Nos. 19-2058 & 19-2082

In the United States Court of Appeals For the Third Circuit

CHRISTINA WILLIAMS, ET AL.,

Plaintiffs-Appellees,

v.

MEDLEY OPPORTUNITY FUND II, LP, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 2:18-cv-02747 (Hon. Mitchell S. Goldberg)

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

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November 15, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, amicus curiae hereby provides the following disclosure statement:

The American Association for Justice (AAJ) has no parent company. No publicly held company owns 10% or more of its stock or has as a financial interest in the outcome of the proceeding. Neither AAJ nor its counsel represent a debtor or trustee in the underlying bankruptcy proceeding.

Respectfully submitted this 15th day of November, 2019.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established 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, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate for 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" 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

[1] Pursuant to Federal Rule of Appellate Procedure 29, amicus curiae states 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.

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. 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. Payday lenders' 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 to the private office of an arbitrator obliged to apply tribal law.

2. Defendants' sole basis for moving to compel arbitration, the Federal Arbitration Act, does not apply to Plaintiffs' contracts with AWL or Red Stone. The FAA was based on Congress's authority to regulate interstate commerce, but Congress specifically excluded commerce "with the Indian tribes" from its definition of "commerce" in the statute. There is no basis for rewriting the text of the FAA nor to infer a legislative intent to broaden its scope. Indeed, subsequent congressional action clearly shows that Congress believed the FAA did not apply to dealings 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 any financial benefit 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. 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, but because forced arbitration provisions strongly discourage consumers from pursuing their claims at all. Data shows that exceedingly few individuals bring claims under forced arbitration contracts. One reason is that so few consumers prevail when their claims are forced into private arbitration. Indeed, AAA and JAMS databases show that fewer U.S. consumers prevail on their forced arbitration claims than 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 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.

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.

Plaintiffs in this case allege that Defendants predatorily charged Pennsylvania consumers interest rates of 400% to 700% APR for short term loans in violation of Pennsylvania consumer and borrower protection laws. *Williams v. Red Stone, Inc., et al.*, No. 18-cv-2747, Dist. Ct. Order 1 (E.D. Pa. May 7, 2019). These loans 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) [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.

These finance costs are not only very high, exceeding every state's usury law, but they are unaffordably high. Christina Williams, for example, borrowed $1,400 from AWL and was required to pay $6,005.94 within ten months, representing an interest rate of 520%. On her second loan of $1,600, AWL required her to pay $9,388. Plaintiff Michael Stermel's loan was similar. Consolidated Brief For Plaintiffs-Appellees 7.

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).

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.").

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.

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* 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 accountability under 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 . . . 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).

Payday lenders have labored strenuously 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 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).

In this case, Defendants seek to shield themselves from accountability not only by claiming tribal immunity, but also by enforcement of a mandatory arbitration

provision in Plaintiffs' loan agreements. AAJ addresses this Court regarding that specific 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* Brief For Appellant Red Stone, Inc. 10-11. But the agreements in this case do 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).

Only three reported decisions have determined that the FAA applies to arbitration agreements with Indian tribes. They do so by rewriting the phrase "involving commerce" to mean involving *interstate* commerce and inferring congressional intent that the scope of "commerce" in § 2 reach the outer limits of the Interstate Commerce Clause.[2] Thus, in *Comanche Indian Tribe of Okla. v. 49,*

[2] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. I, § 8, cl. 3.

L.L.C., 391 F.3d 1129 (10th Cir. 2004), the Tenth Circuit construed "involving commerce" in § 2 to be coextensive with Congress's power to regulate under the Interstate Commerce Clause. *Id.* at 1132. The Sixth Circuit in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 514 (6th Cir. 2004), similarly stated without discussion that the casino development agreement in that case "involves interstate commerce and therefore falls within the ambit of the Federal Arbitration Act." *Id.* at 514. In *Wisconsin v. Ho-Chunk Nation*, 478 F. Supp. 2d 1093, 1100 (W.D. Wis. 2007), the district court ruled that a tribal agreement with the state to authorize the operation of gaming casinos "affects interstate commerce" and therefore the parties' agreement to arbitrate was enforceable under the FAA. *Id.* at 1100. The Seventh Circuit, however, affirming in part and vacating in part, expressly declined to address the merits of the district court's decision on this issue. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 n.5 (7th Cir. 2008).

AAJ submits that there is no sound basis for rewriting the statutory text in this way. It is true that the FAA is based on Congress's authority to regulate interstate commerce. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967). But there is no indication that Congress intended the FAA to regulate every contract within its Interstate Commerce Clause authority. Indeed, the plain text of FAA makes clear that Congress intended "commerce" to have a narrower scope than

the Commerce Clause and does not extend to arbitration agreements with Indian tribes.

First, Congress provided its own definition of "commerce" specifically for the FAA:

> "[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 clearly drew upon the text of the Interstate Commerce Clause, but conspicuously omitted commerce "with the Indian Tribes."

Second, there is no reason to infer that when Congress used the term "commerce" it intended the definition spelled out in the Interstate Commerce Clause. For example, Congress also used the word "commerce" when it carved out an exception for certain transportation workers:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Id.

The Supreme Court has determined that in this provision, Congress did not intend "commerce" as defined in the Interstate Commerce Clause. Instead, the Court

interpreted the term more narrowly, guided by the surrounding text. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-16 (2001).[3]

Nor are Plaintiffs' contracts encompassed by any other term in § 1. It is beyond dispute that an Indian tribe is not a State. *See 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." *See Wilson v. Marchington*, 127 F.3d 805, 808-09 (9th Cir. 1997) (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"); *Ex parte Morgan*, 20 F. 298, 305 (N.D. Ark. 1883) (The 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,

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3 Although the Court stated that "involving commerce," like "affecting commerce," "signals an intent to exercise Congress' commerce power to the full," *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995), the Court was there assessing the breadth of the terms "involving" and "affecting." It had no occasion to look at the FAA's definition of "commerce" and its exclusion of Indian tribes.

"domestic dependent nations." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014); *The Cherokee Nation v. The State of Georgia*, 5 Pet. 1, 17 (1831).

Third, Congress subsequently made clear that it 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) (emphasis added).

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.

Finally, the FAA is not applicable to the contracts in this case 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. § 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 its 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).

Because the arbitration provisions in this case do not come within the scope of the FAA, there is no basis for Defendants to move to compel arbitration or to insist that arbitrability questions be decided by an arbitrator, rather than the district court.

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 in Support of Appellants ["ALEC Br."] 6-8. The facts show quite the opposite.

A. Forced Arbitration Does Not Benefit Consumers.

Amici suggest that this Court should enforce the arbitration provisions in the payday loan agreements in this case because of the "Benefits of Arbitration Agreements," which purportedly include "cost-savings and greater time-efficiencies for both businesses and individuals." ALEC Br. 6. But amici's discussion is empty of any proof that arbitration benefits consumers. Our civil justice system resolves disputes from small claims to mass tort class actions. Some litigation "can be expensive and time consuming." *Id.* If evidence showed that arbitration is less so, it should be easily found. But amici's sole supporting reference focuses on 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). But attorneys must be compensated in arbitrations as well. A CFPB study found that 95% 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 also have attorney representation in nearly all arbitrations. Amici make no showing that arbitration results in any savings for consumers. Indeed, for

some consumers litigation may be cheaper because their claims against payday lenders might be brought in small claims court without an attorney.

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 rather than accept a randomly selected judge. ALEC Br. 6-7. It should be immediately apparent that consumers benefit from the neutrality of judges rather than accept the choice of arbitrator by a company that is familiar with the system and with the arbitrators. Moreover, it should be quite obvious that arbitration, which requires that parties to pay for-profit arbitration administrators, such as the American Arbitration Association ["AAA"] and JAMS, as well as the compensation of arbitrators and associated costs, is far more expensive than the making use of the courthouse publicly funded for this purpose.[4]

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. 6-7. 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

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[4] It should be noted that AAA and JAMS administer arbitrations, but do not employ arbitrators, who are chosen and compensated separately.

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, and the cost-efficiency of class actions. Ware also assumes in the quoted passage that arbitration requires filing fees greater than court fees, making it harder for consumers to prove their claims.

Moreover, 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 when businesses save money by using arbitration agreements, they will pass those savings along to consumers in the form of lower prices or interest rates due to competition. *Id.* at 91-93. The crucial, if unstated assumption underlying this proposition is 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 targeting borrowers who are unable to access conventional lending sources and are often uninformed regarding the true costs of their loans, thereby negating the informed consumer choice demanded by Ware's economic equalization principle.

Amici do not offer a single example of a lender 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 provisions 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 would cast a 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. 6. One is entitled to inquire where such cost-savings might come from. Claims are removed from a public justice system where judges, supporting 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 well over 2 million small claims cases were filed *every year* from 2012 to 2017 in the 37 states for which it had data. National Center for State Courts, State Court Caseload Digest: 2017 Data 4 (2019), *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/Overview/CSP%2020 17%20Data%20-%20Spreads%20for%20viewing.ashx.

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 the few claimants who pursued arbitration at all. *The Truth About Forced Arbitration* at 15. That amounts to 382 winners per year. 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. 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.

* * *

Courts have 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,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit and remain a member in good standing of the Bar of this Court.

Date: November 15, 2019

/s/ Jeffrey White
Jeffrey White
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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 Times New Roman type style.

I further certify pursuant to L.A.R.31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that a virus check was performed on the electronic version using Malwarebytes Anti-Malware. No computer virus was detected.

Date: November 15, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 15, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Third 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.

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