

No. 26-

IN THE
Supreme Court of the United States

W6LS, INC., D/B/A WITHU AND WITHU LOANS,
AND CALIBER FINANCIAL SERVICES, INC.,
Petitioners,

v.

JOSHUA HARRIS AND DONITA OLDS,
ON BEHALF OF PLAINTIFFS AND THE CLASS
MEMBERS DESCRIBED HEREIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act makes an arbitration provision “severable from the remainder of the contract.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). A party’s “challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.” *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). A delegation provision within an arbitration agreement is severable in the same way. It 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.” *Id.* at 70.

The delegation provision here commits to the arbitrator disputes over the formation, validity, enforceability, and scope of the arbitration agreement, and it contains no choice-of-law term. The formation of the container contracts in which the delegation provision sits is undisputed. The Seventh Circuit held that the delegation provision lacked mutual assent because separate provisions of the arbitration agreement directed the arbitrator to apply tribal law and applicable federal law, when the Tribe had not yet enacted a contract code.

The question presented is:

Whether a court may hold, based on an alleged defect in separate provisions of a contract whose own formation is undisputed, that no delegation agreement was formed, where the delegation provision itself contains no such defective term and where the party resisting arbitration made no specific showing that the delegation provision itself was never formed.

PARTIES TO THE PROCEEDING

Petitioners are W6LS, Inc., doing business as WithU and WithU Loans, and Caliber Financial Services, Inc., who were the defendants-appellants in the court of appeals. Neither W6LS, Inc. nor Caliber Financial Services, Inc. has a stock ticker symbol.

Respondents are Joshua Harris and Donita Olds, who sued on behalf of themselves and the class members described in their complaint and were the plaintiffs-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners assert, based on their corporate records and declarations, that both W6LS, Inc. and Caliber Financial Services, Inc. are wholly owned and operated by the Otoe-Missouria Tribe of Indians, a federally recognized Indian Tribe. Neither petitioner has a parent corporation, and no publicly held company owns 10% or more of either petitioner's stock.

RELATED PROCEEDINGS

Harris v. W6LS, Inc., No. 1:23-cv-16429, U.S. District Court for the Northern District of Illinois, Eastern Division. Memorandum Opinion and Order denying petitioners' motion to compel arbitration entered May 22, 2024.

Harris v. W6LS, Inc., No. 24-2056, U.S. Court of Appeals for the Seventh Circuit. Judgment entered March 31, 2026. Rehearing and rehearing en banc denied, and amended opinion issued, June 5, 2026, reported at 177 F.4th 777.

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W6LS, Inc. and Caliber Financial Services, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a–19a) was issued on June 5, 2026, and is reported at 177 F.4th 777. The original opinion of the court of appeals, issued on March 31, 2026, was superseded by the amended opinion and is reported at 171 F.4th 957. The order of the court of appeals denying rehearing and rehearing en banc (App., *infra*, 45a–47a) was entered on June 5, 2026, and is reported at 177 F.4th 885. The order of the district court denying petitioners’ motion to compel arbitration (App., *infra*, 22a–44a) is unreported but is available at 2024 WL 2319716.

JURISDICTION

The court of appeals entered judgment on March 31, 2026. The court of appeals denied a petition for rehearing and rehearing en banc on June 5, 2026, (App., *infra*, 45a–47a) but issued an amended opinion the same day (App., *infra*, 1a–19a). On August 19, 2026, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including October 5, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

STATEMENT

1. W6LS, Inc. is an economic arm of the Otoe-Missouria Tribe of Indians, a federally recognized Tribe whose trust land lies within Oklahoma. D. Ct. Doc. 7-1, at 4–5; D. Ct. Doc. 27-1 ¶¶ 2, 4. W6LS is organized and operates under Tribal law. D. Ct. Doc. 27-1 ¶ 6; D. Ct. Doc. 7-1, at 5.

Caliber Financial Services, Inc. is a wholly owned Tribal instrumentality providing support services to W6LS. D. Ct. Doc. 27-1 ¶ 6; D. Ct. Doc. 27-2 ¶ 3.

2. Donita Olds and Joshua Harris each borrowed \$600 from W6LS under substantively identical loan agreements dated December 22, 2022, and May 22, 2023, respectively. D. Ct. Doc. 7-1, at 26 (Olds); *id.* at 2 (Harris).

Each loan agreement disclosed that W6LS is an arm of the Tribe, organized under Tribal law and immune from suit except as provided in the limited immunity waiver;

that the loan was made within the Tribe's jurisdiction; and that "THE LOAN AND THIS AGREEMENT ARE NOT GOVERNED BY THE LAW OF YOUR STATE OF RESIDENCE OR ANY OTHER STATE." D. Ct. Doc. 7-1, at 5–6, 30–31. Each agreement recited the borrower's consent to every term, including the interest rate and the process for resolving disputes. *Id.* at 6, 31.

3. Section 23 contains the arbitration agreement. D. Ct. Doc. 7-1, at 16–23, 42–48. It allows the borrower to opt out of arbitration within thirty days from their loan date, selects the American Arbitration Association and its Consumer Arbitration Rules, and provides a process for selecting a substitute if the AAA cannot administer the dispute. *Id.* at 17, 20–21, 42, 46–47. It also contains a severability clause, stating that the provisions of the arbitration agreement be interpreted, where possible, "to sustain its legality and enforceability." *Id.* at 23, 48. Neither respondent opted out of arbitration. D. Ct. Doc. 27-2 ¶ 7.

Section 23(a) sets out the delegation provision. D. Ct. Doc. 7-1, at 18, 43–44. It defines "Dispute" to include claims concerning "the interpretation, applicability, validity, arbitrability, enforceability, formation or scope of any Loan Agreement or this Arbitration Agreement." *Id.* at 18, 44. As the Seventh Circuit recognized, the provision "delegates to the arbitrator the 'threshold' questions of whether the parties agreed to arbitrate their disputes and whether the claims at issue fall within the scope of that agreement." App., *infra*, 3a. Disputes go to arbitration regardless of whether they rest on "contract, tort, constitutional provision, statute, regulation, common law, equity or other source[.]" D. Ct. Doc. 7-1, at 18, 44.

Section 23(a) includes no separate choice-of-law sentence. *See id.* at 18–19, 43–44.

Other provisions of the arbitration agreement, however, do select the governing law. Section 23(c) states that the FAA governs the Arbitration Agreement and that “the law applicable in arbitration is Applicable Law, as that term is defined in your Loan Agreement.” D. Ct. Doc. 7-1, at 19, 45. Section 23(d) clarifies that Applicable Law “includes applicable federal law” and that borrowers may invoke the same federal law available in litigation. *Id.* at 19, 45. Section 23(j) specifies that the arbitrator is bound by the Arbitration Agreement and “must apply Applicable Law, the terms of the Loan Agreement and this Arbitration Agreement.” *Id.* at 22, 47. And section 24 provides that Applicable Law governs the loan agreement. *Id.* at 23, 49. The agreements separately provide that the loan and the agreement are not governed by the law of any state. *Id.* at 6, 31.

The loan agreements define “Applicable Law” as “Tribal Law and applicable federal law” and define “Tribal Law” as “any law, ordinance or regulation duly enacted by the Tribe or the Otoe-Missouria Consumer Finance Services Regulatory Commission.” D. Ct. Doc. 7-1, at 4, 30.

4. Respondents sued petitioners in the United States District Court for the Northern District of Illinois on behalf of a putative Illinois class. D. Ct. Doc. 7 ¶¶ 1, 95–96. The First Amended Complaint alleged that the loans’ interest rates violate the Illinois Interest Act, the Illinois Predatory Loan Prevention Act, and the Illinois Consumer Fraud Act, and it asserted federal claims under the Racketeer Influenced and Corrupt Organizations

Act and the Electronic Fund Transfer Act. *Id.* ¶ 2. Their complaint did not dispute formation of the loan agreements. *See id.* ¶¶ 25–28, 33–34.

Petitioners moved to compel individual arbitration under the FAA. D. Ct. Doc. 26, at 1. Respondents’ opposition rested on enforceability, not formation. *See* D. Ct. Doc. 33, at 2–12. The governing-law provisions, they argued, prospectively waived their state law rights, the arbitration and delegation provisions were unconscionable, and the exclusion of state law left no body of law under which those provisions could be enforced. *Id.* at 5–11.

In a section headed “THE DELEGATION PROVISION IS UNENFORCEABLE,” respondents stated that “Plaintiff specifically challenges the validity of the arbitration provision as well as the delegation provision” and that “[t]he arbitration agreement’s delegation clause is unenforceable for the same reasons as the underlying arbitration agreement.” D. Ct. Doc. 33, at 11–12.

5. The district court refused to compel arbitration. *See App., infra*, 23a, 43a. It found it “undisputed that the parties entered into loan agreements that contain provisions requiring individual arbitration,” and framed the case accordingly: “The only question, therefore, is whether the arbitration agreement is enforceable.” *Id.* at 25a. The plaintiffs, the court observed, “do not dispute that the arbitration agreement exists.” *Id.* at 23a.

The district court then held the arbitration agreement unenforceable under the prospective waiver doctrine, concluding that the doctrine reaches state substantive

rights and that compelling arbitration under exclusively Tribal and applicable federal law would force the plaintiffs to waive their Illinois rights. *Id.* at 28a–43a. It did not reach any other basis for that holding: “Nor does the Court address Plaintiffs’ arguments besides the prospective waiver doctrine.” *Id.* at 25a n.6.

6. Petitioners appealed to the Seventh Circuit. Because the district court’s decision rested only on prospective waiver, “the parties framed their initial arguments on appeal on that singular issue.” App., *infra*, 8a n.3. The Seventh Circuit heard argument on February 12, 2025.

Ten months later, on December 12, 2025, the court ordered supplemental briefing. See App., *infra*, 20a–21a. The supplemental briefing order asked the parties to address “whether the non-existence of the Otoe-Missouria Tribe’s Tribal Contract Code, and lack of applicable federal common law (see *Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC*, 104 F.4th 978, 991 (7th Cir. 2024)), at the time of the plaintiffs’ loan agreements impacts the formation or enforceability of the delegation clause at issue.” *Id.* at 21a.

Petitioners responded that formation of the loan agreements was undisputed, that the plaintiffs’ own claims depend on the loan agreements’ existence, and that Tribal law, including the Tribal Consumer Financial Services Ordinance, existed when the parties executed the loan agreements. C.A. Doc. 45, at 5, 10, 15–17. The Tribe first enacted a consumer financial services ordinance in 2010, adopted a second in 2014, and consolidated both into the current Tribal Consumer Financial Services Ordinance on May 3, 2018. *Id.* at 26. Only the Tribal Contract Code

postdated the loan agreements. *See id.* at 13–15; C.A. Doc. 43, at 6.

For their part, respondents argued formation for the first time, claiming that, because the Tribe adopted the Tribal Contract Code only after the parties contracted, the parties never mutually assented to the arbitration and delegation agreements. C.A. Doc. 43, at 5–10. Under a heading reading “THE NONEXISTENCE OF THE SPECIFIED LAW PREVENTS FORMATION OF AN AGREEMENT TO ARBITRATE UNDER THAT LAW,” they claimed that “[u]nder Illinois law, a ‘meeting of the minds’ on all material terms is essential to formation of an agreement,” that “[t]he applicable law is a material term in this case,” and that the delegation clause was therefore “not an enforceable agreement under basic contract law principles.” *Id.* at 7, 10.

7. On March 31, 2026, the Seventh Circuit affirmed on the formation theory. It held that “both the delegation provision and the Arbitration Agreement fail for the same reasons: both agreements, by selecting then-nonexistent tribal law and inapplicable ‘federal law’ of contract to control their disputes, lacked mutual assent at the time of contracting.” App., *infra*, 7a. The “lack of definiteness in the contract’s Governing Law provision,” the Seventh Circuit reasoned, “contradicts any mutual assent to the delegation or arbitration provisions.” *Id.* at 11a.

Because the contract claimed to have the arbitrator use “applicable federal law” (which does not provide underlying principles of contract formation) or Otoe-Missouria tribal law (which the panel found did not exist at the time of contracting), the Seventh Circuit concluded

it could not “ascertain what the parties have agreed to do in committing their future disputes to arbitration.” *Id.* at 12a (quotation omitted). Because it was not “reasonably certain” what law would govern arbitration, the panel held that the parties “cannot have mutually assented to the delegation or arbitration terms.” *Id.*

The Seventh Circuit analogized this case to *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014). There, the plaintiffs signed loan agreements with a provision assigning future disputes to arbitration “conducted by the Cheyenne River Sioux Tribal Nation.” *Jackson*, 764 F.3d at 769. The agreement specified that either a Tribal Elder or a panel of three members of the Tribal Council would conduct the arbitration, and that the plaintiffs could participate by phone or videoconference without traveling to the reservation. *Id.*

But that forum did not exist. *Id.* at 776. The Cheyenne River Sioux Tribe does not authorize arbitration, does not hire arbitrators, and does not have consumer dispute rules. *Id.* As a result, the forum was “illusory” and enforcing the forum-selection clause within the loan agreement was unreasonable. *Id.* The court also concluded that the forum-selection provision was both procedurally and substantively unconscionable. *Id.* at 778. The Seventh Circuit in *Harris* quoted *Jackson*’s comment that “mutuality of intent . . . [was] not at all apparent” because “[t]he loan consumers did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed.” App., *infra*, 12a–13a (quoting *Jackson*, 764 F.3d at 781).

The panel in *Harris* then applied that logic to the delegation agreement at issue here. While Harris and Olds “agreed to arbitrate and delegate gateway questions of arbitrability on the understanding that *some* law would govern in that alternative forum,” the court held, “that law did not exist at the time of contracting.” *Id.* at 13a. It therefore could not say the parties reached a meeting of the minds as to an essential element of the parties’ bargain to arbitrate: “the substantive law that would bind the arbitrator.” *Id.*

Finally, the Seventh Circuit rejected petitioners’ argument that the plaintiffs could not contest formation as to the delegation or arbitration provisions because their statutory claims presume the existence of an agreement. *Id.* at 15a–17a. In doing so, the court invoked severability, noting that this Court has held that “agreements to arbitrate or delegate questions of arbitrability are ‘severable’ from the container contract and, indeed, from each other.” *Id.* at 15a (citing *Buckeye*, 546 U.S. at 445). Because delegation and arbitration provisions are separate agreements, “a formation challenge to either does not presume the invalidity of the container contract.” *Id.* at 15a.

8. Petitioners sought rehearing en banc on April 28, 2026, arguing that the panel’s holding conflicts with *Rent-A-Center, Coinbase, Inc. v. Suski*, 602 U.S. 143, 151 (2024), and the Eleventh Circuit’s decision in *Dunn v. Global Trust Management, LLC*, Nos. 21-10120, 21-10121, 2024 WL 4379966 (11th Cir. Oct. 3, 2024) (per curiam) (unpublished), because the choice-of-law clauses the panel relied on sit outside the delegation provision. C.A. Doc. 55, at 6.

On June 5, 2026, the court denied rehearing, App., *infra*, 45a–47a, and, the same day, issued an amended opinion adding a new footnote 3, *see* App., *infra*, 8a n.3. In the footnote, the panel acknowledged that it “affirm[ed] on a basis not relied on by the district court but argued by the parties in supplemental briefing,” that the district court “based its decision solely on prospective waiver,” and that the parties “framed their initial arguments on appeal on that singular issue.” *Id.* Because “it remains an open question whether the prospective waiver doctrine applies to state statutory rights,” the panel explained, formation “is a clear prerequisite for delegation and arbitration, and provides a narrower path to resolving this case on the facts before us.” *Id.* The panel added that, with supplemental briefing, “[b]oth parties have now had the opportunity to fully brief and be heard on this issue.” *Id.*

REASONS FOR GRANTING THE PETITION

The Seventh Circuit held that the parties never formed a delegation agreement within a broader loan agreement whose execution no one disputes. Respondents signed the loan agreements, received the loan proceeds, and made payments, and in the district court they argued only that the arbitration and delegation provisions were unenforceable. Yet after ordering supplemental briefing on a theory no party had raised, the panel held that governing-law provisions elsewhere in the arbitration agreement, by selecting tribal law and applicable federal law before the Tribe enacted its Tribal Contract Code, defeated mutual assent to section 23(a), the provision that commits formation and enforceability disputes to the arbitrator and contains no choice-of-law term.

That holding inverts this Court’s severability doctrine, which governs challenges to an agreement’s validity and enforceability, *see Rent-A-Center*, 561 U.S. at 70 & n.2, and respondents framed their challenge below as one of enforceability. A delegation provision is “simply an additional, antecedent agreement,” and “the FAA operates on this additional arbitration agreement just as it does on any other.” *Id.* at 70. A challenge to another provision of the contract “does not prevent a court from enforcing a specific agreement to arbitrate.” *Id.* The panel nonetheless found that an alleged defect in separate governing-law provisions showed a lack of mutual assent to the one provision respondents never showed was defective. The decision also implicates two circuit conflicts, one over whether a defect in a separate provision can defeat a delegation provision, and another over what a challenge to a delegation provision must contain. The petition should be granted.

1. The decision below conflicts with this Court’s severability decisions and resolves a formation question those decisions left open.

Section 2 of the FAA makes a written arbitration provision “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. Because “[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract,” a party’s “challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.” *Rent-A-Center*, 561 U.S. at 70–71 (quoting *Buckeye*, 546 U.S. at 445). A delegation provision is “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.” *Id.* at 70.

Of course, severability does not insulate a delegation provision from challenge. Where a challenge “applies ‘equally’ to the whole contract and to an arbitration or delegation provision, a court must address that challenge.” *Coinbase*, 602 U.S. at 151 (citing *Rent-A-Center*, 561 U.S. at 71). Still, the challenge must be directed at “the precise agreement to arbitrate at issue,” *Rent-A-Center*, 561 U.S. at 71, and this Court has suggested that a defect common to the arbitration agreement and the delegation provision may reach delegation where, “*as applied* to the delegation provision,” it renders “*that provision*” invalid, *id.* at 74.

Formation is the threshold question. This Court has distinguished the validity of an agreement from the question whether an agreement “was ever concluded” in the first place, *Buckeye*, 546 U.S. at 444 n.1; *Rent-A-Center*, 561 U.S. at 70 n.2, and courts, not arbitrators, decide whether an agreement to arbitrate was formed when the formation of the contract containing it is in issue. *MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 402 (3d Cir. 2020); *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879–80 (6th Cir. 2021); *see App., infra*, 8a n.3 (quoting *K.F.C. v. Snap Inc.*, 29 F.4th 835, 837 (7th Cir. 2022)).

Here, section 23(a), the delegation agreement, defines “Dispute” to include disputes concerning “the interpretation, applicability, validity, arbitrability, enforceability, formation or scope of any Loan Agreement

or this Arbitration Agreement,” and commits every such dispute to arbitration “regardless of whether” it rests on “contract, tort, constitutional provision, statute, regulation, common law, equity or other source.” D. Ct. Doc. 7-1, at 18, 44. The provisions designating the law applicable in arbitration appear elsewhere: section 23(c) provides that the arbitration agreement “is governed by the Federal Arbitration Act” and that “the law applicable in arbitration is Applicable Law”; section 23(j) directs the arbitrator to apply that law along with both agreements; and section 24 makes Applicable Law govern the loan agreement. *Id.* at 19, 22–23, 45, 47, 49. Section 23(a) contains no choice-of-law term. *Id.* at 18–19, 43–44.

Yet the panel applied a mutual assent rule it found common to Illinois and tribal law, under which essential terms must be definite enough that “the promises and performances to be rendered by each party are reasonably certain.” App., *infra*, 11a. It then treated the law the arbitrator would apply as an essential term of both delegation and arbitration. Because federal law supplied no rules of contract formation and the Tribe had not yet enacted its contract code, the panel concluded that it could not “ascertain what the parties have agreed to do” in committing future disputes to arbitration despite the existence of federal consumer protection laws, the Tribal Consumer Financial Services Ordinance, and the American Arbitration Association Consumer Arbitration Rules. *Id.* at 11a–12a. Since it was not “reasonably certain” what law the arbitrator would apply, the panel held, the parties “cannot have mutually assented to the delegation or arbitration terms.” *Id.* at 12a.

That holding conflicts with this Court’s decisions in two ways. First, respondents’ challenge in the district

court went to enforcement rather than formation, and the panel accepted a formation theory that emerged only after argument and supplemental briefing. Second, uncertainty about the governing law did not make section 23(a)'s promised performance uncertain.

A. In the district court, respondents challenged the enforcement of the delegation provision, not its formation.

Respondents did not argue in the district court that the delegation agreement failed for lack of mutual assent. *See* D. Ct. Doc. 33. They argued instead, in a section headed “THE DELEGATION PROVISION IS UNENFORCEABLE,” that the delegation clause was unenforceable for the same three reasons they pressed against the arbitration agreement: that it “is part of an agreement to waive statutory rights”; that “it is unconscionable”; and that “the loan agreement’s wholesale waiver of the application of state law makes the delegation clause invalid.” D. Ct. Doc. 33, at 12. Their governing-law argument also addressed enforcement: by disclaiming state law, they contended, petitioners “negate[d] application of the only body of law which permits enforcement of either the arbitration clause or the delegation clause,” D. Ct. Doc. 33, at 11, leaving the arbitrator in the “impossible position of deciding the enforceability of the agreement without authority to apply any applicable federal or state law,” *id.* at 12 (quotation omitted). At no point did they claim that section 23(a) omitted an essential term, that its promised performance was uncertain, or that the parties had failed to assent to it.

True, respondents maintained that the delegation provision was unenforceable. D. Ct. Doc. 33, at 11–12. But

Rent-A-Center still required the basis of the challenge to be “directed specifically” to that provision, 561 U.S. at 71–72, and suggested that a defect common to both agreements could meet that requirement if, “*as applied* to the delegation provision,” it “rendered *that provision* unconscionable.” *Id.* at 74. Respondents’ theory was that the governing-law provisions left the arbitrator unable to decide enforceability. D. Ct. Doc. 33, at 12. That theory assumed an arbitrator with authority to decide, and it did not deny that the parties had conferred that authority in section 23(a).

Respondents did invoke contract formation principles, but not to argue these agreements were never formed. Instead, they invoked formation to identify the law a court consults in deciding whether an arbitration agreement exists. Under the heading “THE DISCLAIMER OF STATE LAW ALSO MAKES THE ARBITRATION CLAUSE UNENFORCEABLE AS A MATTER OF CONTRACT LAW,” they wrote that “[s]tate law governs whether an agreement to arbitrate exists and who is entitled to enforce it,” and that courts “generally should apply ordinary state-law principles that govern the formation of contracts.” D. Ct. Doc. 33, at 10 (quotation omitted). The only conclusion they drew from those principles was the enforceability argument quoted above: that by disclaiming state law, the agreements negated the only law under which either clause could be enforced. *Id.* at 11.

The mutual assent theory entered the case after oral argument. Respondents had noted below that federal law supplies no general common law of contracts, but they advanced that point to show that the agreements

disclaimed the only law under which they could be enforced. D. Ct. Doc. 33, at 10–11. The Seventh Circuit acknowledged that the district court had relied solely on prospective waiver and that the parties had framed their initial appellate arguments around that “singular issue.” App., *infra*, 8a n.3. Because they “had not framed the issue as one of formation on appeal,” the panel ordered supplemental briefing on formation of the arbitration and delegation agreements. *Id.* That briefing placed the Tribal Contract Code’s post-contract adoption and the claimed absence of mutual assent at issue, and the panel then held that the delegation provision and the arbitration agreement both lacked mutual assent. *Id.* at 7a–14a.

The panel later described respondents as “challeng[ing] the formation of the delegation and Arbitration Agreements specifically, not the Loan Agreement as a whole.” *Id.* at 15a. That description fits the supplemental briefing the panel itself ordered, not the opposition respondents filed in the district court. On that opposition, the district court held it “undisputed that the parties entered into loan agreements that contain provisions requiring individual arbitration” and framed the “only question” as “whether the arbitration agreement is enforceable.” App., *infra*, 25a.

B. The governing-law provisions did not make the delegation provision uncertain.

Section 23(a) makes the delegation provision reasonably certain. It identifies the parties, defines the gateway disputes subject to arbitration, and commits them to an arbitrator. The remaining provisions designate the AAA, supply a substitute-selection process if the AAA declines to act, specify the qualifications and selection

of a neutral arbitrator, and establish the governing procedures. D. Ct. Doc. 7-1, at 20–22, 46–47. Whatever uncertainty existed about the law the arbitrator would apply, none existed about what the parties agreed to do, which was to submit gateway disputes to a neutral arbitrator under the specified process.

The parties also gave the arbitrator authority to sever or reform unenforceable provisions. Section 23(m) directs that the arbitration agreement be interpreted, where possible, “to sustain its legality and enforceability,” and authorizes the arbitrator to “sever and/or reform” an unenforceable provision. D. Ct. Doc. 7-1, at 23, 48. Even so, the panel let the alleged defect in the governing-law provisions defeat the delegation provision, giving no effect to that express direction.

Respondents’ “impossible position” theory assumes that the governing-law directions bind the arbitrator before the arbitrator decides whether they are valid. Section 23(a), however, authorizes the arbitrator to decide their validity and effect, and section 23(m) authorizes severance or reformation if they are unenforceable. And the panel itself applied mutual assent principles it found common to Illinois and tribal law, invoking this Court’s instruction to apply “ordinary state-law principles that govern the formation of contracts.” App., *infra*, 8a–9a (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). An arbitrator acting under section 23(a) could conduct the same inquiry without assuming that a disputed choice-of-law direction is valid.

The governing-law provisions are not the kind of common defect *Rent-A-Center* suggested might reach a

delegation provision. The procedures for discovery and fee sharing challenged there governed both merits arbitration and proceedings under the delegation provision, and this Court explained that “[i]t may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court.” *Rent-A-Center*, 561 U.S. at 74. Here, the governing-law provisions allegedly deprived the arbitrator of a prescribed rule of decision, but sections 23(a) and 23(m) left the arbitrator free to determine their validity and effect. The alleged defect therefore did not prevent the arbitrator from performing that delegated task.

The Seventh Circuit also compared this case to its decision in *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014). *Jackson* involved a different defect: the absence of any arbitration forum or rules whatsoever, not the selection of nonexistent tribal law. *Id.* at 778. The agreement there told the plaintiffs that disputes would be resolved through arbitration conducted by the Cheyenne River Sioux Tribe, *id.* at 769, but the Tribe did not authorize arbitration, hire arbitrators, or maintain consumer dispute rules, *id.* at 776. The arbitral forum was therefore “illusory,” and the arbitration provision “unreasonable and substantively and procedurally unconscionable under federal, state, and tribal law.” *Id.* at 776, 786.

The agreements here name the AAA, supply a substitute if the AAA is unable or declines to administer the dispute, set arbitrator qualifications, adopt the AAA Consumer Arbitration Rules, and authorize severance

and reformation. D. Ct. Doc. 7-1, at 20–23, 46–48. These agreements supplied a real forum, arbitrator qualifications, and rules. The *Jackson* agreement did not supply any of them.

The Seventh Circuit treated uncertainty about the law the arbitrator would apply as a failure to agree that an arbitrator would decide, even though the alleged defect sits outside section 23(a). The arbitrator must therefore decide the effect of the governing-law provisions and the formation of the broader arbitration agreement.

2. The decision below conflicts with the decisions of another circuit.

A. Eleventh Circuit decisions have enforced delegation provisions despite alleged defects in separate governing-law provisions.

Two Eleventh Circuit decisions have enforced delegation provisions in tribal lending agreements although neither panel could identify a rule of tribal contract law.

In *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1147 (11th Cir. 2015), the Eleventh Circuit faced a loan agreement selecting the laws of the Cheyenne River Sioux Tribe. The parties cited no rule of tribal law governing contract interpretation, and the court’s “research uncovered none.” *Parnell*, 804 F.3d at 1147. The court instead borrowed a rule of interpretation from Georgia, the forum the lender had targeted, in what the Eleventh Circuit later called “a choice-of-law analysis,” *Dunn*, 2024 WL 4379966, at *13. The court then found that the plaintiff had not challenged

the delegation clause specifically and reversed the denial of CashCall's motion to compel arbitration. *Parnell*, 804 F.3d at 1147–49. Even so, no one suggested the absence of tribal contract law defeated assent.

In *Dunn*, the Eleventh Circuit rejected a governing-law objection to a tribal lender's delegation provisions. Because "the choice-of-law provisions applicable to Plaintiffs' arbitration agreements expressly incorporate the FAA," the court observed, "as applied to the delegation provisions, the choice-of-law provisions do not foreclose the arbitrator's ability to consider Plaintiffs' argument that their arbitration agreements are unenforceable under § 2 of the FAA." *Dunn*, 2024 WL 4379966, at *12. The separate question, "whether the choice-of-law provisions apply to Plaintiffs' argument that their arbitration agreements are unenforceable," was "an issue beyond the scope of the enforceability of the delegation provisions." *Id.* That was so because "the delegation provisions are severable from the arbitration agreements as a whole and from other provisions of the arbitration agreement," and because "a 'challenge to another provision of the contract . . . does not prevent a court from enforcing' . . . the delegation provision." *Id.* (quoting *In re StockX*, 19 F.4th at 886).

Dunn rested in part on the arbitration agreement's incorporation of the FAA: because the choice-of-law provisions "expressly incorporate the FAA," the arbitrator retained authority to apply federal law to an enforceability challenge. *Id.* at *12. Sections 23(c) and 23(d) do the same. Section 23(c) provides that the arbitration agreement "is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq." D. Ct. Doc. 7-1, at 19, 45. Section 23(d) states that

Applicable Law “includes applicable federal law,” that “in arbitration you are entitled to invoke the same body of federal law that you would have been entitled to invoke in litigation,” and that “proceeding in arbitration gives you access to the exact same body of federal remedies available in litigation.” *Id.* So the arbitrator was never limited to a body of law that did not exist.

The panel concluded that “applicable federal law” supplies no rules of contract formation, so that the governing-law provisions left the arbitrator with tribal law that did not yet exist. App., *infra*, 9a–11a. That reasoning overlooks that the parties delegated the task of deciding the agreements’ enforceability under § 2, a task the agreements’ express incorporation of the FAA leaves within the arbitrator’s authority, and “how an arbitrator will ultimately determine what law to apply is irrelevant.” *Dunn*, 2024 WL 4379966, at *12, *14.

Neither Eleventh Circuit decision treated the missing tribal contract law as a problem of mutual assent. *Parnell* found a clear and unmistakable delegation by borrowing a Georgia rule of interpretation when no tribal contract law could be located, and enforced it because the borrower never aimed his challenge at the delegation provision. *Dunn* rejected the argument that the governing-law provisions stripped the arbitrator of authority to decide and enforced the delegation provision.

B. The circuits are divided over what a challenge to a delegation provision must contain.

The Ninth Circuit has expressed this variation among the circuits explicitly. It holds “that to sufficiently challenge

a delegation provision, the party resisting arbitration must specifically reference the delegation provision and make arguments challenging it; a court need not, as required by the Sixth and Eleventh Circuits, first evaluate the substance of the challenge.” *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1011 (9th Cir. 2023). That rule, it explained, is “consistent with the rules in the Second, Third, and Fourth Circuits,” which “require a relatively low barrier to entry: if a party’s challenge mentions and specifically relates to the validity of the delegation provision in its opposition to the motion to compel arbitration or other pleading, the federal court has a green light to consider those arguments.” *Id.* at 1010 (citing *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019); *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226 (3d Cir. 2018); *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 291 (4th Cir. 2020)).

The Sixth and Eleventh Circuits, by contrast, “require litigants to provide more substance in their delegation provision challenge.” *Id.*

The Sixth Circuit in *In re StockX* sent the arbitrator a challenge the plaintiffs had aimed at the delegation provision by name, because in substance it attacked the whole agreement. The delegation provision there, like section 23(a), committed disputes over the arbitration agreement’s enforceability to the arbitrator. *In re StockX*, 19 F.4th at 877. Website users suing over a data breach argued that unconscionability, and for the two minor plaintiffs the infancy doctrine, rendered the terms of service, the arbitration agreement, and the delegation provision invalid and unenforceable. *Id.* at 876. The minor plaintiffs maintained that they had specifically

challenged the delegation provision because the infancy doctrine independently invalidated it. *Id.* at 884. The court disagreed. The specificity requirement “is not a mere pleading requirement.” *Id.* at 885. A party may challenge the whole agreement and the delegation provision “under the same legal doctrine,” but “a party’s mere statement that it is challenging the delegation provision is not enough; courts must look to the substance of the challenge.” *Id.* Because the plaintiffs had “simply recycled the same arguments that pertain to the enforceability of the agreement as a whole,” their infancy defense was for the arbitrator. *Id.* at 886.

The plaintiffs also urged that the arbitration agreement, “including the delegation clause,” lacked mutuality because another provision of the terms gave StockX discretion to change them. *Id.* But “a ‘challenge to another provision of the contract . . . does not prevent a court from enforcing a specific agreement to arbitrate’ or the delegation provision for that matter.” *Id.* (quoting *Rent-A-Center*, 561 U.S. at 70). The plaintiffs had “failed to explain how the change-in-terms provision operates on the delegation provision any differently than it operates on other provisions” of the terms. *Id.* That argument, too, went to the arbitrator. *Id.*

Under the Eleventh Circuit’s approach, a court should intervene “if, and only if, the substantive nature of the party’s challenge meaningfully goes to the parties’ precise agreement to delegate threshold arbitrability issues” because “[c]hallenging a delegation agreement is a matter of substance, not form.” *Attix v. Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1304 (11th Cir. 2022). The borrower in *Attix* argued that his statutory challenge

under the Dodd-Frank Act was “specific” to the parties’ delegation agreement. *Id.* at 1306. The Eleventh Circuit disagreed: the challenge was “only about whether the parties’ *primary* arbitration agreement is enforceable, not whether the parties’ *delegation* agreement is enforceable.” *Id.* That issue was “committed to an arbitrator’s review,” and the borrower did “not explain how” the statute “*bars an arbitrator from resolving that dispute.*” *Id.* at 1306, 1308.

Respondents’ challenge to the delegation provision rested on the grounds they asserted against the arbitration agreement as a whole. Their delegation argument began by asserting that a party “may contest the enforceability of the delegation clause with the same arguments it employs to contest the enforceability of the overall arbitration agreement,” citing *Hengle v. Treppa*, 19 F.4th 324, 335 (4th Cir. 2021), and *MacDonald*, 883 F.3d at 226–27. D. Ct. Doc. 33, at 11. It then argued that the delegation clause was unenforceable for “the same reasons as the underlying arbitration agreement.” *Id.* at 12. Their only argument directed at the delegation provision itself was a single sentence: that enforcing it “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.” *Id.* (quotation omitted). That argument did not identify a defect in section 23(a). Instead, it relied entirely on the governing-law provisions respondents attacked throughout, which expressly preserve the arbitrator’s authority to apply the FAA and federal law. *See Dunn*, 2024 WL 4379966, at *12. In the Sixth and Eleventh Circuits, that challenge would not have defeated the delegation provision because courts there look to the substance of a delegation challenge, and

it is “not sufficient for a party to merely say the words, ‘I am challenging the delegation agreement.’” *Attix*, 35 F.4th at 1304; see *In re StockX*, 19 F.4th at 885.

The provisions that, according to respondents, made the delegation provision unenforceable also sat outside that provision. Sections 23(c), 23(d), and 23(j) address the law applicable in arbitration, and section 24 the law governing the loan agreement, but section 23(a), the delegation provision itself, says nothing about governing law. D. Ct. Doc. 7-1, at 18–19, 21–22, 43–45, 47. Invoking *Coinbase*, the panel reasoned that the mutual assent argument “applies equally” to the delegation provision and to the arbitration agreement because both are “controlled by the same choice-of-law provision.” App., *infra*, 16a (citing *Coinbase*, 602 U.S. at 151). While *Coinbase* requires a court to address a challenge common to two agreements, it did not displace *Rent-A-Center*’s requirement that the basis of the challenge be “directed specifically” to “the precise agreement to arbitrate at issue,” a requirement *Rent-A-Center* suggested a common defect could satisfy by operating “as applied to the delegation provision.” 561 U.S. at 71–72, 74.

In *Bielski*, Judge Miller, concurring in part, disagreed that there was any split, reasoning that the Sixth and Eleventh Circuits’ inquiry into “substance” does not differ “meaningfully” from the Ninth Circuit’s rule. *Bielski*, 87 F.4th at 1016 (Miller, J., concurring in part and concurring in the judgment). If Judge Miller is right, respondents’ resistance to arbitration here still fails. After all, Judge Miller agreed that a party relying on the same arguments against both agreements must articulate “why the argument invalidates each specific

provision.” *Id.* at 1015. Respondents offered one such explanation: that enforcing the delegation provision would leave the arbitrator to decide enforceability “without authority to apply any applicable federal or state law.” D. Ct. Doc. 33, at 12 (quotation omitted). That explanation, however, identified no defect in section 23(a), depended on governing-law provisions that expressly preserve the arbitrator’s authority to apply the FAA and federal law, and said nothing about mutual assent, the ground on which the panel held that section 23(a) was never formed.

C. The courts of appeals have reached the formation of a delegation provision only where the container contract’s own formation was disputed.

The panel treated the delegation and arbitration provisions as agreements whose formation could be challenged separately from a container contract that everyone agrees was formed. In doing so, the panel cited *MZM Construction Co. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020), for the notion that “in the other direction, a formation challenge to the *container* contract may apply to a nested arbitration agreement.” App., *infra*, 15a (citing *MZM*, 974 F.3d at 397–98).

But *MZM* decided the case only in that direction. The Third Circuit confronted a claim that the container contract itself was never formed and reasoned that “[l]ack of assent to the container contract necessarily implicates the status of the arbitration agreement, when the container contract and the arbitration provision depend on the same act for their legal effect.” *MZM*, 974 F.3d at 400. It held

that “the degree of specificity required in *Rent-A-Center* does not apply” to that threshold question, *id.*, and that “courts retain the primary power to decide questions of whether the parties mutually assented to a contract containing or incorporating a delegation provision,” *id.* at 402.

The circuits that have joined *MZM* did so for the same reason and in that same direction. As the Third Circuit observed, “several sister circuits have confronted this same threshold question and have declined to enforce delegation provisions when the formation or existence of the container contract was at issue.” *MZM*, 974 F.3d at 401–02 (collecting decisions from the Fourth, Fifth, Sixth, and Eighth Circuits). *MZM* rests on the idea that “a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it.” *Id.* at 400 (quoting *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003)). As *MZM* describes them, those decisions involved container contracts whose formation or existence was at issue.

By contrast, the formation of the loan agreements here is undisputed. The panel held that the parties never mutually assented to the delegation and arbitration provisions because the law selected to govern them did not exist, yet left the container contract intact, reasoning that setting up “a dispute-resolution procedure under non-existent law,” while “material to that separate and severable Arbitration Agreement,” is “not necessarily so for a broader agreement to borrow money.” App., *infra*, 16a. No circuit appears to have ruled that a delegation clause lacked mutual assent because of defects in other

provisions of a contract whose formation was undisputed. The result below is that the delegation and arbitration provisions were never formed, although the loan agreement containing them was.

The Third Circuit has since declined to treat a challenge that conceded the arbitration agreement's existence as a formation challenge under *MZM*. In *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136 (3d Cir. 2022), the borrower invoked *MZM* to claim that his challenge to an assignment was a challenge to the arbitration agreement's formation. *Id.* at 144. The court rejected that framing, holding that the challenge “targets the *validity* of the assignment . . . not whether the agreement *exists*,” and that the agreement “clearly does exist.” *Id.* Resolving the disputed question as one of formation, the court explained, would “render the threshold question of arbitrability meaningless” and would be “nothing more than performative, not to mention antithetical to the FAA’s purpose of unwanted judicial interference.” *Id.* at 143.

Because formation of the loan agreements was undisputed, the panel’s reference to the Tribe’s “unilateral ability to create applicable tribal law,” App., *infra*, 13a–14a, is an unconscionability challenge, not a formation one. The panel itself recognized that the mutual assent inquiry “may turn on facts that go to both the intent of the parties and unconscionability,” yet it expressly declined to reach unconscionability, making no “holding as to unconscionability in this case.” *Id.* at 14a n.5. Under *Rent-A-Center*, an unconscionability challenge is for the arbitrator unless directed at the delegation provision specifically. 561 U.S. at 72; *see id.* at 74. Section 23(a) sends those disputes to the arbitrator, and section

23(m) authorizes the arbitrator to sever or reform any unenforceable provision.

The panel narrowed its holding, stating that it did “not mean to cast doubt on other contracts entered under the auspices of Otoe-Missouria tribal law prior to the enactment of the Tribal Contract Code,” because “[d]epending on the language of other agreements, the absence of governing law chosen by the parties may not relate to an essential term, or there may be alternative law that *does* provide substantive rules of decision.” App., *infra*, 17a. Even with that limit, however, the decision will reach well beyond these loan agreements.

3. This case warrants this Court’s review.

The rule announced below extends beyond lending by sovereign entities. The panel reasoned that the law an arbitrator will apply is an essential term of an agreement to delegate, and that uncertainty about that law defeats mutual assent to delegation even when the container contract was formed. App., *infra*, 10a–17a. A party resisting arbitration can describe many governing-law provisions as missing, uncertain, or inapplicable. Under the decision below, that description turns a challenge to a separate provision into a challenge to the formation of the delegation provision, and a court rather than the arbitrator decides it.

This case presents the question cleanly. The formation of the loan agreements is undisputed, and all parties performed under the agreements. Respondents signed the loan agreements, received the loan proceeds from petitioners, and made payments. The Seventh Circuit

rested its judgment on formation alone. It declined to reach the prospective waiver doctrine on which the district court relied, and it made no holding on unconscionability. App., *infra*, 8a n.3, 14a n.5. The question is one of law, decided in a published opinion, and the court of appeals denied rehearing en banc. If the delegation provision is enforced, the remaining disputes over the governing-law provisions and the formation and enforceability of the arbitration agreement belong to the arbitrator.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, FILED JUNE 5, 2026**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 24-2056

JOSHUA HARRIS AND DONITA OLDS, ON
BEHALF OF PLAINTIFFS AND THE CLASS
MEMBERS DESCRIBED HEREIN,

Plaintiffs-Appellees,

v.

W6LS, INC., DOING BUSINESS AS WITHU AND
WITHU LOANS, AND CALIBER FINANCIAL
SERVICES, INC.,

Defendants-Appellants.

ARGUED FEBRUARY 12, 2025

DECIDED MARCH 31, 2026

AMENDED JUNE 5, 2026

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 1:23-cv-16429—**Lindsay C. Jenkins**, *Judge*.

Before PRYOR, KOLAR, and MALDONADO, *Circuit Judges*.

Appendix A

KOLAR, *Circuit Judge*. Plaintiffs went online and borrowed \$600 from defendants at interest rates of nearly 500% per year. They later sued, invoking their consumer rights under Illinois and federal law. Defendants sought to enforce an arbitration provision in their loan contracts delegating all questions of arbitrability to the arbitrator, while also requiring that these questions be resolved under a body of tribal contract law that did not exist at the time the plaintiffs took out their loans. It is well-established, however, that “arbitration is a matter of contract.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). And contracts require mutual assent. Here, defendants drafted an arbitration agreement directing an arbitrator to apply a body of law that did not exist, which they maintained a unilateral ability to invent. Absent any indication that the plaintiffs intended this, we find no mutual assent. We, therefore, affirm the district court’s order denying defendants’ motion to compel arbitration.

I. Background

Defendant W6LS, Inc. offers consumer loans online as “WithU Loans.” Caliber Financial Services, Inc. manages the underwriting and collection of the online loans given out by W6LS. W6LS and Caliber are corporations organized under the laws of the Otoe-Missouria Tribe of Indians. The Tribe maintains an ownership stake in the defendants.¹

1. The parties dispute the precise nature of the defendants’ relationship to the Tribe. Defendants, in an effort to claim tribal sovereign immunity, assert that they are “economic arms of, and

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Plaintiffs are two Illinois citizens who took out online loans from WithU in 2022 and 2023. Joshua Harris borrowed \$600 with an annual interest rate of 498.63%. Donita Olds similarly took out a \$600 loan at an annual interest rate of 497.25%. Both of the loans violate Illinois’s statutory limits on interest. *See* 815 ILCS 123/15-5-5.

The Loan Agreements for Harris’s and Olds’s loans contain an Arbitration Agreement. According to the agreement, an arbitrator will decide all “claims or disputes arising from or relating in any way to: the interpretation, applicability, validity, arbitrability, enforceability, formation or scope of any Loan Agreement or this Arbitration Agreement.” In plain English, the agreement delegates to the arbitrator the “threshold” questions of whether the parties agreed to arbitrate their disputes and whether the claims at issue fall within the scope of that agreement.

The Arbitration Agreement states that the arbitrator should use “Applicable Law,” which is defined elsewhere in the Loan Agreement as “Tribal Law and applicable federal law,” to resolve these questions. “Tribal law” refers to law enacted by the Otoe-Missouria Tribe or the Otoe-Missouria Consumer Finance Services Regulatory

wholly owned, managed, and controlled by, the Otoe-Missouria Tribe of Indians.” Plaintiffs, meanwhile, have alleged that the Tribe is merely a “nominal” owner, and that all substantive aspects of defendants’ business are run by persons unaffiliated with the Tribe. While this dispute might be relevant to whether defendants can avail themselves of the Tribe’s sovereign immunity on the merits, we need not resolve this dispute here.

Appendix A

Commission. The Tribe adopted a Tribal Contract Code on May 2, 2024, but this code was not in place at the time Harris and Olds entered into the Loan Agreements. *See* Otoe-Missouria Tribe of Indians, Resolution OTMC #0502061 (May 2, 2024) (“Tribal Contract Code”).²

The Tribal Contract Code defines a contract and sets out the elements of contract formation, who can contract, defenses, a statute of frauds, and modes of interpretation. The Code has several provisions that apply to loan contracts, although none set a cap on the interest rate to be charged. The Code also says that it applies retroactively to “all applicable contracts that become effective on or after April 1, 2018.” Although the Code describes some defenses to the formation or enforcement of a contract, there are no provisions that address unconscionability—we are aware of no state that takes the same approach.

The Loan Agreement disclaims application of any other law aside from the Tribe’s law and applicable federal law. It states that “[t]he Loan and this Agreement are not governed by the law of your state of residence or any other state.” Finally, the agreement reiterates that “[t]he arbitrator is bound by the terms of this Arbitration Agreement,” and “must apply” tribal law or applicable federal law.

Harris and Olds filed a putative class action against W6LS and Caliber for violations of Illinois’s rate-cap

2. The Tribal Contract Code appears on the district court docket at entry number 36-1.

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and other consumer-protection statutes, as well as the federal Racketeer Influenced and Corrupt Organizations Act and Electronic Funds Transfer Act. Defendants filed a motion to compel individual arbitration, which the district court denied. The district court’s denial turned on the “prospective waiver” doctrine: it found both the delegation provision and the Arbitration Agreement unenforceable because compelling arbitration under exclusively tribal or “applicable federal law” forced the plaintiffs to prospectively waive their substantive rights under Illinois law.

Defendants immediately appealed the denial as permitted by the Federal Arbitration Act (“FAA”). *See* 9 U.S.C. § 16(a)(1)(C); *United Natural Foods, Inc. v. Teamsters Local 414*, 58 F.4th 927, 932-33 (7th Cir. 2023).

II. Discussion

A court should compel arbitration when (1) there was a valid agreement between the parties to arbitrate, (2) the claim at issue falls within the scope of that agreement, and (3) a party has nevertheless refused to arbitrate. *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 702 (7th Cir. 2022). We review *de novo* the denial of a motion to compel arbitration. *United Natural Foods*, 58 F.4th at 933.

“[A]rbitration is strictly a matter of consent.” *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148, 144 S.Ct. 1186, 218 L.Ed.2d 615 (2024) (citation omitted). Thus, in order to compel arbitration, a court must first determine that the parties agreed to arbitrate their disputes. *Granite*

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Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287, 296, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010); *K.F.C. v. Snap Inc.*, 29 F.4th 835, 837 (7th Cir. 2022). Parties can go one step further and agree to let the arbitrator decide “‘gateway’ questions of ‘arbitrability’” such as if that agreement is enforceable or whether the disputes at issue are within the scope of the agreement. *Rent-A-Center*, 561 U.S. at 68-69, 130 S.Ct. 2772.

This additional step is often called a “delegation provision,” because it reflects the parties’ decision to delegate arbitrability to the arbitrator instead of having the courts decide. *Id.* A delegation provision is “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.” *Id.* at 69-70, 130 S.Ct. 2772. Delegation is an exception to the general rule that arbitrability is a question for the courts, so the party seeking delegation must show the parties’ intent to delegate arbitrability by “clear and unmistakable evidence.” *Coinbase*, 602 U.S. at 149, 144 S.Ct. 1186 (internal alterations removed) (citing *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)); *United Natural Foods*, 58 F.4th at 933-34.

In applying this rule, we recognize as a background principle that “Congress adopted the [FAA] in an effort to counteract judicial hostility to arbitration and establish a liberal federal policy favoring arbitration agreements.” *New Prime Inc. v. Oliveira*, 586 U.S. 105, 120, 139 S.Ct. 532, 202 L.Ed.2d 536 (2019) (quotation omitted). We thus

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“place arbitration agreements upon the same footing as other contracts” when determining their validity. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 437, 140 S.Ct. 1637, 207 L.Ed.2d 1 (2020) (cleaned up). This reflects “the fundamental principle that arbitration is a matter of contract.” *Rent-A-Center*, 561 U.S. at 67, 130 S.Ct. 2772.

Accordingly, under § 2 of the FAA, all arbitration agreements and delegation provisions “may be invalidated by generally applicable contract defenses.” *Id.* at 68, 130 S.Ct. 2772 (cleaned up). The Supreme Court has held, however, that “[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” *Id.* at 70-71, 130 S.Ct. 2772 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). Thus, a court may still order arbitration if a party fails to “challenge[] specifically” the arbitration (or delegation) provision rather than “the contract as a whole.” *Id.* But “where a challenge applies ‘equally’ to the whole contract and to an arbitration or delegation provision, a court must address that challenge.” *Coinbase*, 602 U.S. at 151, 144 S.Ct. 1186 (citing *Rent-A-Center*, 561 U.S. at 71, 130 S.Ct. 2772).

Here, both the delegation provision and the Arbitration Agreement fail for the same reasons: both agreements, by selecting then-nonexistent tribal law and inapplicable “federal law” of contract to control their disputes, lacked mutual assent at the time of contracting. We proceed in three steps. First, we determine which law of contract

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formation applies, concluding that under *either* Illinois or tribal law, mutual assent is required. Second, we conclude that the delegation and arbitration provisions of the Loan Agreements lacked mutual assent, as they selected non-existent law to govern future disputes. Third, we consider an alternative basis for affirmance: the prospective waiver doctrine.³

A. Choice of Law

Courts apply “ordinary state-law principles that govern the formation of contracts” to determine “whether the parties agreed to arbitrate a certain matter (including

3. In taking this approach, we affirm on a basis not relied on by the district court but argued by the parties in supplemental briefing. The district court based its decision solely on prospective waiver, and the parties framed their initial arguments on appeal on that singular issue. As we discuss below, however, it remains an open question whether the prospective waiver doctrine applies to state statutory rights. *Infra* pp. 786-87. Formation, on the other hand, is a clear prerequisite for delegation and arbitration, and provides a narrower path to resolving this case on the facts before us. *See K.F.C.*, 29 F.4th at 837 (“Even the most sweeping delegation cannot send the contract-formation issue to the arbitrator[.]”). And we may generally affirm the district court’s judgment on any ground supported by the record. *See, e.g., E.D. by Duell v. Noblesville Sch. Dist.*, 151 F.4th 907, 914 n.1 (7th Cir. 2025); *see Kass v. PayPal Inc.*, 75 F.4th 693, 700 (7th Cir. 2023) (noting a motion to compel arbitration is procedurally akin to a summary judgment motion). Cognizant that the parties had not framed the issue as one of formation on appeal, we requested supplemental briefing on formation as to the arbitration and delegation provisions of the Loan Agreements. Both parties have now had the opportunity to fully brief and be heard on this issue.

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arbitrability).” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). As to which state’s law would apply to questions of formation, “we would normally respect the law chosen in the [parties’] agreement.” *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 809 (7th Cir. 2011).

That approach presents a challenge here. The Loan Agreement specifies “Tribal law and applicable federal law”—not state law—as the applicable law, further defining “Tribal law” as “any law, ordinance or regulation duly enacted by the Tribe or the Otoe-Missouria Consumer Finance Services Regulatory Commission.” But the “applicable law” is the FAA, which does not “provide a substantive law governing the formation or general interpretation of contracts.” *Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC*, 104 F.4th 978, 991 (7th Cir. 2024); *see also Druco Rests., Inc. v. Steak N Shake Enters.*, 765 F.3d 776, 781-82 (7th Cir. 2014). And the Otoe-Missouria Tribe adopted its Contract Code in May 2024, after Harris took out his loan in 2023 and Olds took out hers in 2022. Thus, the Tribal Contract Code submitted to the district court did not exist at the time the parties purportedly designated it as the law governing the arbitration and delegation provisions. At the time of the contract, the bodies of law mentioned in the governing law provision—federal and tribal—provided no rule of contract formation and defense.

Defendants urge, nonetheless, that because the Tribal Contract Code now exists and expressly states that its terms apply retroactively, it governs questions

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of formation. This assumes, of course, that parties *may* substitute tribal law for “ordinary state-law principles,” *First Options*, 514 U.S. at 944, 115 S.Ct. 1920—which we have yet to resolve. Plaintiffs counter that Illinois law—the law of the forum state—should govern questions of formation.

Ultimately, we need not decide between tribal law and Illinois law in this case because they share the same basic formation requirements, including mutual assent (or “consent” as phrased in the Tribal Contract Code) to the essential terms of the agreement. *Compare Kass v. PayPal Inc.*, 75 F.4th 693, 701 (7th Cir. 2023) (citing *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 20, 457 Ill.Dec. 45, 194 N.E.3d 534), *with* Tribal Contract Code § 10 (requiring mutual consent), *and id.* § 24 (“Consent is not mutual unless the parties all agree upon the same terms and conditions setting forth the parties’ respective obligations and rights under the contract[.]”). Though we lack judicial opinions applying the Tribal Contract Code’s mutual-consent requirement, neither party argues there is any daylight between “mutual consent” under the Code and “mutual assent” under Illinois law. We thus cite Illinois caselaw with the assumption, given the parties’ briefs, that the same rules apply under tribal law. *See Sosa v. Onfido, Inc.*, 8 F.4th 631, 637 (7th Cir. 2021) (“A choice-of-law determination is required only when a difference in law will make a difference in the outcome.” (quotation omitted)).

*Appendix A***B. Mutual Assent**

A valid contract requires “offer, acceptance, and consideration,” and “there must also be mutual assent as to the contract’s terms.” *Kass*, 75 F.4th at 701 (quotation omitted). Those terms must be so definite that “the promises and performances to be rendered by each party are reasonably certain.” *Bus. Sys. Eng’g, Inc. v. Int’l Bus. Machs. Corp.*, 547 F.3d 882, 888 (7th Cir. 2008) (quoting *Acad. Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29, 161 Ill.Dec. 335, 578 N.E.2d 981 (1991)). Even though “some contract terms may be missing or left to be agreed upon, . . . essential terms” must be certain. *Acad. Chicago Publishers*, 144 Ill. 2d at 30, 161 Ill.Dec. 335, 578 N.E.2d 981. And without “mutual assent as to the terms of the contract,” there is no enforceable contract. *Id.* “[W]e look at the parties’ intent to be bound and the agreement on the material terms *at the time of contracting*, not in its aftermath.” *In re Broiler Chicken Antitrust Litig.*, 167 F.4th 430, 439 (7th Cir. 2026) (citing *Abbott Laboratories v. Alpha Therapeutic Corp.*, 164 F.3d 385, 387-89 (7th Cir. 1999)).

Here, the lack of definiteness in the contract’s Governing Law provision contradicts any mutual assent to the delegation or arbitration provisions. The contract purports to have the arbitrator use “applicable federal law” or Otoe-Missouria tribal law to determine the “interpretation, applicability, validity, arbitrability, enforceability, formation or scope of . . . this Arbitration Agreement.” But as discussed above, federal law does not provide underlying principles of contract formation

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and there was no tribal law for an arbitrator to apply when plaintiffs signed their contracts. We cannot, then, “ascertain what the parties have agreed to do” in committing their future disputes to arbitration. *Bus. Sys. Eng’g, Inc.*, 547 F.3d at 888 (quoting *Acad. Chicago Publishers*, 144 Ill. 2d at 29, 161 Ill.Dec. 335, 578 N.E.2d 981). Since it was not “reasonably certain” what law Harris and Olds, or for that matter WithU Loans, Inc., agreed would be used in arbitration, they cannot have mutually assented to the delegation or arbitration terms. *Id.*⁴

Jackson v. Payday Financial, LLC provides a useful analogy. In that case, the plaintiffs entered agreements for high-interest loans with a provision assigning future disputes to arbitration “which shall be conducted by the Cheyenne River Sioux Tribal Nation.” 764 F.3d 765, 769 (7th Cir. 2014). As it turned out, the Cheyenne River Sioux Tribal Nation had no arbitration procedures, process for hiring arbitrators, or rules to govern consumer disputes—it was a purely “illusory forum.” *Id.* at 776. Though we ultimately found the arbitration clause unenforceable based on (among other things) unconscionability under Illinois law, we noted that “mutuality of intent . . . [was]

4. Defendants suggest that applicable tribal law *did* exist prior to the signing of the Loan Agreements, citing a Consumer Financial Services Ordinance that the Tribe adopted in 2018. But that ordinance, beyond requiring that loan agreements include certain notices, simply restates that “[t]he Loan is made within the Tribe’s jurisdiction and governed by Tribal law and applicable federal law”; it does not provide substantive rules of contract. Otoe-Missouria Tribe of Indians, Resolution OTMC #050341 § 6.2 (May 3, 2018), <https://perma.cc/2X58-7UNN>.

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not at all apparent” because “[t]he loan consumers did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed.” *Id.* at 781. That same logic applies here: plaintiffs agreed to arbitrate and delegate gateway questions of arbitrability on the understanding that *some* law would govern in that alternative forum. But that law did not exist at the time of contracting. Indeed, it did not exist until *after* plaintiffs filed their action in federal court. We cannot say, therefore, that there was a “meeting of the minds” as to an essential element of the parties’ bargain to arbitrate: the substantive law that would bind the arbitrator.

We pause to distinguish the language at issue here from the run-of-the mill choice-of-law provision. A chosen jurisdiction’s law will change over time and parties may validly accept the risk posed by this change as part of their contract. The difference here is that the Otoe-Missouria Tribal Contract Code was completely nonexistent at the time the parties entered into the delegation and arbitration agreements. It is one thing for parties to agree to be bound by a settled body of law that is subject to later *change*; it is quite another to select a non-existent body of law, which is subject to later *invention*. The latter provides no basis for us to conclude that the parties shared a mutual understanding as to what law would govern their future disputes.

That absence of mutual understanding is particularly evident here where the Otoe-Missouria Tribe of Indians—with the unilateral ability to create applicable tribal

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law—has a proprietary and financial interest in the defendant corporations. Nothing in the record suggests that defendants disclosed—or that plaintiffs knew—that the Tribe both owned the defendants and retained the ability to draft its law to materially disadvantage plaintiffs in a future dispute, such as by omitting unconscionability as a defense to enforcement.

Defendants cite cases where we have enforced arbitration agreements despite holding that a choice-of-law provision is unenforceable or inapplicable. *See Faulkenberg*, 637 F.3d at 809 (applying Illinois law as argued by parties rather than Texas law contained in choice-of-law provision); *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1026 (7th Cir. 2003) (enforcing arbitration agreement despite finding choice-of-law provision unenforceable). But this misunderstands the argument here: it is not that the Governing Law provision is *unenforceable*—we make no ruling on that question—but that the Governing Law provision, in this case, *reflects* the parties’ lack of mutual assent as to delegation and arbitration at the time of contracting.⁵ The provision simultaneously reflects the parties’ desire to choose governing law as an integral part of the dispute resolution

5. Without making any holding as to unconscionability in this case, we recognize that under Illinois law the mutual assent inquiry may turn on facts that go to both the intent of the parties and unconscionability. *See Greenfield v. Ervin Cable Constr., LLC*, 2025 IL App (5th) 240210-U, ¶ 45, 2025 WL 913863, *as modified on denial of reh’g* (Mar. 25, 2025) (“[M]any of the trial court’s findings on the issue of mutual assent would also apply to the issue of procedural unconscionability.”).

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process and frustrates that very end by specifying law that does not exist.

Defendants assert that plaintiffs *cannot* contest formation as to the delegation or arbitration provisions because their statutory claims presume the existence of an agreement: the agreement to issue loans at allegedly unlawful rates. But defendants confuse the broader Loan Agreement—or “container contract”—with the nested agreements to arbitrate future disputes and delegate questions of arbitrability. *See MZM Constr. Co., Inc. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 397 (3d Cir. 2020). There is no doubt that plaintiffs agreed to take out loans at the rates they now claim were unlawful. But the Supreme Court has made clear that agreements to arbitrate or delegate questions of arbitrability are “severable” from the container contract and, indeed, from each other. *Buckeye*, 546 U.S. at 445, 126 S.Ct. 1204; *Rent-A-Center*, 561 U.S. at 72, 130 S.Ct. 2772; *see also Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983) (“The agreement to arbitrate and the agreement to buy and sell . . . are separate.”). Thus, we view the delegation and arbitration provisions as separate agreements—and a formation challenge to either does not presume the invalidity of the container contract. *Cf. MZM*, 974 F.3d at 397-98 (noting that in the other direction, a formation challenge to the *container* contract may apply to a nested arbitration agreement).

Plaintiffs challenge the formation of the delegation and Arbitration Agreements specifically, not the Loan Agreement as a whole. They do not contend that the

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Governing Law provision was an “essential” term to the container contract. Setting up a dispute-resolution procedure under non-existent law is no doubt material to that separate and severable Arbitration Agreement, but that is not necessarily so for a broader agreement to borrow money. *Rent-A-Center*, 561 U.S. at 71, 130 S.Ct. 2772; *cf. Jackson*, 764 F.3d at 778 (finding choice-of-forum provision unenforceable where “it was not possible for the Plaintiffs to ascertain the dispute resolution processes and rules to which they were agreeing”); *Broiler Chicken*, 167 F.4th at 439 (materiality must be evaluated “in the context of the particular contract” based in part on “the purpose that [the parties] sought to accomplish” (quotations omitted)).

In contrast, the same mutual-assent argument that invalidates the delegation provision “applies equally” to the Arbitration Agreement itself, which is controlled by the same choice-of-law provision. *Coinbase*, 602 U.S. at 151, 144 S.Ct. 1186. As with delegation, the parties intended to arbitrate their disputes according to a predetermined body of governing law but chose sources of law (federal and tribal) that would provide an arbitrator with no substantive rules of contract with which to resolve those future disputes. Indeed, given the Tribe’s ability to unilaterally draft rules of contract formation and defense directly for defendants’ benefit, it is unclear that what the parties “agreed” to could even be termed “arbitration” under the FAA at all. *See Flores v. New York Football Giants, Inc.*, 150 F.4th 172, 184-85 (2d Cir. 2025) (affirming denial of motion to compel arbitration where “the late unilateral designation of an adviser to

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the [defendant] as arbitrator neither provides for an even facially independent arbitral forum, nor remedies the [defendant's] unilateral contractual authority over both the substance of [plaintiff]'s statutory claims and the procedures governing their alleged 'arbitration'). There was, therefore, no meeting of the minds as to this essential element of their agreement to arbitrate.

In holding that the parties did not mutually assent to the specific delegation provision and Arbitration Agreements in this case, we do not mean to cast doubt on other contracts entered under the auspices of Otoe-Missouria tribal law prior to the enactment of the Tribal Contract Code. Depending on the language of other agreements, the absence of governing law chosen by the parties may not relate to an essential term, or there may be alternative law that *does* provide substantive rules of decision. But on the record before us, we cannot conclude that the parties mutually assented to arbitrate (including on issues of arbitrability) where their specific agreement directed the arbitrator to apply a body of governing law that did not exist at the time of contracting.

C. Prospective Waiver

Defendants face another hurdle to enforcing the arbitration provision: the "effective vindication" or "prospective waiver" doctrine. The doctrine reflects the broad principle that arbitration provides only an alternative forum for resolving disputes and should not change the nature of the underlying rights at issue. It stems from language in *Mitsubishi Motors Corp. v. Soler Chrysler-*

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Plymouth, Inc., where the Supreme Court held that a corporation could be compelled to arbitrate its Sherman Act claim against another corporation: “By agreeing to arbitrate a statutory claim, a party *does not forgo the substantive rights* afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (emphasis added). This passage has been read to stand for the notion that a party cannot “prospectively waive” their substantive rights just by agreeing to arbitrate their claims. Applying this principle, the district court found the Arbitration Agreement unenforceable because it required plaintiffs to prospectively waive their Illinois state-law rights in arbitration.

The Supreme Court’s prospective-waiver cases have generally involved federal statutory rights. *See, e.g., id.* at 626-28, 105 S.Ct. 3346 (Sherman Act); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (Carriage of Goods by Sea Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (Age Discrimination in Employment Act). *But see Preston v. Ferrer*, 552 U.S. 346, 360, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (holding that prospective waiver did not invalidate arbitration agreement where plaintiff “relinquishe[d] no substantive rights . . . California law may accord him”). Defendants thus argue that the prospective-waiver doctrine only applies to rights created by federal law, not those created by state law. They cite Justice Kagan’s 2013 dissent in *American Express Co. v. Italian Colors Restaurant*, which other courts have read to imply that

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the prospective-waiver doctrine does not apply to state-law substantive rights. *See* 570 U.S. 228, 252, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013) (Kagan, J., dissenting) (“Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law[.]”); *Dr.’s Assocs., LLC v. Tripathi*, 794 F. App’x 91, 94 (2d Cir. 2019) (nonprecedential order); *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 935-36 (9th Cir. 2013).

In 2022, however, the Supreme Court again mentioned the prospective-waiver doctrine and, in a footnote, suggested that it was “not . . . unique [to] federal statutes.” *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 n.5, 142 S.Ct. 1906, 213 L.Ed.2d 179 (2022). *Viking River Cruises*, therefore, at the very least strongly suggests that an arbitration agreement like defendants’ impermissibly forces borrowers to prospectively waive their state-law rights.

We take no issue with the district court’s decision to rely on prospective waiver, but we do not find it necessary to do the same. Because we find that defendants’ motion to compel arbitration fails on ordinary formation principles, we need not reach the untrodden ground of prospective waiver of state-law rights post-*Viking River Cruises* and leave that question for another day.

III. Conclusion

The judgment of the district court is AFFIRMED.

20a

**APPENDIX B — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, FILED DECEMBER 12, 2025**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 24-2056

JOSHUA HARRIS AND DONITA OLDS, ON
BEHALF OF PLAINTIFFS AND THE CLASS
MEMBERS DESCRIBED HEREIN,

Plaintiffs-Appellees,

v.

W6LS, INC., D/B/A WITHU AND WITHU LOANS,
AND CALIBER FINANCIAL SERVICES, INC.,

Defendants-Appellants.

Filed December 12, 2025

ORDER

Before

DORIS L. PRYOR, *Circuit Judge*
JOSHUA P. KOLAR, *Circuit Judge*
NANCY L. MALDONADO, *Circuit Judge*

Originating Case Information:
District Court No: 1:23-cv-16429
Northern District of Illinois, Eastern Division
District Judge Lindsay C. Jenkins

Appendix B

The parties shall, by January 12, 2026, provide supplemental briefing on the following issue: whether the non-existence of the Otoe-Missouria Tribe's Tribal Contract Code, and lack of applicable federal common law (*see Rodgers-Rouzier v. American Queen Steamboat Operating Co., LLC*, 28 104 F.4th 978, 991 (7th Cir. 2024)), at the time of Plaintiffs' loan agreements impacts the formation or enforceability of the delegation clause at issue.

**APPENDIX C — MEMORANDUM OPINION AND
ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION,
FILED MAY 22, 2024**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 23 CV 16429

JOSHUA HARRIS, *et al.*,

Plaintiffs,

v.

W6LS, INC. D/B/A WITHU
AND WITHU LOANS, *et al.*,

Defendants.

Filed May 22, 2024

MEMORANDUM OPINION AND ORDER

Lindsay C. Jenkins, United States District Judge

Plaintiffs Joshua Harris and Donita Olds brought this putative class action against Defendants W6LS, Inc. and Caliber Financial Services, Inc.,¹ contending that loan

1. The Court does not resolve any issues with respect to the 20 Doe Defendants who have not been identified. [*See* Dkt. 7.]

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agreements they entered into with W6LS violate state and federal law. [Dkt. 7.] Defendants move to compel arbitration, as required by the loan agreements. [Dkt. 26.]² Plaintiffs do not dispute that the arbitration agreement exists and purports to require individual arbitration; instead, they argue that the arbitration agreement is unenforceable because it waives their substantive state law rights. Supreme Court precedent supports Plaintiffs' position, so the motion to compel arbitration is denied.³

I. Background

Little need be said about the substance of Plaintiffs' allegations in this posture. Harris and Olds each took out a \$600 loan from W6LS d/b/a WithU Loans. [Dkt. 7 ¶¶ 25–

2. Defendants state that they are specially appearing for the purpose of moving to compel arbitration and “do not waive and expressly reserve their ability to challenge this Court’s subject matter jurisdiction due to Defendants’ sovereign immunity from suit.” [Dkt. 27 at 1 n.1.] This statement is puzzling. “Subject-matter jurisdiction is the first issue in any case,” and the Court has “an independent obligation to determine that jurisdictional requirements are satisfied.” *Ware v. Best Buy Stores, L.P.*, 6 F.4th 726, 731 (7th Cir. 2021) (cleaned up). There is no jurisdictional problem, here, however. Defendants contend that they enjoy tribal sovereign immunity [Dkt. 27 at 1], but this type of sovereign immunity is not jurisdictional, *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822–23 (7th Cir. 2016), so the Court can entertain the motion to compel without overstepping the bounds of its Article III power.

3. The Court has reviewed Plaintiffs’ proposed additional filing. [Dkt. 37.]

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26; Dkt. 7-1 Exh. A–B (copies of the loan agreements).]⁴ The contracts disclosed interest rates approaching 500% annually. [Dkt. 7 ¶¶ 25–26.] The contracts also contained identical arbitration provisions. [Dkt. 7-1 at 16–23 (Harris’s agreement), 42–49 (Olds’s agreement).]⁵ The arbitration provision permits either party to require any “Dispute” to be decided by individual arbitration, rather than litigation, and that the provision is broad enough to cover the disputes at issue here. [Dkt. 7-1 at 18–23; Dkt. 27 at 3–9; *see* Dkt. 33 (not contesting this point).] The arbitration provision states that federal law and the law of the Otoe-Missouria Tribe of Indians (“Tribal Law”) apply to the loan agreement. [Dkt. 7-1 at 19; *see id.* at 4 (defining “Applicable Law” to mean federal and Tribal Law).]

Plaintiffs filed a putative class action alleging that Defendants’ loans violate state and federal law. [Dkt. 7.] Defendants move to compel individual arbitration as required by the loan agreements. [Dkt. 26.]

II. Legal Standard

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, governs when courts must compel arbitration. Section 2 of the FAA provides that any written contract

4. Citations to exhibits refer to the electronic pagination, not the page numbers in the underlying documents. Citations to briefs refer to the pagination in the briefs themselves.

5. Hereafter, for convenience, the Court cites the relevant portion of Harris’s agreement without citing the identical portion of Olds’s agreement.

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“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. A motion to compel is granted “if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate.” *Scheurer v. Fromm Fam. Foods LLC*, 863 F.3d 748, 752 (7th Cir. 2017). However, an arbitration agreement that violates public policy is not enforceable. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013).

III. Analysis

It is undisputed that the parties entered into loan agreements that contain provisions requiring individual arbitration. [Dkt. 27 at 3–9; Dkt. 33 at 1.]⁶ The only question, therefore, is whether the arbitration agreement is enforceable. The Court agrees with Plaintiffs that it is not.

A. Delegation Clause

At the threshold, the Court must determine whether Plaintiffs have challenged the clause delegating the

6. The briefs discuss equitable estoppel, but Defendants clarify that they only argue that Plaintiffs are estopped from challenging the existence and validity of the loan agreements, not the arbitration provision [Dkt. 36 at 1–2], so the Court does not discuss this issue. Nor does the Court address Plaintiffs’ arguments besides the prospective waiver doctrine.

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question of the enforceability of the arbitration provision to the arbitrator. [Dkt. 7-1 at 18 (defining arbitrable disputes to include those relating to the “enforceability” of “this Arbitration Agreement”).] This question is for the arbitrator unless Plaintiffs have “challenged the delegation provision specifically.” *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010). Plaintiffs argue that the “delegation clause is unenforceable for the same reasons as the underlying arbitration agreement.” [Dkt. 33 at 10–11.] Defendants contend that *Rent-A-Center* requires Plaintiffs’ arguments about the delegation clause to be distinct from their arguments about the arbitration agreement as a whole; because Plaintiffs’ arguments “have nothing to do with the delegation provisions,” Defendants urge that they do not constitute a specific challenge to the delegation provision. [Dkt. 36 at 10.]

The Court disagrees. “The Seventh Circuit has not addressed the enforceability of delegation provisions in tribal lending contracts,” *Fahy v. Minto Dev. Corp.*, — F. Supp. 3d —, 2024 WL 1116050, at *8 (N.D. Ill. Mar. 14, 2024), but the Second, Third, and Fourth Circuits have held that under *Rent-A-Center*, “[a] party may contest the enforceability of the delegation clause with the same arguments it employs to contest the enforceability of the overall arbitration agreement.” *Hengle v. Treppa*, 19 F.4th 324, 335 (4th Cir. 2021) (citation omitted); accord *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019). In the absence of Seventh Circuit authority to the contrary, the Court will follow the consensus view of the circuits that have addressed this issue.

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Defendants point to the Ninth Circuit’s opinion in *Brice v. Haynes Investments, LLC*, which came out the other way than the Second, Third, and Fourth Circuits. 13 F.4th 823, 833–36 (9th Cir. 2021); *see id.* at 836 (“Although some of the out-of-circuit decisions properly tee up the question, none of them follow through.”). [Dkt. 36 at 10–11.] The problem for Defendants is that, as they acknowledge, the Ninth Circuit voted to rehear *Brice* en banc and vacated the panel opinion, 35 F.4th 1219 (9th Cir. 2022), and then the case settled. “Defendants submit that the original opinion is nonetheless highly persuasive,” but they do not explain why or cite authority for the proposition that the Court should treat the vacated opinion as persuasive. [Dkt. 36 at 10 n.1.]

In fact, the opposite is true. *Brice* was not a case where Ninth Circuit precedent precluded the panel from reaching what it viewed as the correct decision, which could have required en banc review even if the panel opinion’s reasoning was sound. *Cf. Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc) (discussing when a panel may depart from circuit precedent). Rather, the *Brice* panel created a circuit split, and the full Ninth Circuit likely granted rehearing en banc because it doubted that outcome. Under these circumstances, the Court treats the grant of en banc review as a signal that the *Brice* panel erred, which reinforces the correctness of the Second, Third, and Fourth Circuits’ approach.

The Court holds that Plaintiffs have adequately challenged the delegation clause under *Rent-A-Center*, and if they succeed on their challenge to the arbitration

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agreement as a whole, the delegation clause must fall with the rest of the agreement.

B. Prospective Waiver Doctrine

Plaintiffs argue that the arbitration agreement as a whole is unenforceable because it impermissibly purports to waive state substantive rights. [Dkt. 33 at 4–5.] The crux of this issue is whether the prospective waiver (or effective vindication [*see* Dkt. 36 at 2]) doctrine applies only to waivers of federal substantive rights, or if it also extends to state substantive rights. The Court concludes that it does.

1. Early Supreme Court Caselaw

Beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court has indicated that an arbitration provision that prospectively waived statutory rights is invalid on public policy grounds. It “note[d] that in the event the [arbitration provision’s] 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, [the Court] would have little hesitation in condemning the agreement as against public policy.” 473 U.S. 614, 637 n.19 (1985) (collecting authorities).

The Court has reiterated the doctrine in subsequent cases. In *14 Penn Plaza LLC v. Pyett*, the Court stated that “federal antidiscrimination rights may not be prospectively waived,” but “an agreement to arbitrate

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those statutory claims” does not constitute “a prospective waiver of the substantive right.” 556 U.S. 247, 265 (2009) (citation omitted). *Italian Colors* explained that the Supreme Court has “expressed a willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party’s *right to pursue* statutory remedies,” which “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights,” but it did not invalidate an individual-arbitration provision that might have made it too costly to economically pursue certain claims. 570 U.S. at 235–36 (cleaned up).

The *Italian Colors* dissent argued that the doctrine only applied to waivers of federal substantive rights and that the majority erred by relying on a case involving state law to uphold an arbitration provision:

AT&T Mobility [LLC v. Concepcion, 563 U.S. 333 (2011),] involved a *state* law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA’s purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law,

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like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them.

Id. at 252 (Kagan, J., dissenting). This view, of course, did not carry the day. *See id.* at 235–38 & 238 n.5 (majority op.) (holding that the prospective waiver doctrine does not require that a party be able to pursue its claims in an economically effective manner and rejecting the dissent’s attempt to distinguish *AT&T Mobility*).

2. *Viking River*

Recently, the Court decided *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), a case that is central to the arguments here. The Court stated, in a footnote:

In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous. The basis of this principle is not anything unique about federal statutes. It is that the FAA requires only the enforcement of “provisions” to settle a controversy “by arbitration,” [9 U.S.C.] § 2, and not any provision that happens to appear in a contract that features an arbitration clause. That is why we mentioned this principle in *Preston* [*v. Ferrer*], which concerned claims

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arising under state law. See [552 U.S. 346, 359 (2008)]^{7 1} (noting that under the agreement, a party “relinquished no substantive rights California law may accord him”).

Id. at 653 n.5 (cleaned up). Plaintiffs argue that this footnote confirms that “[t]he prospective waiver doctrine applies to state statutory claims as well as federal.” [Dkt. 33 at 4.]⁸ Defendants counter that *Viking River* was not a

7. *Viking River* cites *Preston* at page 360, but the quotation actually appears on page 359. The Court has modified the citation to reflect the correct page.

8. Plaintiffs also cite the Second Circuit decision *Gingras* in support of this proposition, but that decision does not support their argument. While *Gingras* referenced state law claims in connection with the prospective waiver doctrine, it had no need to decide whether a waiver of substantive state law rights makes an arbitration agreement unenforceable because the agreement there also waived federal substantive rights. 922 F.3d at 127. In a later decision, the Second Circuit did not read *Gingras* to settle this question. *Doctor’s Associates, LLC v. Tripathi*, 794 F. App’x 91, 94 (2d Cir. 2019) (nonprecedential) (“[T]hese precedents expressly deal only with federal statutory rights, which the Tripathis did not assert in the California state-court action. Moreover, even if some variant of the effective-vindication rule were to apply in the context of state statutory rights, *see, e.g.*, [*Gingras*, 922 F.3d at 127], such a rule would not apply here” (cleaned up)).

Doctor’s Associates also does not help Defendants because the arbitration clause there simply required the parties to arbitrate their state law claims; it did not waive those rights. *See id.* The same reasoning applies to federal rights, *see 14 Penn Plaza*, 556 U.S. at 265, so *Doctor’s Associates* is neutral on the question of whether the prospective waiver doctrine applies to substantive state law rights.

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prospective waiver case and that the opinion “contains no discussion whatsoever on the doctrine and does not alter the consensus of federal courts that the doctrine is limited to preserving federal statutory rights.” [Dkt. 36 at 4–5.]

While Defendants are correct that *Viking River* did not expressly mention the prospective waiver or effective vindication doctrine, context makes clear that footnote 5 is about that doctrine. The *Viking River* opinion cites *Preston*, which in turn cites *Mitsubishi* in context of the prospective waiver doctrine. *See* 596 U.S. at 653 n.5; *Preston*, 552 U.S. at 359. And the argument the Supreme Court was responding to was about the prospective waiver doctrine. *Viking River* stated in its reply brief:

While Moriana repeatedly invokes *Mitsubishi* for the supposed rule that “an arbitration agreement cannot waive an entire statutory cause of action,” that rule applies only to waivers of “federal statutory rights,” not state-law ones. *Italian Colors*, 570 U.S. at 235. When it comes to state efforts to insulate a state law from bilateral arbitration, the FAA and the Supremacy Clause supply the rule of decision.”

Reply Brief at 6 n.1, 2022 WL 839398 (cleaned up).

Nor can Defendants escape the conclusion that *Viking River* meant what it said when it rejected this argument: “In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal

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statutes. This argument is erroneous.” 596 U.S. at 653 n.5. This is not, as Defendants argue, “reiterat[ing] the unremarkable position that an agreement to arbitrate merely submits resolution of statutory rights to an arbitral forum pursuant to the parties’ agreed upon procedure.” [Dkt. 36 at 5.] That is what the Supreme Court stated in the main text on the same page:

Moriana is correct that the FAA does not require courts to enforce contractual waivers of substantive rights and remedies. The FAA’s mandate is to enforce *arbitration agreements*. . . . An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum.

596 U.S. at 653 (cleaned up). Footnote 5 makes a distinct point, that the prospective waiver principle applies to state as well as federal substantive rights. *Id.* at 653 n.5.

The Court also disagrees that a “consensus” of courts had recognized that the prospective waiver doctrine does not apply to state substantive rights prior to *Viking River*. Defendants principally rely on the dissent in *Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting), but the dissent did not prevail, and the relevant passage did not note a point of agreement with the majority, *see id.* at 235–

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38 & 238 n.5 (majority op.) (disagreeing with the dissent’s discussion of *AT&T Mobility*); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (“A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.”). The *Italian Colors* dissent did not speak for a majority of the Supreme Court regarding the prospective waiver doctrine.

The lower court cases that Defendants contend constitute the consensus suffer from one of two flaws. Some do not squarely address whether the doctrine applies to state substantive rights. For example, in *Hengle*, the Fourth Circuit confronted a waiver of federal and state law in favor of tribal law and concluded that the waiver rendered the arbitration provision invalid. 19 F.4th at 336–42; *accord Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 784 (E.D. Pa. 2016); *Ryan v. Delbert Servs. Corp.*, 2016 WL 4702352, at *5 (E.D. Pa. 2016). *Hengle* framed the doctrine in terms of waiver of federal rights, but it did not address whether an arbitration clause that retains federal rights but waives state rights is enforceable. Staying that “[an] arbitration provision [that] impermissibly waives federal substantive rights without recourse to federal substantive law” “is unenforceable as a violation of public policy,” 19 F.4th at 338, is not equivalent to saying that an arbitration clause that waives state substantive rights but retains federal rights *is* enforceable.

The pre-*Viking River* cases that do expressly discuss whether the prospective waiver doctrine applies to state substantive rights rely on the *Italian Colors* dissent.

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See Torres v. CleanNet, U.S.A., Inc., 90 F. Supp. 3d 369, 377–78 (E.D. Pa. 2015); *see also Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 935–36 (9th Cir. 2013) (not cited by Defendants but relying on the *Italian Colors* dissent for the same point). But because these decisions predated *Viking River*, they necessarily could not explain how following the *Italian Colors* dissent is consistent with the *Viking River* majority. Perhaps the *Italian Colors* dissent was the most persuasive authority available on the question of whether the doctrine applies to state rights at the time, and nothing in the *Italian Colors* majority expressly contracts the dissent’s view. That is no longer the case post-*Viking River*, however, so these decisions’ persuasive value is minimal.

Defendants’ final point about *Viking River* also misses the mark. They argue that it matters that “the holding in *Viking River* enforced an arbitration agreement as to individual claims because the FAA preempted contrary state law [T]he Court did not enforce state law while at the same time compelling arbitration. This further shows the FAA is not concerned with preserving rights under state law.” [Dkt. 36 at 5.] This does not follow. The Supreme Court’s reasoning is “just as binding” as its holdings. *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019). Footnote 5 appeared in a discussion of why the arbitration agreement was enforceable, and its reasoning—explaining that *Preston* (and implicitly *Mitsubishi*) do not distinguish between federal and state sources of substantive rights—speaks for a majority of the Supreme Court. 596 U.S. at 653 & n.5. Even if the footnote was technically unnecessary to the *Viking River* decision, it is telling

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that the majority expressly stated that “[t]he basis of this principle is not anything unique about federal statutes,” 596 U.S. at 653 n.5, rather than reserving the question, as the Supreme Court often does. *See, e.g., Luna Perez v. Sturgess Pub. Schs.*, 598 U.S. 142, 149 (2023) (noting that a previous opinion “went out of its way to reserve rather than decide [a] question” (citation omitted)); *cf. Reich v. Cont’l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (noting the persuasive value of recent, considered dicta).

3. Post-Viking River Caselaw

Defendants next cite post-*Viking River* decisions to bolster their argument that the Supreme Court did not recognize that the prospective waiver doctrine applies to waivers of state substantive law in addition to federal substantive law. [Dkt. 36 at 5–6.] These efforts fail.

Defendants cite *Rivas v. Coverall North America, Inc.*, 2024 WL 1342738 (9th Cir. Mar. 29, 2024) (nonprecedential), which they submit “further confirms that *Viking River* did not extend the doctrine to preserving state rights.” [Dkt. 36 at 5.] There, the plaintiff could not afford to pay his share of the arbitration filing fee, which he argued meant he could not “effectively vindicate his rights in arbitration because the delegation clause purported to require cost-splitting just to appoint an arbitrator to decide gateway issues of arbitrability.” 2024 WL 1342738, at *2 (cleaned up). *Rivas* noted that *Italian Colors* left open the possibility that the prospective waiver doctrine “may ‘perhaps cover filing and administrative fees attached to arbitration that are so high as to make access

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to the forum impracticable,” *id.* (quoting *Italian Colors*, 570 U.S. at 236), but it cited pre-*Viking River* circuit precedent holding that this doctrine ‘does not extend to state statutes,’ *see id.* (quoting *Ferguson*, 733 F.3d at 936). *Ferguson* relied on the *Italian Colors* dissent, with which it thought the *Italian Colors* majority would agree on Supremacy Clause grounds. 773 F.3d at 935–36. But *Viking River* took the opposite view, 596 U.S. at 653 n.5, and the Ninth Circuit did not explain how continuing to follow the *Italian Colors* dissent squares with *Viking River*. *See Rivas*, 2024 WL 1342738, at *2. *Rivas* is not binding on this Court, and its lack of analysis on this point renders it unpersuasive.

Defendants also cite *Walton v. Uprova Credit LLC*, which interpreted *Viking River* not to extend the prospective waiver doctrine to state statutes:

Extending the prospective waiver rule to state law claims is, in our view, incompatible with the rule’s purpose. The prospective waiver rule rests on the uncontested understanding that, in crafting the FAA, Congress did not intend to preempt rights created by other federal statutes. . . .

Mr. Walton attempts to invoke *Viking River Cruises, Inc. v. Moriana* for the proposition that the Supreme Court has condoned the application of the prospective waiver rule to claims arising under state law. In that decision, the Court characterized as “erroneous” the

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petitioner’s argument “that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes.” Stripped of its context, this footnote would surely lend itself to Mr. Walton’s portrayal. However, nowhere in the Viking River’s decision did the Court mention the prospective waiver doctrine (or its alternative namesake, the effective vindication exception). To the contrary, the Court simply reiterated that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in the arbitral forum.” In other words, substantive statutory rights—whether they be federal or state—are not nullified simply by virtue of their resolution in an arbitral, rather than a judicial, forum.

More relevant to the case at bar is the holding in *Italian Colors*, where the Supreme Court upheld arbitration agreements that precluded class arbitration of federal antitrust claims, despite the allegation that individual claims were not worth the expense involved in proving them Though Justice Kagan rejected the majority opinion’s narrow interpretation of the prospective waiver rule, she, too, affirmed that the rule has no bearing on the vindication of state law Rather, when compelling arbitration under the FAA conflicts with state law, standard preemption principles dictate that federal law must prevail.

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In light of these controlling principles, we disagree with Mr. Walton that the disclaimer of state law renders the delegation clause unenforceable under the prospective waiver rule. No fair reading of the rule’s purpose, nor of Supreme Court caselaw, supports such a conclusion. The delegation clause at issue here repeatedly affirms the applicability of federal law and therefore contains no waiver of federal rights. By that measure, the delegation clause is enforceable.

— F. Supp. 3d —, 2024 WL 1241836, at *8–9 (S.D. Ind. Mar. 21, 2024) (cleaned up). [*See* Dkt. 36 at 5–6.]

The *Walton* court thoroughly explained why it believes that the prospective waiver doctrine does not apply to state statutes, but this Court respectfully disagrees. The *Walton* court reads *Viking River* not to address prospective waiver, *see* 2024 WL 1241836, at *9 (“[N]owhere in the *Viking River*’s decision did the Court mention the prospective waiver doctrine (or its alternative namesake, the effective vindication exception).”), but this Court interprets footnote 5 to be a response to an argument about the scope of the prospective waiver doctrine. *See Viking River*, 596 U.S. at 653 n.5; Reply Brief at 6 n.1, 2022 WL 839398. The *Italian Colors* dissent’s analysis that the doctrine does not apply to substantive state law rights, no matter how well reasoned, must give way to the *Viking River* majority.

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Plaintiffs cite two district court opinions that reached the same conclusion as this Court does. [Dkt. 33 at 4–5.]⁹ In *Fahy*, the court reasoned:

The defendants also contend that the prospective waiver doctrine applies only to waivers of federal law. But the Supreme Court directly addressed this contention in *Viking River Cruises, Inc. v. Moriana*. In that case, the defendant argued in briefing that the prospective waiver doctrine applied only to waivers of federal statutes. The Court rejected the defendant’s argument as “erroneous” and highlighted its discussion of the prospective waiver doctrine in *Preston v. Ferrer*, a case that concerned state law claims. The defendants attempt to downplay the significance of the Supreme Court’s language by calling it “dicta.” But the Seventh Circuit has stated that absent controlling precedent, considered Supreme Court dictum “provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.” *Reich*, [33 F.3d at 757].

This Court finds no reason to discount the Supreme Court’s express rejection of the

9. Plaintiffs also cite *Harris v. FSST Management Services*, — F. Supp. 3d —, 2023 WL 5096295, at *4 (N.D. Ill. Aug. 9, 2023), but in that case, there was a waiver of federal and state law, making it distinguishable on the same grounds as *Gingras*. [See Dkt. 36 at 7.]

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defendant’s argument in *Viking River Cruises, Inc.*

2024 WL 1116050, at *13–14 (cleaned up); *accord Fitzgerald v. Wildcat*, — F. Supp. 3d —, 2023 WL 5345302, at *9–10 (W.D. Va. Aug. 18, 2023). The Court agrees with these decisions, which in its view correctly recognize that footnote 5 in *Viking River* is a clear statement about the scope of the prospective waiver doctrine.

Defendants counter that “Plaintiffs’ position and their cited cases . . . cannot be reconciled with Justice Kagan’s explanation of the Effective Vindication Doctrine’s origins and its purpose. Plaintiffs and the cases they rely upon offer no rationale as to why the FAA or a federal court should have any interest in preserving rights under any particular state law.” [Dkt. 36 at 6–7.] Plaintiffs need not reconcile their position with a dissent, however, and even if Defendants are correct about the policy rationale underlying the prospective waiver doctrine, that would not change the fact that a majority of the Supreme Court said that the doctrine applies to state law rights.¹⁰

10. The fact that the two *Italian Colors* dissenters who remained on the Court when it decided *Viking River* joined the majority in that decision does not imply that *Viking River*’s articulation of the prospective waiver doctrine is the same as the *Italian Colors* dissent’s. In *Edwards v. Vannoy*, the majority suggested that it was inconsistent for Justice Kagan to “impugn today’s majority for supposedly shortchanging criminal defendants” when she had dissented from *Ramos v. Louisiana*, the rule of which the Supreme Court declined to give retroactive effect in *Edwards*. 593 U.S. 255, 275 (2021). The dissent replied: “I dissented in *Ramos* precisely because of its abandonment of *stare*

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* * *

For the foregoing reasons, the Court holds that *Viking River* establishes that the prospective waiver doctrine applies to waivers of substantive state law rights, in addition to federal rights.

C. Application to W6LS’s Arbitration Agreement

Having concluded that the prospective waiver doctrine applies to substantive state rights, the Court now applies the doctrine to the arbitration agreement here. If the contracts included a waiver of federal rights, ample precedent supports holding that the arbitration agreement is wholly invalid. *See, e.g., Hengle*, 19 F.4th at 342–44; *Williams*, 965 F.3d at 241–42; *Gingras*, 922 F.3d at 127; *cf. Italian Colors*, 570 U.S. at 235–36.¹¹ *Viking River*

decisis. Now that *Ramos* is the law, *stare decisis* is on its side. I take the decision on its own terms, and give it all the consequence it deserves.” *Id.* at 295 (Kagan, J., dissenting) (citations omitted). This Court does not assume that the dissenters in *Italian Colors* continued to adhere to that opinion’s conception of the prospective waiver doctrine when they voted in *Viking River*. Those Justices could have declined to join footnote 5 if they disagreed with it, which would have rendered it a plurality opinion. *See Viking River*, 596 U.S. at 664–65 (concurring opinion of Barrett, J., joined by Kavanaugh, J., and by Roberts, C.J., in relevant part, not joining Part II of the majority, and dissenting opinion of Thomas, J.); *cf., e.g., Johnson v. Guzman Chavez*, 594 U.S. 523, 525 (2021) (“Justice Alito delivered the opinion of the Court, except as to footnote 4.”).

11. *Brice* is on the other side, concluding that the question of whether the contract waived federal substantive law was a question for the arbitrator because the delegation clause was enforceable. 13 F.4th at 828–32. But as discussed above, *Brice* is not persuasive.

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clarified that the prospective waiver doctrine applies to state substantive law as well as federal substantive law. 596 U.S. at 653 n.5. The Court therefore concludes that the principles in *Hengle* and the other cases apply here too. Because the agreement purports to waive the application of all state substantive law, the arbitration agreement is unenforceable in full. *See Fahy*, 2024 WL 1116050, at *12–14 (holding that both the delegation clause and arbitration provision were unenforceable because the agreement purported to waive substantive state rights); *Fitzgerald*, 2023 WL 5345302, at *9–11 (same). Defendants argue only that the prospective waiver doctrine does not apply to substantive state law rights; they make no alternative argument that if the Court holds that the doctrine applies to state law, the Court should nevertheless enforce the arbitration agreement. [*Cf.* Dkt. 36 at 7–8 (arguing only that the contracts do not waive federal rights).] They have therefore waived any argument they could have made on this point. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010). The Court holds that because the arbitration agreement purports to waive all substantive state law rights, it is unenforceable.

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IV. Conclusion

For the foregoing reasons, Defendants' motion to compel arbitration [Dkt. 26] is denied.

Enter: 23-cv-16429

Date: May 22, 2024

/s/ Lindsay C. Jenkins
Lindsay C. Jenkins
United States District Judge

45a

**APPENDIX D — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, FILED JUNE 5, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 24-2056
No. 1:23-cv-16429

JOSHUA HARRIS AND DONITA OLDS, ON
BEHALF OF PLAINTIFFS AND THE CLASS
MEMBERS DESCRIBED HEREIN,

Plaintiffs-Appellees,

v.

W6LS, INC., D/B/A WITHU AND WITHU LOANS,
AND CALIBER FINANCIAL SERVICES, INC.,

Defendants-Appellants.

Filed June 5, 2026

ORDER

Before

DORIS L. PRYOR, *Circuit Judge*
JOSHUA P. KOLAR, *Circuit Judge*
NANCY L. MALDONADO, *Circuit Judge*

Appendix D

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

Lindsay C. Jenkins, *Judge*.

On consideration of the petition for rehearing and rehearing en banc filed on April 28, 2026, no judge in active service requested a vote on the petition for rehearing en banc and all members of the original panel have voted to deny rehearing and to issue an amended opinion. The following language was added to footnote 3 on page 7:

In taking this approach, we affirm on a basis not relied on by the district court but argued by the parties in supplemental briefing. The district court based its decision solely on prospective waiver, and the parties framed their initial arguments on appeal on that singular issue. As we discuss below, however, it remains an open question whether the prospective waiver doctrine applies to state statutory rights. *Infra* pp. 15–16. Formation, on the other hand, is a clear prerequisite for delegation and arbitration, and provides a narrower path to resolving this case on the facts before us. *See K.F.C.*, 29 F.4th at 837 (“Even the most sweeping delegation cannot send the contract-formation issue to the arbitrator[.]”). And we may generally affirm the district court’s judgment on any ground supported by the record. *See, e.g., E.D. by Duell v. Noblesville Sch. Dist.*, 151 F.4th 907, 914 n.1 (7th Cir. 2025); *see Kass v. PayPal Inc.*, 75

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F.4th 693, 700 (7th Cir. 2023) (noting a motion to compel arbitration is procedurally akin to a summary judgment motion). Cognizant that the parties had not framed the issue as one of formation on appeal, we requested supplemental briefing on formation as to the arbitration and delegation provisions of the Loan Agreements. Both parties have now had the opportunity to fully brief and be heard on this issue.

The court's opinion dated March 31, 2026, is amended in a separately filed opinion released today.

It is therefore ORDERED that the petition for rehearing and for rehearing en banc is DENIED.