No. 19-15707

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,
on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees,

v.

PLAIN GREEN LLC,
Defendant,

and

HAYNES INVESTMENTS, LLC, and L. STEPHEN HAYNES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California at San Francisco
No. 3:18-cv-01200 (The Hon. William Horsley Orrick)

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certifies that it is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock.

Respectfully submitted this 10th day of November, 2021.

/s/ Jeffrey R. White

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful conduct.[1]

This case is of acute interest to AAJ and its members. AAJ members often represent clients whose constitutional right to present their legitimate claims for redress to a jury has been taken from them through consumer contracts of adhesion. Such forced arbitration "agreements" undermine the rights of consumers and employees to vindicate their rights under federal and state law and hold businesses and employers accountable for unfair and illegal practices.

[1] Amicus curiae affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

1. The district court held that the Plaintiffs' forced arbitration agreements were unenforceable because they prospectively waived borrowers' federal rights. That conclusion would appear self-evident in that the arbitrator was authorized to apply only tribal law. The panel disagreed, however, and reversed, stating that the delegation clause did not itself preclude the arbitrator from considering federal claims. The panel's decision is in direct conflict with decisions of five other circuits. This Court should grant the Petition for Rehearing to assure that this drastic departure receives thorough review.

2. The fact that the forced arbitration "agreements" in this case are contracts of adhesion imposed on vulnerable borrowers underscores the importance of granting rehearing of the panel's decision to prevent borrowers from holding payday lenders accountable in our public civil justice system for violating their obligations under federal and state law.

Payday loans often become "debt traps" for low-income borrowers. They command very high rates of interest that borrowers who live paycheck to paycheck cannot afford. Additionally, requiring payment through automatic debits from the borrower's checking account often results in mounting fees owed to both the lender and to the bank. The borrower is forced to take out ever larger loans simply to pay off previous loans.

Federal and state governments have long sought to protect financially vulnerable citizens from such exploitation by imposing limits on interest rates and requiring truthful disclosures in loan agreements. Defendants' efforts to clothe themselves with Indian tribal immunity is simply the most recent tactic for evading governmental regulation. That tactic includes removing a borrower's disputes regarding the loan out of American courts and into the private office of a paid arbitrator obliged to apply tribal law.

3. Proponents of forced arbitration contend that this represents a fair and cost-efficient means of dispute resolution compared to the civil justice system which taxpayers have provided for this purpose.

AAJ's own study shows that private arbitrations are often more expensive and less efficient than dispute resolution in the public's courts. This study's most important finding is that businesses do not insist upon arbitration clauses because they offer quick and efficient resolution of consumer claims; they favor forced arbitration because it is so tilted against consumers that most do not pursue even plainly meritorious claims.

AAJ urges this Court to grant the Petition for Rehearing and reconsider the panel's decision to allow defendants to use a rent-a-tribe scheme and forced arbitration to evade federal and state-law consumer protections.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION FOR REHEARING TO ENSURE THAT THE PANEL'S DECISION ALLLOWING ENFORCEMENT OF FORCED ARBITRATION PROVISIONS IN PAYDAY LOAN CONTRACTS, IN CONFLICT WITH OTHER CIRCUITS, RECEIVES FULL CONSIDERATION.

AAJ addresses this Court in support of Plaintiffs-Appellees' Petition for Rehearing or Rehearing En Banc of the panel's decision regarding the enforceability of the arbitration provisions contained in the payday loan agreements in this case.

The district court specifically held that the delegation provision contained in the arbitration agreements was unenforceable because it prospectively waives the borrower's right to pursue federal statutory claims by requiring arbitrators to apply tribal law. *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 970-71 (N.D. Cal. 2019). That conclusion would seem self-evident: A claimant cannot effectively vindicate her federal rights in a forum that is permitted to apply only tribal law. A panel of this Court disagreed, concluding that the delegation provision is not itself an invalid prospective waiver because the "plain language of the delegation provision does not foreclose the arbitrator from considering enforceability disputes based on federal law." *Brice v. Haynes Invs., LLC*, 13 F.4th 823, 830 (9th Cir. 2021). In the panel's view the delegation provision is entirely separate from the larger arbitration provision, which authorizes the arbitrator to apply *only* tribal law (and limited federal laws not relevant here). *Id.* The panel erroneously stated that the arbitrator

could decide "disputes" arising under federal and state law, *id.*, though nothing in the agreement between the parties permits the arbitrator to apply federal law, including the prospective-waiver principle, to resolve such disputes. It is elementary that arbitrators can "wield only the authority they are given" expressly by the parties' contract. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019).

The panel's decision not only overturns the considered judgement of the district court, it also departs from the well-reasoned positions of five other circuit courts. *See, e.g.*, *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332 (4th Cir. 2020); *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331 (11th Cir. 2016).

This Court has emphasized, "Absent some good reason to do so, we are disinclined to create a direct conflict with another circuit." *United States v. Bainbridge*, 746 F.3d 943, 949 n.6 (9th Cir. 2014) (quoting *United States v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987)). This Court should grant the Petition for Rehearing to carefully reconsider the panel's decision.

II. ONLINE PAYDAY LENDERS PREY ON FINANCIALLY VULNERABLE CONSUMERS AND SHOULD BE HELD TO COMPLIANCE WITH FEDERAL AND STATE LAWS THROUGH THE CIVIL JUSTICE SYSTEM, NOT SHIELDED BY A SECRET, ONE-SIDED SCHEME OF FORCED ARBITRATION.

A. Online Payday Lenders Use Unfair and Deceptive Tactics to Trap Low-Income Borrowers in a Cycle of Debt.

The importance of the governmental interest in protecting the most financially vulnerable consumers from abusive lending practices also warrants granting the Petition for Rehearing.

Online payday loans are often predatory, leading vulnerable consumers into a "debt trap" constructed of exorbitant interest charges, preauthorization for the lender to raid the borrower's checking account, and promotion of back-to-back-to-back loans that barely allow the borrower to keep up with escalating financing costs. Too often, according to an analysis of millions of such transactions by the Consumer Financial Protection Bureau, "many consumers are unable to repay their loan in full and still meet their other expenses . . . [so] they continually re-borrow and incur significant expense to repeatedly carry this debt." Consumer Financial Protection Bureau, *Payday Loans And Deposit Advance Products: A White Paper Of Initial Data Findings* 43-44 (Apr. 24, 2013), *available at* https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

1. *Predatory payday lenders charge exorbitantly high interest rates that low-income borrowers cannot afford.*

Payday loan customers generally borrow relatively small amounts and pay exorbitant interest rates. *See generally* Consumer Financial Protection Bureau, *Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products* 11-12 (Jun. 2016), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf [hereinafter "CFPB Supplemental Report"] (finding the median loan size was $2,400, and the median interest rate was 249% APR). The Fourth Circuit's decision rejecting efforts by some of the same defendants involved here to evade state and federal consumer protections involved loan agreements that charged 219.38% to 373.97% APR. *Gibbs v. Haynes Invs., LLC*, 967 F.3d at 335.

Such abusive terms are not atypical for the online payday loan market. *See generally* Jean Ann Fox & Anna Petrini, *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections*, Consumer Federation of America 22 (Nov. 30, 2004), https://consumerfed.org/pdfs/Internet_Payday_Lending113004.PDF. *See also* Lauren K. Saunders, et al., *Stopping the Payday Loan Trap*, National Consumer Law Center 4 (Jun. 2010), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf [hereinafter "*Stopping the Payday Loan Trap*"].

These finance costs are not only very high, exceeding usury laws in every state, but they are unaffordably high. Not surprisingly, 55% of online payday installment borrowers default. CFPB Supplemental Report, *supra*, at 9.

This is not an accident, but a feature of predatory lending. High finance charges mean that a payday lender can quickly receive back more than the original loan amount in interest, even if the borrower cannot repay the principal. So "payday lenders characteristically target poor Americans, who are less likely to repay their loan in full, which increases the lender's revenue through extensive charges." Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326, 331-32 (2012).

2. *Payday lenders require borrowers to agree to automatic debits to their accounts.*

Payday loan "agreements" can also be spectacularly unconscionable in other ways. Many online payday lenders require that loan applicants authorize direct debiting of their checking accounts. Consumer Financial Protection Bureau, Online Payday Loan Payments 2 (Apr. 2016), *available at* https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf [hereinafter "Online Payday Loan Payments"].

When a borrower's checking account does not have sufficient funds to cover the debit demand, the lender generally charges an added fee. Some lenders submit a demand over and over, perhaps several times in one day, charging a fee for each

denial of payment. About half of borrowers also incur overdraft or non-sufficient funds fees from their bank. *Id.* at 3.

3. *Payday lenders encourage repeat loans that mire borrowers in further debt.*

Payday lenders do not target one-time borrowers. Industry analysts estimate that customers do not become profitable to lenders until they have borrowed four or five times. The Pew Charitable Trusts, *Payday Lending in America: Policy Solutions* 5 (Oct. 2013), *available at* https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydayoverviewandrecommendationspdf.pdf. *See also Stopping the Payday Loan Trap*, *supra*, at 4 (noting that the payday loan business largely depends on borrowers who take out new loans to pay off previous payday loans).

This highly profitable business is not responsive to market constraints. It thrives by targeting uninformed customers and by evading consumer protection laws that restrain conventional lenders.

B. State and Federal Governments Have a Strong Interest in Protecting the Public from Predatory Payday Lending.

Federal and state governments have long recognized the strong public interest in protecting their citizens "from improvident transactions drawn by lenders and brought on by dire personal financial stress." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) (internal quotation

marks omitted). Colonial legislatures "were nearly unanimous in their prohibition of usurious lending . . . [and they] aggressively capped interest rates." Christopher L. Peterson, *"Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances*, 69 Wash. & Lee L. Rev. 893, 896 (2012). The Uniform Small Loan law, promulgated in 1916 and adopted by many states, created "important new standards of usury in small loans" and included "prohibitions against . . . [f]alse, misleading, and deceptive advertising." F. B. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 L. & Contemp. Probs. 108, 115 & 117 (1941). Today, many states restrict or even prohibit payday lending. *See generally* Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 Suffolk U. L. Rev. 31 (2011) (examining state regulation of payday lenders).

Payday lenders have worked hard to evade, escape, or eliminate these statutory restrictions. Defendants' effort in this case to wrap themselves in tribal immunity is merely the payday lending industry's latest evasion of regulation and accountability.

The industry's "rent-a-tribe" tactic involves "a non-tribal payday lender [making] an arrangement with a tribe under which the tribe receives a percentage of the profits, or simply a monthly fee, so that otherwise forbidden practices of the lender are presumably shielded by tribal immunity." Kyra Taylor et al., *Stretching*

the Envelope of Tribal Sovereign Immunity? An Investigation of the Relationships Between Online Payday Lenders and Native American Tribes, Public Justice Found. 6 (Nov. 2017), https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf (internal quotation marks omitted). *See also generally* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751 (2012).

In this case, Defendants seek to shield themselves from accountability not only by attempting to buy tribal immunity from consumer protection laws, but also by trying to hand over to hired arbitrators the very decision of whether borrowers can vindicate their rights in court.

III. FORCED ARBITRATION IS NEITHER A FAIR NOR A COST-EFFICIENT MEANS TO RESOLVE CONSUMER CLAIMS.

Defendants portray themselves as victims of unfriendly courts in other circuits that "recently invalidated similar arbitration provisions in cases involving Native American lenders." Opening Brief of Defendants-Appellants at 41 n.9, *Brice v. Haynes Invs., LLC*, 13 F.4th 823 (9th Cir. 2021). Those decisions, they assert, "sought to punish tribal lenders and related defendants for using time-honored legal mechanisms to facilitate efficient resolution of disputes" through arbitration. *Id.* The federal courts in those cases, they argue "proceeded on conjecture rather than evidence." *Id.*

To the contrary, empirical evidence compiled by AAJ convincingly demonstrates that forced arbitration is neither fair nor efficient.

Congress enacted the Federal Arbitration Act in 1925 to enforce truly voluntary commercial agreements between merchants of roughly equal bargaining power; Congress did not intend enforcement of form contracts imposed on weaker and less knowledgeable employees or consumers. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L. Q. 637, 647 (Jan. 1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 97 Wis. L. Rev. 33, 76-78 (1997). The Supreme Court has construed the statute broadly on the basis of arbitration's purported cost-efficiency. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). However, there is no evidence that this is the case when it comes to forced arbitration "agreements" in take-it-or-leave-it consumer contracts.

AAJ has undertaken an analysis of the databases of the two largest arbitration administrators in the country, AAA and JAMS, two organizations named in the arbitration provisions in this case. American Association for Justice, *The Truth About Forced Arbitration* (Sept. 2019), *available at* https://facesofforcedarbitration.com/wp-content/uploads/2019/09/Forced-Arbitration-2019-FINAL.pdf [hereinafter "*The Truth About Forced Arbitration*"].

This analysis examined cases that were filed and terminated during the five years from 2014 to 2018. *Id.* at 32. The study concluded that forced arbitration is "clearly not 'fairer' than the Seventh Amendment right to a trial by jury." *Id.* at 31. It is less costly to corporate defendants only because the system makes it so difficult and costly for individual plaintiffs to win that many consumers do not bring even meritorious claims. Nor does the arbitration administrators' own data support the notion that arbitration is a faster, more efficient process for resolving claims than the civil justice system.

1. *Arbitration is not a less costly procedure for resolving disputes than the civil justice system.*

It is certainly not self-evident that arbitration would be a less expensive means of dispute resolution. Arbitration moves a consumer's claims from the public civil justice system where judges, supporting personnel, and physical infrastructure have been supplied by taxpayers for public use. In forced arbitration, claimants are required to purchase the services of a for-profit arbitration administrator, such as AAA or JAMS, the services of an individual arbitrator, as well as the cost of hearing rooms and other needed services. The arbitrator's financial interest lies in more arbitration.

There are situations where the civil justice system is at least as efficient as the arbitration involved in this case. For example, under the agreement here, "the arbitrator has no authority to conduct class-wide proceedings and will be restricted

to resolving individual disputes." *See Brice v. Plain Green, LLC*, 372 F. Supp. at 967 (quoting relevant provisions). Defendants, if they prevail, may face numerous arbitrations of individual claims which could have been resolved in a single civil action. The civil justice system, unlike arbitration, also makes use of pretrial settlement and voluntary mediation to resolve disputes efficiently. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L. J. 2804, 2806 (2015). Arbitrators have no financial incentive to resolve disputes quickly.

The data indicate that businesses use arbitration clauses not because they offer access to quick and efficient resolution of consumer claims, but because they strongly discourage consumers from pursuing their claims at all – even those claims with clear merit.

The use of forced arbitration agreements has become almost ubiquitous. It is very conservatively estimated that more than 800 million arbitration provisions permeate our everyday lives. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019). For example, "[a]n estimated 290 million people have cell phones, and 99.9% of subscribers to the eight major wireless services are subject to arbitration clauses. For those with credit card debt, about 50% face arbitration."

Resnik, 124 Yale L.J., *supra*, at 2813 (internal citations and quotation marks omitted).

Yet, AAA and JAMS, the two dominant consumer arbitration providers by far, recorded only approximately 30,000 consumer arbitrations from 2014-2018, an average of just 6,000 per year. *The Truth About Forced Arbitration*, *supra*, at 9. The databases reveal that large companies that make use of consumer forced arbitration provisions experience very few consumer arbitrations. For example, Amazon, with 101 million Prime subscribers, faced only 15 forced arbitrations over five years; General Motors sold approximately 40 million vehicles over five years and faced only 5 arbitrations during that time; and Walmart, which serves 275 million customers per week, faced just 2 consumer arbitrations. *Id.* at 12. Consumer Financial Protection Bureau figures also indicate that consumers file few arbitrations, particularly with respect to consumer finance claims. In the three years from 2010-2012, consumers filed only 1,234 consumer finance arbitrations with the AAA. Bureau of Consumer Financial Protection, Proposed Rules, Arbitration Agreements, 81 FR 32830-01, 2016 WL 2958777, at *32856 (May 24, 2016).

It is not that consumers have few legal claims to pursue. The National Center for State Courts reports that approximately 2 million small claims cases were filed *every year* from 2014 to 2018 in the 36 states for which it had data. National Center for State Courts, State Court Caseload Digest: 2018 Data at 9 (2020), *available at*

https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf.

An investigation conducted by the New York Times similarly found that consumers bring few claims under forced arbitration provisions. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), *available at* https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html. Researchers there did not find that consumers enjoyed any "cost-savings and greater time-efficiencies" as a result of force arbitration provisions. *Id.* Rather, the study concluded, "Once blocked from going to court as a group, most people dropped their claims entirely." *Id*.

It is no mystery why consumers should decline the opportunity to arbitrate their claims. The AAA and JAMS databases indicate that during the five-year period studied, a total of 1,909 consumers won their arbitration claims, 6.3% of the few claimants who pursued arbitration at all – 382 plaintiffs prevail per year. *The Truth About Forced Arbitration*, *supra*, at 15. More people are struck by lightning annually in the United States. See National Lightning Safety Institute, Lightning Strike Probabilities, http://lightningsafety.com/nlsi_pls/probability.html (last visited Oct. 30, 2021). Notably, arbitrations involving financial services were among the least likely to succeed. *The Truth About Forced Arbitration*, *supra*, at 15 (finding 2.1%

success rate in AAA financial services arbitrations and 2.8% in JAMS "credit" arbitrations).

By comparison, the most recent available statistics from state courts show that "[p]laintiffs won in more than half (56%) of all general civil trials." Bureau of Justice Statistics Special Report, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. Dep't of Justice 4 (Apr. 9, 2009), *available at* https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf.

Moreover, unlike the civil justice system, a claimant who does not prevail in arbitration generally may be required to pay the defendant's costs and/or attorney fees. *See The Truth About Forced Arbitration*, *supra*, at 17-18 (describing examples). In 112 cases conducted by American Arbitration Association, consumers who initiated arbitrations and either lost completely or won a lesser award than the defending corporation, had to pay 100% of the arbitration fees as well. In those cases, consumers claimed an average of $170,000 per case, but won only an average of $1,400. Those consumers were forced to pay an average of $27,000 in arbitration fees and payments to the defendant and its attorneys. *Id.* at 17.

Businesses prefer arbitration because the consumer's chances of winning a meritorious claim are exceedingly low and failure to win may entail a crippling financial penalty. Thus, an arbitration agreement effectively shields a business from having to face any consumer claims at all. As one scholar has opined, "Binding, pre-

dispute arbitration imposed on the weaker party in an adhesion contract . . . should be recognized for what it truly is: claim-suppressing arbitration." David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L. J. 239 (2012).

2. Arbitration is not a more "time-efficient" procedure for resolving disputes than the civil justice system.

There is also no indication that claims are resolved faster through arbitration than through the civil justice system.

There are, of course, extreme examples of lawsuits lasting for many years. However, the average time the civil justice system uses to resolve claims is not extraordinary. In all federal district courts during the 12-month period ending December 31, 2018, the average time for disposition of civil cases was 10.1 months. Administrative Office of U.S. Courts, U.S. District Courts–Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, Table C-5, https://www.uscourts.gov/sites/default/files/statistics_import_dir/c05sep02.pdf. Because speed and efficiency are among the advantages claimed for forced arbitration, one might expect the leading arbitration providers to make a point of compiling comparable statistics with regard to arbitrations. But researchers looking at the AAA database found that AAA "deletes data every quarter in a way that significantly distorts arbitration results." *The Truth About Forced Arbitration*, *supra*, at 7. The organization "deletes cases by filed date instead of closed date," even though it is a database of closed claims. *Id.*

at 9. The result is that "claims that take a long time are automatically scrubbed from its database." *Id.*

Researchers at Yale Law School unearthed previous iterations of the AAA database and were able supply more than 1,000 case records that had been many deleted from its 2014 database. At least 389 of those cases took more than a year to close, 90 took more than two years, and 20 took more than three years. *The Truth About Forced Arbitration*, *supra*, at 20 (summarizing results found at Yale Law School Consumer Arbitration Data Archive, Yale Law School (May 23, 2018), *available at* https://library.law.yale.edu/news/yale-law-school-consumer-arbitration-data-archive)). Similarly, the JAMS 2014 database included features 18 cases filed before 2009. These cases took between and five and six years to close. *The Truth About Forced Arbitration*, *supra*, at 21. There is simply no evidence suggesting that, on average, arbitrations are faster or more efficient than the resolutions of disputes by the civil justice system.

*   *   *

The Fourth Circuit Court of Appeals pointedly stated that an arbitration agreement that was not designed to provide "a just and efficient means of dispute resolution" but rather "to avoid state and federal law and to game the entire system" is not worthy of enforcement by the federal courts. *Hayes v. Delbert Servs. Corp.*,

811 F.3d 666, 676 (4th Cir. 2016). The forced arbitration provisions in this case should fare no better.

CONCLUSION

For the foregoing reasons, AAJ respectfully urges this Court to grant the Petition for Rehearing.

Respectfully submitted,

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Date: November 10, 2021

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29-2 because this brief contains 4,098 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: November 10, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on November 10, 2021, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey R. White
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