery Act Claims Is Enforceable.

As the district court observed, the parties agreed that "[t]he arbitrator(s) shall have exclusive authority to resolve any dispute relating to … any claim that all or part of the agreement to arbitrate is void or voidable for any reason." 1-ER-8. Appellants' contention that the Recovery Act "void[s]" the agreement to arbitrate, Appellants' Br. 43-58, plainly falls within that delegation. The contention must therefore be addressed to the arbitrator, not this Court.

Resisting that conclusion, appellants attempt to establish that the Recovery Act renders unenforceable not only the agreement to arbitrate, but also the delegation clause itself. Appellants' Br. 52-58. But this Court's recent decision in *Brice I* forecloses their efforts. There, plaintiffs alleged that defendants (a group of Indian Tribes) conspired to charge interest rates of over 400% on internet "payday" loans. 2021 WL 4203337, at *2; *id.* at *12 (Fletcher, J., dissenting). The loan documents included agreements to arbitrate disputes, delegation clauses, and choice-of-law provisions providing for the primacy of tribal law. *Id.* at *2 (majority op.); *see also id.* at *12 (Fletcher, J., dissenting). Like appellants here, the plaintiffs argued that the delegation clause and arbitration agreement were invalid or unenforceable. *See id.* at *2 (majority op.). In particular, the plaintiffs invoked the "prospective-waiver doctrine," which provides that "an arbitration

agreement that waives a party's right to pursue federal statutory remedies is unenforceable." *Id.* at *4 (quotation omitted).

The Court upheld the delegation clause. As the Court explained, the question "whether the *delegation provision* is unenforceable" depends not on the issue of whether *the arbitration agreement* undermines statutory rights, but instead on whether the delegation provision "precludes" the arbitrator from considering that issue. *Brice I*, 2021 WL 4203337, at *5. Putting it differently, the Court asked whether, if the delegation provision were enforced, the arbitrator would be permitted to "consider[] disputes concerning the enforceability of the arbitration agreement[.]" *Id.* Concluding that the arbitrator would remain free to resolve such issues, the Court "conclude[d] that the delegation provision is enforceable because it does not eliminate [plaintiffs'] right *to pursue* in arbitration their . . . challenge to the arbitration agreement as a whole." *Id.*

The exact same analysis yields the exact same conclusion in this case. The dispositive question is whether enforcing the delegation provision would eliminate appellants' "right to pursue in arbitration," *Brice I*, 2021 WL 4203337, at *5, their argument that their Recovery Act claims are non-arbitrable. Appellants concede that the answer to that question is no; indeed, they assert that if the delegation provision is valid, they will be "force[d]" to do just that. Appellants' Br. 56 (expressing concern about the need to "raise . . . statutory construction arguments

in arbitration"). And because the delegation clause "does not foreclose" appellants from arguing to the arbitrator that the Recovery Act precludes arbitration of their claims, there is no basis on which to invalidate it. *Brice I*, 2021 WL 4203337, at *5.

No authority appellants invoke countermands *Brice I*. In appellants' lead case, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101-02 (2012), the Supreme Court did not so much as mention a delegation clause, no party argued at either the petition or the merits stage that any delegation clause was relevant,[3] and the Court ultimately held that the dispute at issue was arbitrable. The same is true of *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 282 n.1, 289 (2002), where the delegation clause (buried in a block-quote footnote in the Court's opinion) was irrelevant both to the parties' arguments and to the case's disposition. Appellants also place undue weight on *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537-38 (2019), and *In re Van Dusen*, 654 F.3d 838, 843-44 (9th Cir. 2011), but those cases hold only that a court cannot enforce the FAA without first determining that *the FAA's own* terms apply to the agreement at issue. As *Brice I* conclusively

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[3] *See*, *e.g.*, Petition for Certiorari at i, *CompuCredit Corp. v. Greenwood*, No. 10-948 (U.S. Jan. 24, 2011) ("Question Presented[:] Whether claims arising under the Credit Repair Organizations Act are subject to arbitration pursuant to a valid arbitration agreement.") (internal citation omitted). *See generally United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1621 n.2 (2021) (Supreme Court "declines to address" arguments not "fairly encompassed by the question presented to" it).

demonstrates, *New Prime* and *Van Dusen* are irrelevant when a party seeks to avoid the FAA's protections by arguing that *some other statute* overrides the FAA.

*Brice I* also forecloses appellants' invocation of the Indian canon in these circumstances. Appellants' Br. 44, 57-58. In that case, the entities seeking to *enforce* the delegation clause were "tribal lending entities" owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation in Montana and the Otoe-Missouria Tribe. 2021 WL 4203337, at *2. Indeed, there is nothing unusual about a Tribe seeking to enforce an arbitration agreement or delegation clause. *Id.* at *8-11 (discussing similar cases); *see also*, *e.g.*, *Swiger v. Rosette*, 989 F.3d 501, 503 (6th Cir. 2021) (Chippewa Cree). There is therefore no basis for concluding that interpreting the Recovery Act to override the FAA's protections for arbitration agreements and delegation clauses is "to the[] benefit" of Tribes more broadly. *Cf.* Appellants' Br. 57-58; *see also infra* at 16-18 (discussing societal benefits associated with arbitration and delegation).

**B. It Is Not Illegal To Arbitrate Recovery Act Claims.**

Even if the Court were to address appellants' contention that the Recovery Act forecloses arbitration, the contention would fail. The FAA's "liberal federal policy favoring arbitration agreements . . . requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit*, 565 U.S. at 98. That remains "the case even when the claims at issue are federal statutory claims, unless the

FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* (quoting *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). "Congress has … shown that" when it desires to issue such commands, "it knows how to" do so. *Epic*, 138 S. Ct. at 1626. Thus, in one statute, it has explained that "'notwithstanding any other provision of law, arbitration may be used only if' certain conditions are met." *Id.* (quoting 15 U.S.C. § 1226(a)(2)) (alterations omitted). In others, it has provided that "no predispute arbitration agreement shall be valid or enforceable." *Id.* (quoting 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5567(d)(2)) (alterations omitted). And in another, it has made clear that requiring a party to arbitrate is "unlawful." *Id.* (quoting 10 U.S.C. § 987(e)(3)). Yet there is "nothing like that here." *Id.*; *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233-34 (2013); *CompuCredit*, 565 U.S. at 100-01.

Moreover, appellants' contention that the Recovery Act entitles them to a non-waivable "right of recovery" in federal court, Appellants' Br. 43-44, 56-57, is squarely foreclosed by Supreme Court precedent. That Court has repeatedly rejected the argument that a statute's use of terms that might "call to mind a judicial proceeding" establishes a non-waivable "'right' to bring an action in court." *CompuCredit*, 565 U.S. at 100-01; *see also*, *e.g.*, *Epic*, 138 S. Ct. at 1627 (citing cases). Thus, the mere fact that the Recovery Act "*authorizes* a federal claim in federal court," Appellants' Br. 56 (emphasis added), "does not necessarily

mean that it precludes individual attempts at conciliation through arbitration," *Epic*, 138 S. Ct. at 1627 (quotation omitted). Appellants' extensive argument to the contrary fails to address that binding precedent.

Appellants' contention that arbitration would "hinder" any substantive right to recovery they may have, Appellants' Br. 46-52, also fails. The Supreme Court "ha[s] repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 565 U.S. at 101 (compiling sources). Thus, in *CompuCredit*, the Court held that agreed-to arbitration did not undermine any "right of the consumer" under the Credit Repair Organizations Act. *Id.* (citing 15 U.S.C. § 1679f(a)). In numerous other contexts, the Court has rejected assertions that there is an "inherent conflict" between arbitration and the "effective vindicat[ion]" of rights. *See*, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (age-discrimination claims may be arbitrated); *Shearson/Am. Exp.*, 482 U.S. at 242 (RICO claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("There is no reason to assume at the outset of the dispute that . . . arbitration will not provide an adequate mechanism."). Those holdings govern here. Appellants retain whatever "right of recovery" the Recovery Act provides them; they simply must pursue that right in arbitration, if the arbitrator determines that the parties' arbitration agreement is enforceable.

## III. ENFORCING ARBITRATION AGREEMENTS IS SOCIETALLY BENEFICIAL.

The decision below should be affirmed for an additional reason: reversal would have significant and deleterious practical consequences, effectively rewriting scores of contracts and severely undermining the interests that arbitration and the Recovery Act were designed to serve.

Relying on this Court's precedents interpreting the FAA, many entities, including Tribes, have entered into contracts with counterparties that seek to maximize the efficiencies of arbitration by delegating both merits questions and threshold questions of arbitrability to the arbitrator. These entities have done so because, like Congress, they consider arbitration to be a fair and effective way to resolve the full range of contract disputes, including disputes about arbitrability itself, and because resolving these disputes in arbitration can help avoid a slow and costly detour through the courts.

Adopting appellants' arguments would deny Tribes, the parties who contract with them, and many others this flexibility, "breed[] litigation from a statute that seeks to avoid it," *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995), and ultimately make Tribes more difficult and costly to contract with. Before any dispute with a Tribe could proceed to arbitration, antecedent contractual issues, often involving parol evidence and the taking of testimony, would have to be litigated before a court, which is precisely what delegation

provisions seek to avoid. Moreover, depending on the nature of the arguments made, such disputes could involve burdensome discovery, formal hearings, and time-consuming interlocutory appeals. Such gatekeeping disputes "sacrifice[]the principal benefit of arbitration" by "mak[ing] the process slower, more costly, and more likely to generate procedural morass," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011), with the result that "[e]ven if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause," *In re Am. Exp. Merchants Litig.*, 681 F.3d 139, 145 (2d Cir. 2012) (Jacobs, J., dissenting from denial of rehearing *en banc*); *accord Italian Colors*, 570 U.S. at 236 (endorsing Judge Jacobs' view).

Under appellants' view of the law, entities that have entered into scores of contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation," *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), would nonetheless be unable to avoid civil litigation. That result thwarts contracting parties' reasonable expectations under this Court's and the Supreme Court's precedents. And by injecting "uncertainty as to procedure and outcome" into the decision whether to agree to arbitrate, appellants' arguments greatly intensify the perceived "risk [of] using arbitration clauses due to the uncertainty present." Gregory C. Cook & A. Kelly Brennan, *The Enforceability of*

*Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008). The consequent deterrence of the use of arbitration would frustrate the FAA's basic purpose and undermine the interests of both the business community and the country as a whole.

**CONCLUSION**

For the foregoing reasons and those in appellees' brief, the judgment should be affirmed.

Respectfully submitted,

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# CERTIFICATE OF COMPLIANCE

**9th Cir. Case Number 21-16209**

I am the attorney or self-represented party.

**This brief contains 4,068 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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