No. 19-1258(L), 19-1267

United States Court of Appeals for the Fourth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia, Case No. 4:17-cv-00145-HCM-RJK
Hon. Henry Coke Morgan Jr.

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

BRUCE STERN
President
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2810
bruce.stern@justice.org

JEFFREY R. WHITE
Counsel of Record
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Attorneys for Amicus Curiae American Association for Justice

October 28, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. __________ Caption: ____

Pursuant to FRAP 26.1 and Local Rule 26.1,

____
(name of party/amicus)

____

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

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

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

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

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

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

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

Signature: ______________________________________ Date: ____________________

Counsel for: ___________________________________

CERTIFICATE OF SERVICE

****

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

_______________________________ _______________________
(signature) (date)

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT....................................-1-

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. 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..5

A. Online Payday Lenders Use Unfair and Deceptive Tactics to Trap Low-Income Borrowers in a Cycle of Debt. 5

B. State and Federal Governments Have a Strong Interest in Protecting the Public from Predatory Payday Lending.. 12

II. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO AGREEMENTS WITH AN INDIAN TRIBE........................16

III. FORCED ARBITRATION IS NEITHER A FAIR NOR A COST-EFFICIENT MEANS TO RESOLVE CONSUMER CLAIMS...21

A. Claims that Arbitration Benefits Consumers Are False or Unsupported. 21

B. Arbitration Records Reveal that Arbitration Is not Inexpensive or Efficient, but Instead Strongly Discourages Consumers from Pursuing Valid Claims.........26

CONCLUSION 34
CERTIFICATE OF COMPLIANCE 36
CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

Cases

Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.,
259 F.2d 553 (8th Cir. 1958) 17

Colorado, ex rel. Salazar v. ACE Cash Express, Inc.,
188 F. Supp. 2d 1282 (D. Colo. 2002) 15

Commonwealth of Pa. v. Think Fin., Inc., No. 14-CV-7139,
2016 WL 183289 (E.D. Pa. Jan. 14, 2016) 14

Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989) 20

Erlenbaugh v. United States,
409 U.S. 239 (1972) 19

Ex parte Morgan,
20 F. 298 (N.D. Ark. 1883) 18

Gibbs v. Stinson, No. 3:18cv676,
2019 WL 4752792 (E.D. Va. Sept. 30, 2019) 21

Goleta Nat'l Bank v. Lingerfelt,
211 F. Supp. 2d 711 (E.D.N.C. 2002) 14

Hayes v. Delbert Servs. Corp.,
811 F.3d 666 (4th Cir. 2016) 34

Jackson v. Payday Fin., LLC,
764 F.3d 765 (7th Cir. 2014) 21

Michigan v. Bay Mills Indian Cmty.,
572 U.S. 782 (2014)..18, 19

Native Am. Church of North Am. v. Navajo Tribal Council,
272 F.2d 131 (10th Cir. 1959)...17

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991) 18

Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.,
769 F.3d 105 (2d Cir. 2014) 13

Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan,
800 F. Supp. 1484 (W.D. Mich. 1992)..20

Settler v. Lameer,
507 F.2d 231 (9th Cir. 1974)..17

The Cherokee Nation v. The State of Georgia,
5 Pet. 1 (1831) 18

United States v. Kagama,
118 U.S. 375 (1886)..18

Wilson v. Marchington,
127 F.3d 805 (9th Cir. 1997)..17, 18

Statutes

25 U.S.C. § 415(f)..18

Federal Arbitration Act, 9 U.S.C. §1 *et seq*......................................16, 17

Indian Child Welfare Act, 25 U.S.C.A. § 1901.......................................20

Other Authorities

148 Cong. Rec., No. 32, H 945, 107th Congress,

2nd Session (Mar. 19, 2002) 19

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 33

American Association for Justice, *The Truth About Forced Arbitration* (Sept. 2019) .... passim

Bureau of Justice Statistics Special Report, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. Dep't of Justice (Oct. 2008), https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf 31

Carolyn Carter, et al., *Predatory Installment Lending in 2017*, National Consumer Law Center (Aug. 2017) 14

Consumer Financial Protection Bureau, Online Payday Loan Payments (April 2016) 10, 11

Consumer Financial Protection Bureau, *Prepared Remarks by Richard Cordray at a Consumer Advisory Board Meeting* (Feb. 20, 2013) 6

Consumer Financial Protection Bureau, *Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products* (June 2016) 6, 9, 11

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 (Nov. 30, 2004) 7

F. B. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 L. & Contemp. Probs. 108 (1941) 13

Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1 (2002) 9

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) 15

Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 Sw. L. Rev. 785 (2010) 12

Brian Melzer, *Spillovers from Costly Credit*, 31 Rev. of Financial Studies 3568 (Sept. 2018) 12

Brian Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q. J. of Econ. 517 (Feb. 2011) 12

National Lightning Safety Institute, Lightning Strike Probabilities, http://lightningsafety.com/nlsi_pls/probability.html 31

Christopher L. Peterson, "*Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances*, 69 Wash. L. Rev. 893 (2012) 13

Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326 (2012) 9, 10

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) 13

Proposed Rules, Bureau of Consumer Financial Protection, Arbitration Agreements, 81 FR 32830-01, 2016 WL 2958777 (May 24, 2016) 22, 29

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 (2015) 28, 29

Lauren K. Saunders, et al., *Stopping the Payday Loan Trap*, National Consumer Law Center (June 2010) 7, 9, 11

David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239 (2012) 32

Jessica Silver-Greenberg & Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, N.Y. Times (October 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html 30

Diane Standaert & Brandon Coleman, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement*, Center for Responsible Lending (Nov. 2015) 14

Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (2019) 28

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 Foundation (Nov. 2017) 15

The Pew Charitable Trusts, *Payday Lending in America: Policy Solutions* (Oct. 2013) 8, 11

The Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (July 2012) 8

U.S. Const., Art. I, Sec. 8, Cl. 3. 17

Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (Mar. 2001) 23, 24, 25

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 more than 70-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 a consumer contract of adhesion. Such forced arbitration "agreements"

[1] Pursuant to Rule 37.6, amicus 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. Plaintiffs and Defendants have consented to the filing of this brief.

undermine the rights of consumers and employees to hold businesses and employers accountable.

SUMMARY OF ARGUMENT

1. AAJ addresses this Court with regard Defendants' motion to compel the arbitration provisions contained in the loan agreements in this case. The fact that these "agreements" are contracts of adhesion imposed on vulnerable borrowers underscores the importance of permitting plaintiffs to hold defendants accountable in our public civil justice system for violating their obligations under federal and state law. Predatory payday lenders must not be allowed to hide their unfair and deceptive tactics behind a curtain of private, secret arbitration.

Payday loans often become "debt traps" for low-income borrowers. Online payday loans command very high rates of interest that borrowers who live paycheck to paycheck cannot afford. The lender can quickly recover much more than the original loan amount, while the borrower struggles to meet interest payments. Additionally, requiring payment through automatic debits from the borrower's checking account often results in mounting fees owed to both the lender and the bank. The borrower is forced to take out ever larger loans simply to pay off previous

loans. Payday lenders frequently get borrowers to sign loan agreements with onerous terms by providing false or misleading information about the actual cost of the loan. Their profits depend upon the stream of interest and fee payments from repeat borrowers who have become mired in this debt trap.

Federal and State governments have long sought to protect financially vulnerable citizens from such exploitation by imposing limits on permissible 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 dispute regarding the loan out of American courts and placing it into the private office of an arbitrator obliged to apply tribal law to the claim. By compelling arbitration of Plaintiffs' claims, Defendants hope to ward off all accountability.

2. Defendants' sole basis for moving to compel arbitration, the Federal Arbitration Act, does not apply to Plaintiffs' contracts with AWL. Congress limited the scope of the FAA to apply only to written contracts involving "commerce," which Congress specifically defined to exclude

trade with Indian tribes. Nor does the Indian Commerce Clause provide a basis for compelling arbitration of Plaintiffs' contract disputes. That clause stands as a source of plenary and exclusive authority for Congress to legislate with respect to Indian tribes, but it is not a source of substantive rights for Indian tribes.

3. Amici supporting Defendants contend to this Court that forced arbitration saves consumers money and time compared to the civil justice system, but they offer absolutely no evidence that this might be so. Attorneys are paid in arbitration, as well as in litigation. Nor is it credible that parties save money by paying for arbitration providers, arbitrators, facilities, and other requisites for conducting private arbitration proceedings, rather than make use of the of the civil justice infrastructure that the taxpayers have provided for this purpose. The authorities cited by amici actually state that *only* businesses would reap financial benefits from arbitration.

AAJ's own study, cited herein, found no indication that private arbitrations are either less expensive or more efficient than claim resolution in the public courts. The study's most important finding is that businesses do not use arbitration clauses because they offer quick and

efficient resolution of consumer claims, but because forced arbitration provisions strongly discourage consumers from pursuing their claims at all. Exceedingly few individuals bring claims under forced arbitration contracts. One reason is that so few consumers win in forced arbitration. AAA and JAMS databases show that fewer consumers prevail than individuals in the U.S. are struck by lightning.

ARGUMENT

I. 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.

AAJ addresses this Court with regard to the forced arbitration provision contained in the loan agreements in this case. The context of these agreements – online payday loans – underscores the importance of permitting consumers to hold online payday lenders accountable in our public civil justice system. The predatory practices described in this case should not be hidden behind a curtain of forced private and secret arbitration.

The loans in this case are typical of the payday loan market. They are very short-term loans, with exceedingly high interest rates, repaid through direct debits from the borrower's checking account. *See* Consumer Financial Protection Bureau, *Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products*, at 6 n.1 & 7 (June 2016) [hereinafter "CFPB Supplemental Report"], *available at* https://bit.ly/2AgmHc4. *See generally* Consumer Financial Protection Bureau, *Payday Loans And Deposit Advance Products: A White Paper Of Initial Data Findings* (Apr. 24, 2013) [hereinafter "CFPB Findings"], *available at* https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf (reviewing 15 million payday loan transactions in 33 states).

Online payday loans are often predatory, leading vulnerable consumers into what former CFPB Director Richard Cordray termed a "debt trap." *See* Consumer Financial Protection Bureau, *Prepared Remarks by Richard Cordray at a Consumer Advisory Board Meeting* (Feb. 20, 2013), *available at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-by-richard-cordray-at-a-consumer-advisory-board-meeting/. This trap is constructed of elements that

include not only exorbitant interest charges, but also 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.

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

Plaintiff Royce Solomon's loan in this case carried an APR of 726 percent.[2] His loan is not atypical in 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) [hereinafter "Internet Payday Lending"], *available at* 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 (June 2010) [hereinafter "*Stopping the Payday Loan Trap*"], *available at* https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf.

---

[2] Defendants indicate that the relevant terms of Solomon's loan "are materially indistinguishable" from the other loans involved in this case. Opening Br. for Appellants 15.

These finance costs are not only very high, exceeding every state's usury law, but are unaffordably high. Payday loan borrowers spend "about $520 on interest with an average loan size of $375." The Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* 4 (July 2012) [hereinafter "*Payday Lending in America 1*"], *available at* https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

The CFPB points out that the median annual income of a payday borrower is $22,476. CFPB Findings at 18. Most receive wages, though nearly one in four depend on public assistance or retirement benefits. *Id.* They live paycheck to paycheck. Most "can afford to put no more than 5 percent of their paycheck toward a loan payment and still be able to cover basic expenses." The Pew Charitable Trusts, *Payday Lending in America: Policy Solutions*, 3 (Oct. 2013) [hereinafter "*Payday Lending in America 2*"], *available at* https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydayoverviewandrecommendationspdf.pdf. Yet, payments on high-interest payday loans typically demand about one-third of the average borrower's paycheck. *Id.* at 1 & 4.

Not surprisingly, 55% of online payday installment borrowers default. CFPB Supplemental Report at 9. This is not an accident, but a feature of predatory lending. Payday lenders do not evaluate an applicant's ability to repay the loan. 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). Indeed, many payday lenders "use specialized credit reporting services that track the subprime market." *Stopping the Payday Loan Trap* at 4.

Payday lenders often get borrowers to sign agreements containing such onerous terms by

> [G]iving customers false or misleading information about the cost of credit, failing to advertise the cost of credit using APRs, [and] refusing to provide customers with written disclosures prior to contract consummation.

Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 32-33 (2002). *See also* Petrovich, 91 N.C. L. Rev. at

332-33 (Payday lenders' "complete lack of transparency" leaves "the majority of borrowers unaware of the actual terms of their lending agreements.").

In the case before this Court, for example, Plaintiffs allege that Mr. Solomon did not receive a copy of the loan agreement until after he received the loan and after he had specifically requested it. Plaintiff's Second Amended Complaint at ¶ 157. He "had not previously been informed that he was going to be charged an annual percentage rate of 726.13%, or that he would be expected to pay $1,543.16 in finance charges for a $500 loan." *Id.* Nor was Mr. Solomon, or any of the Plaintiffs, informed of the provisions requiring forced arbitration of claims and application of tribal law. *Id.* at ¶ 3 & ¶155.

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

Another feature of the debt trap is the lenders' requirement that loan applicants authorize direct debiting of their checking accounts. Consumer Financial Protection Bureau, Online Payday Loan Payments 2 (April 2016) [hereinafter "Online Payday Loan Payments"], *available at* https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf. 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. The CPFB found that these borrowers paid an average of $185 in overdraft or non-sufficient fund fees, with 10% paying $432 or more. *Id.* at 11-12. Many had to close their accounts as the only way to stop payday lenders from draining them. *Id.* at 23-24.

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

Under the predatory payday lenders' business model, one-time borrowers are not profitable. *Payday Lending in America 2* at 5 ("Industry analysts estimate that customers do not become profitable to lenders until they have borrowed four or five times."). Over 75 percent of payday loan fees are generated by borrowers with 11 or more loans a year. *See* CFPB Findings at 22. *See also Stopping the Payday Loan Trap* 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 customers who are uninformed and by evading accountability that restrains 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 exploitation by predatory lenders. Such activity upends the financial stability of individuals, undermines governmental efforts to combat poverty, and ultimately increases the burden on taxpayers. *See* Brian Melzer, *Spillovers from Costly Credit*, 31 Rev. of Financial Studies 3568 (Sept. 2018); Brian Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q. J. of Econ. 517 (Feb. 2011); Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 Sw. L. Rev. 785, 805-06 (2010).

Consequently, public policy has long sought to "protect impoverished debtors 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 . . . Every signatory to the Declaration of Independence returned to colonies that aggressively capped interest rate." Christopher L. Peterson, "*Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances*, 69 Wash. L. Rev. 893, 896 (2012). A 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 false, 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).

Lenders lobby strenuously in state legislatures to eliminate or create comfortable loopholes in such statutory limitations. *See* Carolyn Carter, et al., *Predatory Installment Lending in 2017*, National

Consumer Law Center 4 (Aug. 2017), *available at* https://www.nclc.org/images/pdf/pr-reports/installment-loans/report-installment-loans.pdf. They attempt to disguise their finance charges to evade interest caps. *See* Diane Standaert & Brandon Coleman, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement*, Center for Responsible Lending (Nov. 2015), *available at* https://www.responsiblelending.org/payday-lending/research-analysis/crl_payday_enforcement_brief_nov2015.pdf. Defendants' efforts in this case to wrap themselves in tribal immunity is merely the latest tactic in evading regulation and accountability.

In the early 2000s, payday lenders devised a scheme to evade state lending limits altogether, sometimes referred to a "rent-a-bank," by partnering with a state- or federally-chartered bank to effectively make their loans subject to the law of a state that had no usury limitation. *See, e.g.*, *Commonwealth of Pa. v. Think Fin., Inc.*, No. 14-CV-7139, 2016 WL 183289, at *1 (E.D. Pa. Jan. 14, 2016). Over time, courts recognized this charade. *See, e.g.*, *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 718-19 (E.D.N.C. 2002) (finding that National Bank Act does not preempt state's claims against payday lender, because although the bank had a

right to make loans at an out-of-state rate, its payday lender agent did not); *Colorado, ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282, 1285 (D. Colo. 2002) (similar).

The payday lending industry next hit upon the "rent-a-tribe" tactic where "a non-tribal payday lender makes 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 Foundation 6 (Nov. 2017) (internal quotation marks omitted), *available at* https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf. *See 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).

The operation involved in this case was similarly designed to evade state restrictions on payday lending. Defendants argue that their payday lending business should be beyond reach of state law due to tribal

immunity or, alternatively, through enforcement of an arbitration and choice-of-law provision in plaintiffs' loan agreement. AAJ addresses this Court regarding that second contention.

II. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO AGREEMENTS WITH AN INDIAN TRIBE.

Defendants' sole basis for seeking to compel arbitration of Plaintiffs' claims is the Federal Arbitration Act, 9 U.S.C. §1 *et seq*. ["FAA"]. *See* AWL Opening Br. 56. But the agreement in this case does not come within the scope of the FAA.

The Federal Arbitration Act 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 . . . 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 (emphasis added). The FAA provides its own definition of "commerce":

> "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation

9 U.S.C. § 1.

In this definition, Congress explicitly departed from the formulation of the Interstate Commerce Clause, which vests in Congress the enumerated power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, Sec. 8, Cl. 3. But "commerce," for purposes of the scope of the FAA, specifically excludes trade with Indian tribes.

Nor are Plaintiffs' contracts encompassed by any other term in § 1. It is beyond dispute that an Indian tribe is not a State. *See Settler v. Lameer*, 507 F.2d 231, 241 (9th Cir. 1974) (Indian tribes are not subject to the constitutional restrictions imposed on states); *Native Am. Church of North Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) ("Indian tribes are not states."); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.*, 259 F.2d 553, 556 (8th Cir. 1958) (same).

The Otoe-Missouria Tribe is not a "Territory." The court in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), held that Indian tribes are not "Territories and Possessions" for purposes of 28 U.S.C. § 1738, which provides for the full faith and credit of authenticated records in the courts "within the United States and its Territories and Possessions." *Id.* at 808-

809. *See also Ex parte Morgan*, 20 F. 298, 305 (N.D. Ark. 1883) (Cherokee Nation is not a "territory" under the federal extradition statute).

Nor is the Otoe-Missouria Tribe a "foreign nation." *See, e.g.*, *United States v. Kagama*, 118 U.S. 375 (1886) (Indian tribes are not "foreign nations" within the meaning of the Commerce Clause, Art. I, §8, cl. 3). Indian tribes are, instead, "domestic dependent nations." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *The Cherokee Nation v. The State of Georgia*, 5 Pet. 1, 17 (1831).

Subsequent developments also make clear that Congress did not intend the FAA apply to commerce with Indian tribes. In 2002, Congress amended the statute that authorizes Indian tribes to lease their trust land with the approval of the Secretary of the Interior. Congress added:

> Any lease entered into under the Act of August 9, 1955 . . . or any contract entered into under . . . 25 U.S.C. 81 . . . affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such lease or contract. Such leases or contracts entered into pursuant to such Acts shall be considered within the meaning of "commerce" as defined and subject to the provisions of section 1 of Title 9.

25 U.S.C. § 415(f).

In his statement before the House of Representatives in support of the amendment, Senator Hayworth explained that many of the Gila River Indian Community's commercial contracts "provide for arbitration of disputes" and that, without the proposed amendment, "Federal courts would lack jurisdiction over contract disputes between private business entities and Indian tribes." 148 Cong. Rec., No. 32, H 945, 107th Congress, 2nd Session (Mar. 19, 2002).

A later legislative act can be regarded as a legislative interpretation of an earlier act and "is therefore entitled to great weight in resolving any ambiguities and doubts." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (internal quotation marks omitted). The obvious purpose of § 415(f) was to make certain contracts with Indian tribes subject to the FAA, reflecting congressional intent that such contracts do not otherwise come within the definition of "commerce" in Section 1 of the FAA.

Nor is the FAA applicable by virtue of the Indian Commerce Clause. The Indian Commerce Clause grants "plenary and exclusive" authority to Congress "to legislate with respect to Indian tribes." *Bay Mills Indian Cmty.*, 572 U.S. at 787-88. Congress is careful to identify the Indian

Commerce Clause as its source of authority when legislating on tribal matters. *See, e.g.*, Indian Child Welfare Act, 25 U.S.C.A. § 1901.

The Federal Arbitration Act was enacted under the Interstate Commerce Clause, a completely separate grant of congressional authority. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("The objects to which the power of regulating commerce might be directed, are divided into three distinct classes-foreign nations, the several states, and Indian Tribes. When forming this article, the [constitutional] convention considered them as entirely distinct" (internal quotation marks omitted)); *Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan*, 800 F. Supp. 1484, 1490 (W.D. Mich. 1992) (congressional authority to regulate commerce with Indian tribes is distinct from the authority to regulate interstate commerce).

Thus, the Indian Commerce Clause is a source congressional power, not a source of rights. As District Judge Lauck recently stated, the Indian Commerce Clause provides no basis for tribal jurisdiction over non-Indians.

> Nor has the Indian Commerce Clause ever been found to serve as a font of substantive rights for Indians or non-Indians. This Court readily joins other courts that have considered this matter in finding inclusion of the Indian Commerce Clause

> amounts to "invocation of an irrelevant constitutional provision."

Gibbs v. Stinson, No. 3:18cv676, 2019 WL 4752792, at *17 n.48 (E.D. Va. Sept. 30, 2019) (quoting *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014)), *cert. denied sub nom. Western Sky Fin. v. Jackson,* 135 S. Ct. 1894 (2015).

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

Amici supporting Defendants have argued to this Court that Plaintiffs should be compelled to arbitrate their claims because arbitration is more beneficial to consumers and businesses than is the civil justice system. *See* Brief Amicus Curiae of the American Legislative Exchange Council, the Center for Individual Freedom, and The American Consumer Institute ["ALEC Br."] 8-11. But the facts show quite the opposite.

A. Claims that Arbitration Benefits Consumers Are False or Unsupported.

Amici entitle a section of their brief "The Benefits of Arbitration Agreements." ALEC Br. 8. But amici's discussion is entirely lacking in any proof of benefits to consumers. It may be true that, viewing a civil justice system that resolves small claims disputes and mass tort class

actions, litigation "can be expensive and time consuming." *Id.* at 9. If evidence showed that arbitration is less so, it should be easily found. But amici's sole reference is to a 1994 Labor Department report focusing on workplace grievances, federal statutes, and collective bargaining agreements. *See id.* at n.1 (quoting the Dunlop Commission for the proposition that for every dollar recovered by employees in litigation, a dollar is paid to attorneys). A CFPB study found that 95 percent of consumers in payday loan disputes in arbitration were represented by counsel. *See* Proposed Rules, Bureau of Consumer Financial Protection, Arbitration Agreements, 81 FR 32830-01, 2016 WL 2958777, at *32845 (May 24, 2016) [hereinafter "CFPB, Proposed Rules"]. It can reasonably be assumed that payday lenders have attorney representation in nearly all arbitrations as well, indicating no savings. Indeed, for some consumers litigation may be cheaper because their claims against payday lenders might be brought in small claims court.

Amici further suggest that individuals can benefit by moving their dispute "from public forums—courtrooms—to private forums," and by being able to choose their arbitrator in place of a randomly selected judge. ALEC Br. 9. It should be immediately apparent that arbitration, which

requires that parties to pay for-profit arbitration administrators, such as the American Arbitration Association ["AAA"] and JAMS, as well as arbitrators and associated costs, is far more expensive than the making use of the courthouse publicly funded for this purpose.

Amici also cites Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (Mar. 2001), for the proposition that arbitration saves time and money for both individuals and consumers. ALEC Br. 9-10. Such an assertion is clearly counterintuitive when speaking of forced arbitration imposed pre-dispute in a contract of adhesion. If arbitrations were beneficial to both parties to a contract, they would rationally and voluntarily undertake arbitration after their disputes arise, negating the need for forced arbitration. However, amici dramatically misrepresent Professor Ware's article. At the cited page, Ware states only that *businesses* can profit from arbitration:

> First, arbitration does away with juries and, for that reason, is commonly thought to reduce the likelihood of high damages awards against *businesses*. Second, arbitration's confidentiality "lessens the risk of adverse publicity" about a *business* and its disputes. Third, arbitration can resolve disputes "according to a nationally uniform set of procedures," thus saving interstate *businesses* the costs of adapting to different procedural rules in different states. Fourth,

> arbitration's finality (near absence of appellate review) saves *businesses* the costs of appeals. Fifth, arbitration can eliminate the possibility of class actions against *businesses*. Sixth, arbitration can deter claims against *businesses* by requiring consumer-plaintiffs to pay arbitrator fees, as well as filing fees that exceed the filing fees in litigation. Seventh, arbitration can reduce the amount of discovery available to consumer-plaintiffs, thus reducing the amount of time and money *businesses* must spend on the discovery process and also making it harder for consumers to prove their claims.

Ware, 2001 J. Disp. Resol. at 90 (emphasis added) (footnotes omitted).

Two points are obvious. First, even in the view of this pro-arbitration commentator, only businesses save money by using arbitration. Second, those business savings come primarily from imposing greater costs and burdens on consumers: Arbitration deprives consumers of trial by jury, full appellate review, the cost-efficiency of class actions. Ware assumes that arbitration requires filing fees greater than court fees, and makes it harder for consumers to prove their claims.

Moreover, this is essentially a thought experiment. Professor Ware readily admits that there is not "any publicly-available single study indicating whether arbitration clauses have in fact saved businesses money." *Id.* at 91. He simply assumes this proposition for his discussion purposes. *Id.*

In that discussion, Professor Ware suggests that businesses that save money by using arbitration agreements will pass those savings along to consumers in the form of lower prices or interest rates due to competition. *Id.* at 91-93. However, it is important to be mindful of the basic assumptions in this economic model: that there is an open competitive market in which consumers have sufficient information to choose among competing suppliers so that demand and price eventually reach equilibrium. *See id.*

But the online payday lending market does not follow that economic model. As described in Part I, the online payday lending market is not competitive on price. Indeed, the triple-digit interest rates charged by AWL and other online lenders are illegal in most states, precluding competition from conventional lending sources. Additionally, also as described in Part I, predatory payday lenders realize profits largely by concealing from borrowers the true costs of their loans at the time they apply, thereby precluding the informed consumer choice demanded by Ware's economic equalization principle.

Amici do not offer a single example of a lending institution reducing its interest rate due to savings realized from the use of arbitration

clauses, despite the hundreds of millions of such arbitration agreements in force in the consumer finance sector. If this Court places its stamp of approval on Defendants' claims of legal unaccountability, one may expect an increase in predatory online payday lenders undermining strong governmental policies intended to protect vulnerable consumers.

B. Arbitration Records Reveal that Arbitration Is not Inexpensive or Efficient, but Instead Strongly Discourages Consumers from Pursuing Valid Claims.

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

This analysis examined cases that were filed and terminated during the five years from 2014 to 2018. *Id.* at 32. Researchers added to or adjusted some reports in the databases to correct for gaps or obvious errors, even where the corrections cast more favorable light on

arbitrations. *Id.* at 33. 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.*

Defendants' amici assert that the prime "benefits" of arbitration are "cost-savings and greater time-efficiencies for both businesses and individuals." ALEC Br. 9. One is entitled to inquire where such cost-savings might come from. Claims are removed from a public justice system where judges, a substantial number of support personnel, and physical infrastructure have been funded by taxpayers for public use. The claimants are required to purchase the services of a for-profit arbitration administrator, such as AAA or JAMS, the services of an arbitrator, as well as the cost of hearing rooms and other needed services.

There are situations where the civil justice system is at least as efficient as the arbitration involved in this case. Because the agreement

bars class arbitrations, 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 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) (noting the use of "judicial dispute resolution").

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 of 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. at 2813 (internal 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* 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. CFPB, Proposed Rules at *32856.

It is not that consumers have few legal claims to pursue. The National Center for State Courts reports that 2,035,090 small claims

cases were filed in a single year in the 37 states for which it had data *The Truth About Forced Arbitration* at 8 (citing 2017 Civil Caseloads – Small Claims, National Center for State Courts (NCSC), http://www.courtstatistics.org/Explorethe-Data.aspx).

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 (October 31, 2015), 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, 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 those few claimants who pursued arbitration. *The Truth About Forced Arbitration* at 15. That amounts to 382 winners

per year. More people are struck by lightning each year in the United States. See National Lightning Safety Institute, Lightning Strike Probabilities, http://lightningsafety.com/nlsi_pls/probability.html (last visited Oct. 27, 2019). Notably, arbitrations involving financial services were among the least likely to succeed. *The Truth About Forced Arbitration* 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 (Oct. 2008), 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* at 17-18 (describing examples). In 112 cases at AAA, 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. *The Truth About Forced Arbitration* 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.

Despite the claims of amici supporting arbitration in this case, there is 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.

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* 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* 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* 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.

* * *

This Court has 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 provision in this case should fare no better.

CONCLUSION

For the foregoing reasons, AAJ respectfully urges this Court to affirm the judgment below.

Respectfully submitted,

/s/ Jeffrey R. White
JEFFREY R. WHITE
Counsel of Record
American Association for Justice
777 6th Street, NW, Suite 250
Washington, DC 20001
Phone: (202) 944-2839
jeffrey.white@justice.org

Date: October 28, 2019

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,499 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 Century Schoolbook type style.

Date: October 28, 2019

/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 October 28, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fourth 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
JEFFREY R. WHITE

USCA4 Appeal: 19-1267 Doc: 89-1 Filed: 10/28/2019 Pg: 47 of 47

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

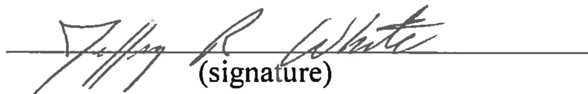
THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 19-1258(L) and 19-1267 as

☑ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☐ Government

COUNSEL FOR: American Association for Justice

_______________________________ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)


(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Jeffrey R. White
Name (printed or typed)

202-944-2839
Voice Phone

American Association for Justice
Firm Name (if applicable)

____
Fax Number

777 6th Street NW, Suite 200
Washington, DC 20003
Address

jeffrey.white@justice.org
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on October 28, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Signature

October 28, 2019
Date

02/16/2018 SCC